IN THE MATTER OF

ALTERNATIVE CIGARETTES, INC., ET AL.

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

Docket C-3956; File No. 9823022
Complaint, June 14, 2000--Decision, June 14, 2000

This consent order requires Respondent Alternative Cigarettes, Inc. to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." The order exempts Alternative Cigarettes from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Alternative Cigarettes possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. Respondent is also required to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." The disclosure must be included in all advertising and on packaging for herbal smoking products that represent that the product has no tobacco, unless respondent possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. Respondent is required to possess competent and reliable scientific evidence prior to: (1) claiming that any herbal smoking product does not present the health risks associated with smoking tobacco cigarettes; or (2) making any claim about the health risks associated with the use of any herbal smoking product.

Participants

For the Commission: *Michael Ostheimer, Shira Modell, Matthew D. Gold, Linda K. Badger, Kerry O'Brien, C. Lee Peeler,* and *BE.*

For the Respondents: *Joseph Pandolfino, Alternative Cigarettes.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Alternative Cigarettes, Inc., a corporation, and Joseph Pandolfino, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Alternative Cigarettes, Inc., is a New York corporation with its principal office or place of business at 125 Virgil Avenue, Buffalo, New York 14216.

2. Respondent Joseph Pandolfino is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Alternative Cigarettes, Inc.

3. Respondents have advertised, promoted, offered for sale, sold and distributed tobacco cigarettes, including Pure cigarettes and Glory cigarettes, and non-tobacco herbal cigarettes, including Herbal Gold cigarettes and Magic cigarettes.

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.

5. Respondents have disseminated or have caused to be disseminated advertisements for cigarettes, including but not necessarily limited to the attached Exhibits A through I. These advertisements contain the following statements:

A. "The major tobacco companies literally put hundreds of chemicals and additives in their cigarette brands. After years of pressure by American consumers and by Congress, this list was recently disclosed by the giant

tobacco companies themselves. This exact list is enclosed for your review.

A number of these additives should give smokers cause for concern. Some of these are known carcinogens. Notice that ammonia is on this list. A recent finding shows that when ammonia is added to cigarettes it actually increases the amount of nicotine that the body absorbs. Other studies show that the most popular brands have up to 12 percent sugar. They also use a high percentage of reconstituted (recycled) tobacco.

Native Americans smoked all natural tobacco without the ills that are associated with smoking today. Could it be that the chemicals and additives cause more health problems than the natural tobacco itself? Much research needs to be done on this subject."

(Exhibit A: Alternative Cigarettes, Inc.'s World Wide Web site)

B. "PURE

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

PREMIUM BRAND

Most popular cigarette brands contain many added chemicals, flavorings, and preservatives. They also contain recycled (reconstituted) tobacco. PURE is made from 100% natural tobacco. No additives are in our cigarettes. Smokers enjoy the natural taste of our premium tobacco without all the additives. PURE is filtered and comes in full flavor, lights, and menthol. PURE is how smoking was originally meant to be."

(Exhibit B: Alternative Cigarettes, Inc.'s World Wide Web site)

C. "GLORY

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

GLORY cigarettes are price competitive with any generic cigarette anywhere. However, unlike generic and premium brands manufactured by the major tobacco companies, GLORY tobacco is natural and additive free. It has no added chemicals, flavorings, preservatives, or recycled tobacco. GLORY is filtered and comes in regular and menthol."

(Exhibit C: Alternative Cigarettes, Inc.'s World Wide Web site)

D. "HERBAL GOLD

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

HERBAL GOLD does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. HERBAL GOLD looks and smokes just like tobacco cigarettes. HERBAL GOLD is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular, menthol, vanilla and cherry are available.

What are HERBAL GOLD cigarettes?

Herbal Gold is a revolutionary product that is nicotine and tobacco free. Herbal Gold offers a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Herbal Gold comes in regular, menthol, vanilla and cherry.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About HERBAL GOLD'S Taste and Aroma?

Herbal Gold offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Herbal Gold's aroma to be identical to tobacco cigarettes since Herbal Gold is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Herbal Gold is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Herbal Gold has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Herbal Gold smokers believe our product is superior to tobacco."

(Exhibit D: Alternative Cigarettes, Inc.'s World Wide Web site)

E. "MAGIC

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

MAGIC does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. MAGIC looks and smokes just like tobacco cigarettes. MAGIC is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular and menthol are available.

What are MAGIC cigarettes?

Magic is a revolutionary product that is nicotine and tobacco free. Magic contains the herbs Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Magic comes in regular and menthol.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About MAGIC'S Taste and Aroma?

Magic offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Magic's aroma to be identical to tobacco cigarettes since Magic is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Magic is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Magic has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Magic smokers believe our product is superior to tobacco."

(Exhibit E: Alternative Cigarettes, Inc.'s World Wide Web site)

F. "Water is the Only Ingredient Added to Tobacco in the Manufacturing of PURE and GLORY.

Do You Want to Smoke This?

The 599 Ingredients Added to Tobacco in the Manufacture of Cigarettes by the Five Major American Cigarette Companies:

[List of Ingredients]"

(Exhibit F: Alternative Cigarettes, Inc.'s World Wide Web site)

G. "The secret is finally out...on all the chemicals, flavorings, preservatives, and fillers that are added to the tobacco in most of the major cigarette brands.

Therefore, a countless number of smokers across the country are requesting our brands.

For Questions Call:
Alternative Cigarettes, Inc.

. . .

See us on the world wide web at: http://www.altcigs.com"

(Exhibit G: brochure)

H. "PURE
100% NATURAL TOBACCO
ADDITIVE-FREE CIGARETTES

GLORY
100% NATURAL TOBACCO
ADDITIVE-FREE CIGARETTES"

(Exhibit H: Point-of-sale display)

I. "NICOTINE FREE HERBAL CIGARETTES"

(Exhibit I: Point-of-sale display)

CLAIMS REGARDING TOBACCO PRODUCTS

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that smoking Pure and Glory cigarettes, because they contain no additives, chemicals, flavorings or preservatives, is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives, chemicals, flavorings or preservatives.

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made. Among other reasons, the smoke from Pure and Glory cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

CLAIMS REGARDING NON-TOBACCO PRODUCTS

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that smoking Herbal Gold and Magic herbal cigarettes does not pose the health risks associated with smoking tobacco cigarettes.

10. In truth and in fact, smoking Herbal Gold and Magic herbal cigarettes does pose many of the health risks associated with smoking tobacco cigarettes. Although Herbal Gold and Magic

herbal cigarettes do not contain nicotine, their smoke, like the smoke from tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 9, at the time the representation was made. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

13. 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.

THEREFORE, the Federal Trade Commission this fourteenth day of June, 2000, has issued this complaint against respondents.

By the Commission.

Complaint Exhibits

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

About Us

Alternative Cigarettes, Inc. is proud to offer our alternative cigarette brands to smokers across the country. These brands give consumers a choice over commercialized brands. The five major American tobacco companies could have offered such products to smokers years ago. However, they have refused to do so.

The major tobacco companies literally put hundreds of chemicals and additives in their cigarette brands. After years of pressure by American consumers and by Congress, this list was recently disclosed by the giant tobacco companies themselves. This exact list is enclosed for your review.

A number of these additives should give smokers cause for concern. Some of these are known carcinogens. Notice that ammonia is on this list. A recent finding shows that when ammonia is added to cigarettes it actually increases the amount of nicotine that the body absorbs. Other studies show that the most popular brands have up to 12 percent sugar. They also use a high percentage of reconstituted (recycled) tobacco.

Native Americans smoked all natural tobacco without the ills that are associated with smoking today. Could it be that the chemicals and additives cause more health problems than the natural tobacco itself? Much research needs to be done on this subject.

For Questions
Call TOLL FREE 1-800-225-1838

Alternative Cigarettes, Inc.
PO Box 678
Buffalo, NY 14207
1-800-225-1838 (716) 877-2983
Fax (716) 877-3064

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

EXHIBIT A

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

PURE

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

PREMIUM BRAND

Most popular cigarette brands contain many added chemicals, flavorings, and preservatives. They also contain recycled (reconstituted) tobacco. PURE is made from 100% natural tobacco. No additives are in our cigarettes. Smokers enjoy the natural taste of our premium tobacco without all the additives. PURE is filtered and comes in full flavor, lights, and menthol. PURE is how smoking was originally meant to be.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

EXHIBIT B

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

GLORY

100% Natural Tobacco Cigarettes...ADDITIVE FREE!

GLORY cigarettes are price competitive with any generic cigarette anywhere. However, unlike generic and premium brands manufactured by the major tobacco companies, GLORY tobacco is natural and additive free. It has no added chemicals, flavorings, preservatives, or recycled tobacco. GLORY is filtered and comes in regular and menthol.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

EXHIBIT C

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

HERBAL GOLD

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

HERBAL GOLD does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. HERBAL GOLD looks and smokes just like tobacco cigarettes. HERBAL GOLD is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular, menthol, vanilla and cherry are available.

What are HERBAL GOLD cigarettes?

Herbal Gold is a revolutionary product that is nicotine and tobacco free. Herbal Gold offers a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

EXHIBIT D

Our cigarettes are the highest quality non-tobacco smokes in the world. They are filtered and look and smoke just like tobacco cigarettes. Herbal Gold comes in regular, menthol, vanilla and cherry.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About HERBAL GOLD'S Taste and Aroma?

Herbal Gold offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Herbal Gold's aroma to be identical to tobacco cigarettes since Herbal Gold is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Herbal Gold is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Herbal Gold has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Herbal Gold smokers believe our product is superior to tobacco.

For more information and to find out if any stores near you carry our brands call: 1-800-225-1838
If there are no stores in your area that carry Herbal Gold, click the Order Online Button in the left panel.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

Home Page

About Us

Herbal Gold

Magic

Pure

Glory

Lewiston

Order Online

See What Other Manufacturers Put In Their Cigarettes

Get Your Local Store To Carry Alternative Cigarettes

News

MAGIC

100% Nicotine Free Herbal Cigarettes!

NO NICOTINE

MAGIC does not contain any nicotine or tobacco. It is made from a special blend of smoking herbs: Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. MAGIC looks and smokes just like tobacco cigarettes. MAGIC is taking the country by storm since smokers can now enjoy a great tasting cigarette without any nicotine. Each carton has 10 king size packs of 20. Regular and menthol are available.

What are MAGIC cigarettes?

Magic is a revolutionary product that is nicotine and tobacco free. Magic contains the herbs Marshmallow, Yerba Santa, Damiana, Passion Flower, Jasmine and Ginseng. These herbs have very good reputations with the health food industry and herbalists. Their histories and other information can be found in numerous herbal and health books.

Our cigarettes are the highest quality non-tobacco smokes in

EXHIBIT E

the world. They are filtered and look and smoke just like tobacco cigarettes. Magic comes in regular and menthol.

Most brands of tobacco cigarettes manufactured by the major tobacco companies have numerous unnatural components, including reconstituted tobacco. Reconstituted tobacco is recycled tobacco that the tobacco companies refuse to waste. The major tobacco companies also put hundreds of chemicals, additives, and preservatives in their brands.

What About MAGIC'S Taste and Aroma?

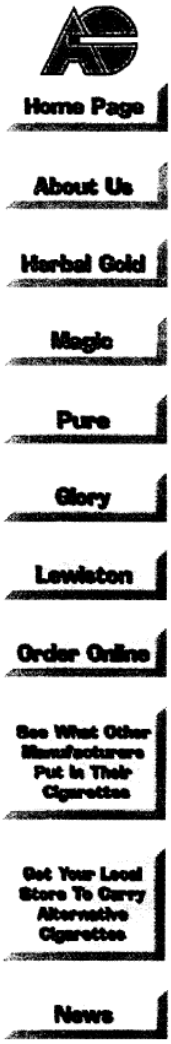
Magic offers a pleasant light taste. Its aroma is sweeter than that of tobacco. One can't expect Magic's aroma to be identical to tobacco cigarettes since Magic is tobacco free. The herbs in our cigarettes are natural and are not cured or processed like tobacco.

The vast majority of smokers and non-smokers alike say that the smoke from Magic is a lot less irritating to the eyes, nose, and throat than tobacco smoke.

Everybody, except the folks from the major tobacco companies, agrees that the arrival of Magic has been long over due. Our cigarettes are considered by many to be a great alternative to tobacco. In fact, many Magic smokers believe our product is superior to tobacco.

For more information and to find out if any stores near you carry our brands call: 1-800-225-1838
If there are no stores in your area that carry Magic, click on the Order Online button on the left panel.

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.



Alternative Cigarettes

Water is the Only Ingredient Added to Tobacco in the Manufacturing of PURE and GLORY.

Do You Want to Smoke This?

The 599 Ingredients Added to Tobacco in the Manufacture of Cigarettes by the Five Major American Cigarette Companies:

Acetanisole, Acetic Acid, Acetoin, Acetophenone, 6-Acetoxydihydrotheaspirane, 2-Acetyl-3- Ethylpyrazine, 2-Acetyl-5-Methylfuran, Acetylpyrazine, 2-Acetylpyridine, 3-Acetylpyridine, 2-Acetylthiazole, Aconitic Acid, dl-Alanine, Alfalfa Extract, Allspice Extract, Oleoresin, And Oil, Allyl Hexanoate, Allyl Ionone, Almond Bitter Oil, Ambergris Tincture, Ammonia, Ammonium Bicarbonate, Ammonium Hydroxide, Ammonium Phosphate Dibasic, Ammonium Sulfide, Amyl Alcohol, Amyl Butyrate, Amyl Formate, Amyl Octanoate, alpha-Amylcinnamaldehyde, Amyris Oil, trans-Anethole, Angelica Root Extract, Oil and Seed Oil, Anise, Anise Star, Extract and Oils, Anisyl Acetate, Anisyl Alcohol, Anisyl Formate, Anisyl Phenylacetate, Apple Juice Concentrate, Extract, and Skins, Apricot Extract and Juice Concentrate, 1-Arginine, Asafetida Fluid Extract And Oil, Ascorbic Acid, 1-Asparagine Monohydrate, 1-Aspartic Acid, Balsam Peru and Oil, Basil Oil, Bay Leaf, Oil and Sweet Oil, Beeswax White, Beet Juice Concentrate, Benzaldehyde, Benzaldehyde Glyceryl Acetal, Benzoic Acid, Benzoin, Benzoin Resin, Benzophenone, Benzyl Alcohol, Benzyl Benzoate, Benzyl Butyrate, Benzyl Cinnamate, Benzyl Propionate, Benzyl Salicylate, Bergamot Oil, Bisabolene, Black Currant Buds Absolute, Borneol, Bornyl Acetate, Buchu Leaf Oil, 1,3-Butanediol, 2,3-Butanedione, 1-Butanol, 2-Butanone, 4(2-Butenylidene)-3,5,5-Trimethyl-2-Cyclohexen-1-One, Butter, Butter Esters, and Butter Oil, Butyl Acetate, Butyl Butyrate, Butyl Butyryl Lactate, Butyl Isovalerate, Butyl Phenylacetate, Butyl Undecylenate, 3-Butylidenephthalide, Butyric Acid, Cadinene, Caffeine, Calcium Carbonate, Camphene, Cananga Oil, Capsicum Oleoresin, Caramel Color, Caraway Oil, Carbon Dioxide, Cardamom Oleoresin, Extract, Seed Oil, and Powder, Carob Bean and Extract, beta-Carotene, Carrot Oil, Carvacrol, 4-Carvomenthenol, 1-Carvone, beta-Caryophyllene, beta-Caryophyllene Oxide, Cascarilla Oil and Bark Extract, Cassia Bark Oil, Cassie Absolute and Oil, Castoreum Extract, Tincture and Absolute, Cedar Leaf Oil, Cedarwood Oil Terpenes and Virginiana, Cedrol, Celery Seed Extract, Solid, Oil, And Oleoresin, Cellulose Fiber, Chamomile Flower Oil And Extract, Chicory Extract, Chocolate, Cinnamaldehyde, Cinnamic Acid, Cinnamon Leaf Oil, Bark Oil, and Extract, Cinnamyl Acetate, Cinnamyl Alcohol, Cinnamyl Cinnamate, Cinnamyl

EXHIBIT F

Isovalerate, Cinnamyl Propionate, Citral, Citric Acid, Citronella Oil, dl-Citronellol, Citronellyl Butyrate, Citronellyl Isobutyrate, Civet Absolute, Clary Oil, Clover Tops, Red Solid Extract, Cocoa, Cocoa Shells, Extract, Distillate And Powder, Coconut Oil, Coffee, Cognac White and Green Oil, Copaiba Oil, Coriander Extract and Oil, Corn Oil, Corn Silk, Costus Root Oil, Cubeb Oil, Cuminaldehyde, para-Cymene, 1-Cysteine, Dandelion Root Solid Extract, Davana Oil, 2-trans, 4-trans-Decadienal, delta-Decalactone, gamma-Decalactone, Decanal, Decanoic Acid, 1-Decanol, 2-Decenal, Dehydromenthofurolactone, Diethyl Malonate, Diethyl Sebacate, 2,3-Diethylpyrazine, Dihydro Anethole, 5,7-Dihydro-2-Methylthieno(3,4-D) Pyrimidine, Dill Seed Oil and Extract, meta-Dimethoxybenzene, para-Dimethoxybenzene, 2,6-Dimethoxyphenol, Dimethyl Succinate, 3,4-Dimethyl-1,2-Cyclopentanedione, 3,5-Dimethyl-1,2-Cyclopentanedione, 3,7-Dimethyl-1,3,6-Octatriene, 4,5-Dimethyl-3-Hydroxy-2,5-Dihydrofuran-2-One, 6,10-Dimethyl-5,9-Undecadien-2-One, 3,7-Dimethyl-6-Octenoic Acid, 2,4-Dimethylacetophenone, alpha,para-Dimethylbenzyl Alcohol, alpha,alpha-Dimethylphenethyl Acetate, alpha,alpha Dimethylphenethyl Butyrate, 2,3-Dimethylpyrazine,2,5-Dimethylpyrazine, 2,6-Dimethylpyrazine, Dimethyltetrahydrobenzofuranone, delta-Dodecalactone, gamma-Dodecalactone, para-Ethoxybenzaldehyde, Ethyl 10-Undecenoate, Ethyl 2-Methylbutyrate, Ethyl Acetate, Ethyl Acetoacetate, Ethyl Alcohol, Ethyl Benzoate, Ethyl Butyrate, Ethyl Cinnamate, Ethyl Decanoate, Ethyl Fenchol, Ethyl Furoate, Ethyl Heptanoate, Ethyl Hexanoate, Ethyl Isovalerate, Ethyl Lactate, Ethyl Laurate, Ethyl Levulinate, Ethyl Maltol, Ethyl Methyl Phenylglycidate, Ethyl Myristate, Ethyl Nonanoate, Ethyl Octadecanoate, Ethyl Octanoate, Ethyl Oleate, Ethyl Palmitate, Ethyl Phenylacetate, Ethyl Propionate, Ethyl Salicylate, Ethyl trans-2-Butenoate, Ethyl Valerate, Ethyl Vanillin, 2-Ethyl (or Methyl)-(3,5 and 6)-Methoxypyrazine, 2-Ethyl-1-Hexanol, 3-Ethyl -2 -Hydroxy-2-Cyclopenten-1-One, 2-Ethyl-3, (5 or 6)-Dimethylpyrazine, 5-Ethyl-3-Hydroxy-4-Methyl-2(5H)-Furanone, 2-Ethyl-3-Methylpyrazine, 4-Ethylbenzaldehyde, 4-Ethylguaiacol, para-Ethylphenol, 3-Ethylpyridine, Eucalyptol, Farnesol, D-Fenchone, Fennel Sweet Oil, Fenugreek, Extract, Resin, and Absolute, Fig Juice Concentrate, Food Starch Modified, Furfuryl Mercaptan, 4-(2-Furyl)-3-Buten-2-One, Galbanum Oil, Genet Absolute, Gentian Root Extract, Geraniol, Geranium Rose Oil, Geranyl Acetate, Geranyl Butyrate, Geranyl Formate, Geranyl Isovalerate, Geranyl Phenylacetate, Ginger Oil and Oleoresin, 1-Glutamic Acid, 1-Glutamine, Glycerol, Glycyrrhizin Ammoniated, Grape Juice Concentrate, Guaiac Wood Oil, Guaiacol, Guar Gum, 2,4-Heptadienal, gamma-Heptalactone, Heptanoic Acid, 2-Heptanone, 3-Hepten-2-One, 2-Hepten-4-One, 4-Heptenal, trans -2-Heptenal, Heptyl Acetate, omega-6-Hexadecenlactone, gamma-Hexalactone, Hexanal, Hexanoic Acid, 2-Hexen-1-Ol, 3-Hexen-1-Ol,

cis-3-Hexen-1-Yl Acetate, 2-Hexenal, 3-Hexenoic Acid, trans-2-Hexenoic Acid, cis-3-Hexenyl Formate, Hexyl 2-Methylbutyrate, Hexyl Acetate, Hexyl Alcohol, Hexyl Phenylacetate, l-Histidine, Honey, Hops Oil, Hydrolyzed Milk Solids, Hydrolyzed Plant Proteins, 5-Hydroxy-2,4-Decadienoic Acid delta- Lactone, 4-Hydroxy-2,5-Dimethyl-3(2H)-Furanone, 2-Hydroxy-3,5,5-Trimethyl-2-Cyclohexen-1-One, 4-Hydroxy -3-Pentenoic Acid Lactone, 2-Hydroxy-4-Methylbenzaldehyde, 4-Hydroxybutanoic Acid Lactone, Hydroxycitronellal, 6-Hydroxydihydrotheaspirane, 4-(para-Hydroxyphenyl)-2-Butanone, Hyssop Oil, Immortelle Absolute and Extract, alpha-Ionone, beta-Ionone, alpha-Irone, Isoamyl Acetate, Isoamyl Benzoate, Isoamyl Butyrate, Isoamyl Cinnamate, Isoamyl Formate, Isoamyl Hexanoate, Isoamyl Isovalerate, Isoamyl Octanoate, Isoamyl Phenylacetate, Isobornyl Acetate, Isobutyl Acetate, Isobutyl Alcohol, Isobutyl Cinnamate, Isobutyl Phenylacetate, Isobutyl Salicylate, 2-Isobutyl-3-Methoxypyrazine, alpha-Isobutylphenethyl Alcohol, Isobutyraldehyde, Isobutyric Acid, d,l-Isoleucine, alpha-Isomethylionone, 2-Isopropylphenol, Isovaleric Acid, Jasmine Absolute, Concrete and Oil, Kola Nut Extract, Labdanum Absolute and Oleoresin, Lactic Acid, Lauric Acid, Lauric Aldehyde, Lavandin Oil, Lavender Oil, Lemon Oil and Extract, Lemongrass Oil, l-Leucine, Levulinic Acid, Licorice Root, Fluid, Extract and Powder, Lime Oil , Linalool, Linalool Oxide, Linalyl Acetate, Linden Flowers, Lovage Oil And Extract, l-Lysine, Mace Powder, Extract and Oil , Magnesium Carbonate, Malic Acid, Malt and Malt Extract, Maltodextrin, Maltol, Maltyl Isobutyrate, Mandarin Oil, Maple Syrup and Concentrate, Mate Leaf, Absolute and Oil, para-Mentha-8-Thiol-3-One, Menthol, Menthone, Menthyl Acetate, dl-Methionine, Methoprene, 2-Methoxy-4-Methylphenol, 2-Methoxy-4-Vinylphenol, para-Methoxybenzaldehyde, 1-(para-Methoxyphenyl)-1-Penten-3-One, 4-(para-Methoxyphenyl)-2-Butanone, 1-(para-Methoxyphenyl)-2-Propanone, Methoxypyrazine, Methyl 2-Furoate, Methyl 2-Octynoate, Methyl 2-Pyrrolyl Ketone, Methyl Anisate, Methyl Anthranilate, Methyl Benzoate, Methyl Cinnamate, Methyl Dihydrojasmonate, Methyl Ester of Rosin, Partially Hydrogenated, Methyl Isovalerate, Methyl Linoleate (48%), Methyl Linolenate (52%) Mixture, Methyl Naphthyl Ketone, Methyl Nicotinate, Methyl Phenylacetate, Methyl Salicylate, Methyl Sulfide, 3-Methyl-1-Cyclopentadecanone, 4-Methyl-1-Phenyl-2-Pentanone, 5-Methyl-2-Phenyl-2-Hexenal, 5-Methyl-2-Thiophenecarboxaldehyde, 6-Methyl-3,-5-Heptadien-2-One, 2-Methyl-3-(para-Isopropylphenyl) Propionaldehyde, 5-Methyl-3-Hexen-2-One, 1-Methyl-3Methoxy-4-Isopropylbenzene, 4-Methyl-3-Pentene-2-One, 2-Methyl-4-Phenylbutyraldehyde, 6-Methyl-5-Hepten-2-One, 4-Methyl-5-Thiazoleethanol, 4-Methyl-5-Vinylthiazole, Methyl-alpha-Ionone, Methyl-trans-2-Butenoic Acid, 4-Methylacetophenone,

para-Methylanisole, alpha-Methylbenzyl Acetate, alpha-Methylbenzyl Alcohol, 2-Methylbutyraldehyde, 3-Methylbutyraldehyde, 2-Methylbutyric Acid, alpha-Methylcinnamaldehyde, Methylcyclopentenolone, 2-Methylheptanoic Acid, 2-Methylhexanoic Acid, 3-Methylpentanoic Acid, 4-Methylpentanoic Acid, 2-Methylpyrazine, 5-Methylquinoxaline, 2-Methyltetrahydrofuran-3-One, (Methylthio)Methylpyrazine (Mixture Of Isomers), 3-Methylthiopropionaldehyde, Methyl 3-Methylthiopropionate, 2-Methylvaleric Acid, Mimosa Absolute and Extract, Molasses Extract and Tincture, Mountain Maple Solid Extract, Mullein Flowers, Myristaldehyde, Myristic Acid, Myrrh Oil, beta-Napthyl Ethyl Ether, Nerol, Neroli Bigarde Oil, Nerolidol, Nona-2-trans,6-cis-Dienal, 2,6-Nonadien-1-Ol, gamma-Nonalactone, Nonanal, Nonanoic Acid, Nonanone, trans-2-Nonen-1-Ol, 2-Nonenal, Nonyl Acetate, Nutmeg Powder and Oil, Oak Chips Extract and Oil, Oak Moss Absolute, 9,12-Octadecadienoic Acid (48%) And 9,12,15-Octadecatrienoic Acid (52%), delta-Octalactone, gamma-Octalactone, Octanal, Octanoic Acid, 1-Octanol, 2-Octanone, 3-Octen-2-One, 1-Octen-3-Ol, 1-Octen-3-Yl Acetate, 2-Octenal, Octyl Isobutyrate, Oleic Acid , Olibanum Oil, Opoponax Oil And Gum, Orange Blossoms Water, Absolute, and Leaf Absolute, Orange Oil and Extract, Origanum Oil, Orris Concrete Oil and Root Extract, Palmarosa Oil, Palmitic Acid, Parsley Seed Oil, Patchouli Oil, omega-Pentadecalactone, 2,3-Pentanedione, 2-Pentanone, 4-Pentenoic Acid, 2-Pentylpyridine, Pepper Oil, Black And White, Peppermint Oil, Peruvian (Bois De Rose) Oil, Petitgrain Absolute, Mandarin Oil and Terpeneless Oil, alpha-Phellandrene, 2-Phenenthyl Acetate, Phenenthyl Alcohol, Phenethyl Butyrate, Phenethyl Cinnamate, Phenethyl Isobutyrate, Phenethyl Isovalerate, Phenethyl Phenylacetate, Phenethyl Salicylate, 1-Phenyl-1-Propanol, 3-Phenyl-1-Propanol, 2-Phenyl-2-Butenal, 4-Phenyl-3-Buten-2-Ol, 4-Phenyl-3-Buten-2-One, Phenylacetaldehyde, Phenylacetic Acid, 1-Phenylalanine, 3-Phenylpropionaldehyde, 3-Phenylpropionic Acid, 3-Phenylpropyl Acetate, 3-Phenylpropyl Cinnamate, 2-(3-Phenylpropyl)Tetrahydrofuran, Phosphoric Acid, Pimenta Leaf Oil, Pine Needle Oil, Pine Oil, Scotch, Pineapple Juice Concentrate, alpha-Pinene, beta-Pinene, D-Piperitone, Piperonal, Pipsissewa Leaf Extract, Plum Juice, Potassium Sorbate, 1-Proline, Propenylguaethol, Propionic Acid, Propyl Acetate, Propyl para-Hydroxybenzoate, Propylene Glycol, 3-Propylidenephthalide, Prune Juice and Concentrate, Pyridine, Pyroligneous Acid And Extract, Pyrrole, Pyruvic Acid, Raisin Juice Concentrate, Rhodinol, Rose Absolute and Oil, Rosemary Oil, Rum, Rum Ether, Rye Extract, Sage, Sage Oil, and Sage Oleoresin, Salicylaldehyde, Sandalwood Oil, Yellow, Sclareolide, Skatole, Smoke Flavor, Snakeroot Oil, Sodium Acetate, Sodium Benzoate, Sodium Bicarbonate, Sodium Carbonate, Sodium Chloride, Sodium Citrate, Sodium Hydroxide, Solanone, Spearmint Oil, Styrax Extract, Gum and Oil, Sucrose Octaacetate, Sugar Alcohols, Sugars, Tagetes Oil, Tannic Acid, Tartaric Acid, Tea Leaf and Absolute, alpha-Terpineol, Terpinolene, Terpinyl Acetate,

5,6,7,8-Tetrahydroquinoxaline,
1,5,5,9-Tetramethyl-13-Oxatricyclo(8.3.0.0(4,9))Tridecane,
2,3,4,5, and 3,4,5,6-Tetramethylethyl-Cyclohexanone,
2,3,5,6-Tetramethylpyrazine, Thiamine Hydrochloride,
Thiazole, l-Threonine, Thyme Oil, White and Red, Thymol,
Tobacco Extracts, Tochopherols (mixed), Tolu Balsam Gum
and Extract, Tolualdehydes, para-Tolyl 3-Methylbutyrate,
para-Tolyl Acetaldehyde, para-Tolyl Acetate, para-Tolyl
Isobutyrate, para-Tolyl Phenylacetate, Triacetin,
2-Tridecanone, 2-Tridecenal, Triethyl Citrate, 3,5,5-Trimethyl
-1-Hexanol, para,alpha,alpha-Trimethylbenzyl Alcohol,
4-(2,6,6-Trimethylcyclohex-1-Enyl)But-2-En-4-One,
2,6,6-Trimethylcyclohex-2-Ene-1,4-Dione,
2,6,6-Trimethylcyclohexa-1,3-Dienyl Methan,
4-(2,6,6-Trimethylcyclohexa-1,3-Dienyl)But-2-En-4-One,
2,2,6-Trimethylcyclohexanone, 2,3,5-Trimethylpyrazine,
l-Tyrosine, delta-Undercalactone, gamma-Undecalactone,
Undecanal, 2-Undecanone, 10-Undecenal, Urea, Valencene,
Valeraldehyde, Valerian Root Extract, Oil and Powder,
Valeric Acid, gamma-Valerolactone, Valine, Vanilla Extract
And Oleoresin, Vanillin, Veratraldehyde, Vetiver Oil,
Vinegar, Violet Leaf Absolute, Walnut Hull Extract, Water,
Wheat Extract And Flour, Wild Cherry Bark Extract, Wine
and Wine Sherry, Xanthan Gum, 3,4-Xylenol, Yeast

SURGEON GENERAL'S WARNING:
Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

Complaint Exhibits

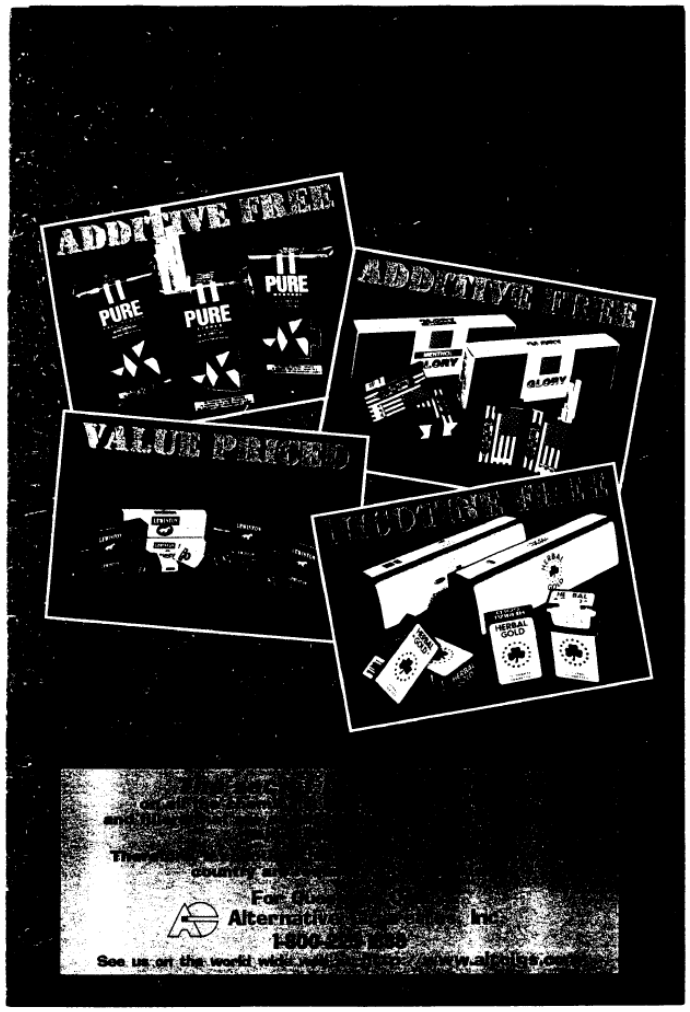
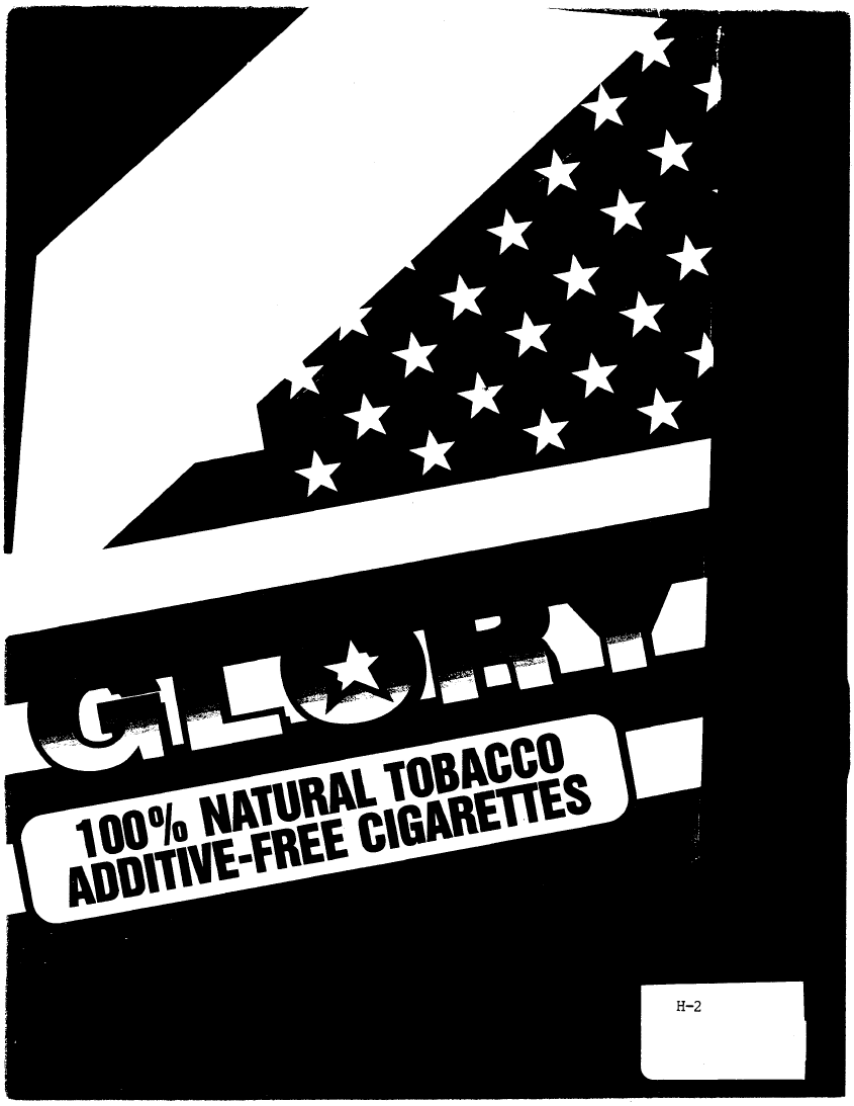


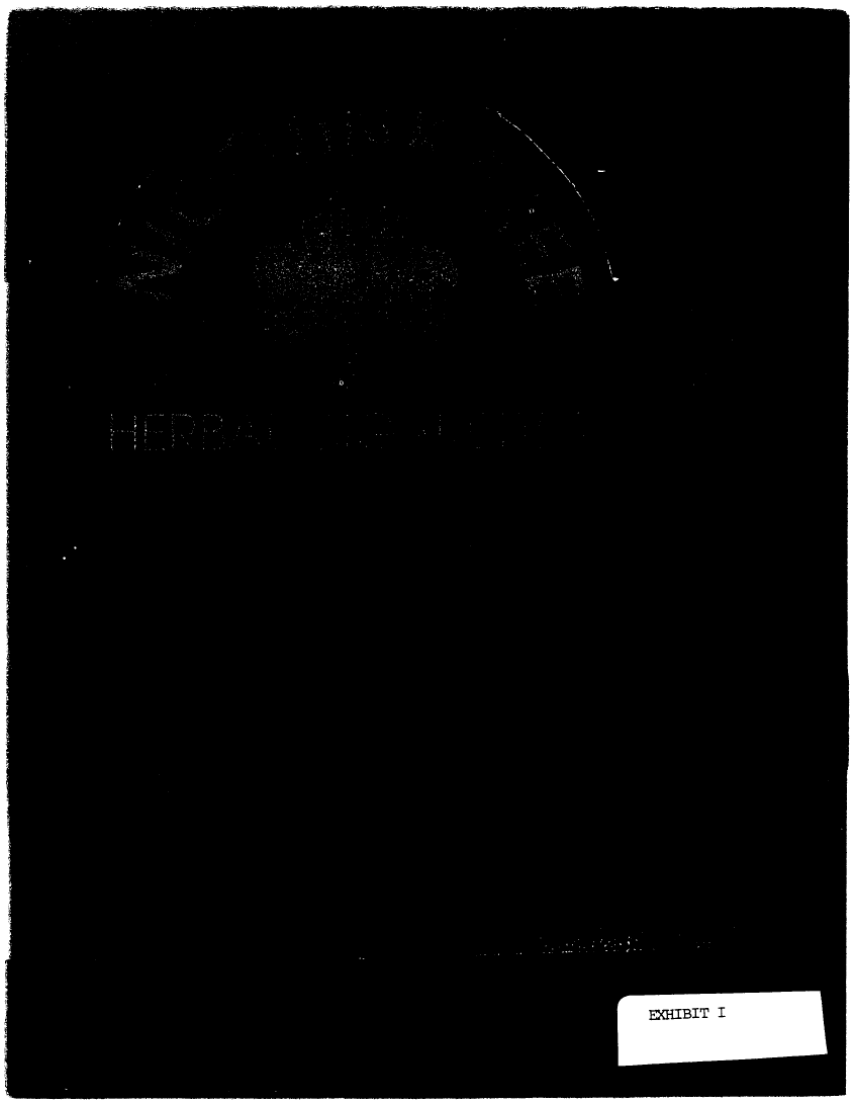
EXHIBIT G

Complaint Exhibits

Complaint Exhibits



Complaint Exhibits



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 Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent Alternative Cigarettes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 125 Virgil Avenue, Buffalo, New York 14216.

1.b. Respondent Joseph Pandolfino is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Alternative Cigarettes, Inc.

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

ORDER

DEFINITIONS

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

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

2. Unless otherwise specified, "respondents" shall mean Alternative Cigarettes, Inc., a corporation, its successors and assigns and its officers; Joseph Pandolfino, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Advertisement" shall mean any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of any product, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, point of purchase display, specialty or utilitarian item, sponsorship material, package insert, film, slide, or the Internet or other computer network or system.

5. "Tobacco product" shall mean cigarettes, cigars, cigarillos, little cigars, smokeless tobacco, cigarette tobacco, pipe tobacco, and any other product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product.

6. "Herbal smoking product" shall mean cigarettes, cigars, cigarillos, little cigars and any other product made or derived from plant material other than tobacco, that is intended for human smoking, including any component, part, or accessory of an herbal smoking product.

7. "Clearly and prominently" shall mean:

   a. With regard to advertisements for tobacco and herbal smoking products, in black type on a solid white background, or in white type on a solid red background, or in any other color combination that would provide an equivalent or greater degree of print contrast as objectively determined by densitometer or comparable measurements of the type and the background color. In advertisements, the color of the ruled rectangle shall be the same color as that of the type; and

b. i. With regard to advertisements for tobacco products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than 40% of the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than 50% of the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than 40% of the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than 50% of the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

ii. With regard to advertisements for herbal smoking products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than the area required for health warnings for tobacco cigarettes by such

amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

c. In the same type style and type size as that required for health warnings for tobacco cigarettes pursuant to 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the type style and type size of the disclosure shall be the same as the type style and type size required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

d. In a clear and prominent location but not immediately next to other written or textual matter or any rectangular designs, elements, or similar geometric forms, including but not limited to any warning statement required under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401 *et seq*. In addition, the disclosure shall not be positioned in the margin of a print advertisement. A disclosure shall be deemed "not immediately next to" other geometric or textual matter if the distance between the disclosure and the other matter is as great as the distance between the outside left edge of the rule of the rectangle enclosing the health warning required by 15 U. S. C. § 1333 and the top left point of the letter "S" in the word "SURGEON" in that health warning; and

e. For audiovisual or audio advertisements, including but not limited to advertisements on videotapes, cassettes, discs, or the Internet; promotional films or filmstrips; and promotional audiotapes or other types of sound recordings, the disclosure shall appear on the screen at the end of the advertisement in the format described above for a length of time and in such a manner that it is easily legible and shall be announced simultaneously at the end of the advertisement in a manner that is clearly audible.

Provided, however, that in any advertisement that does not contain a visual component, the disclosure need not appear in visual format, and in any advertisement that does not contain an audio component, the disclosure need not be announced in audio format.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Pure Cigarettes, Glory Cigarettes, or any other tobacco product in or affecting commerce, shall display in advertisements as specified below, clearly and prominently, the following disclosures (including the line breaks, punctuation, bold font and capitalization illustrated):

In cigarette advertisements:

No additives in our tobacco
does **NOT** mean a safer cigarette.

In advertisements for any other tobacco product:

No additives in our tobacco
does **NOT** mean safer.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement that, through the use of such phrases as "no additives," "100% tobacco," "additive-free," "pure tobacco," "does not contain additives," "no chemicals," "no flavorings," "no preservatives," or substantially similar terms, represents that a tobacco product has no additives, chemicals, flavorings or preservatives.

Provided, that the above disclosures shall not be required in any cigarette advertisement that is not required to bear a health warning pursuant to 15 U.S.C. § 1333.

Provided further, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such cigarette or other tobacco product poses materially lower health risks than other cigarettes or other products of the same type.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however,* that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases "no additives," "100% tobacco," "additive-free," "pure tobacco," "does not contain additives," "no chemicals," "no flavorings," "no preservatives," or substantially similar terms, that a tobacco product has no additives, chemicals, flavorings or preservatives, where such representation is accompanied by the disclosure mandated by this provision.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale,

or distribution of Herbal Gold cigarettes, Magic cigarettes, or any other herbal smoking product in or affecting commerce, shall display in advertisements and on packaging as specified below, clearly and prominently, the following disclosure (including the line breaks, punctuation and capitalization illustrated):

In advertisements and on packaging for herbal cigarettes:

Herbal cigarettes are dangerous to your health.
They produce tar and carbon monoxide.

In advertisements and on packaging for other herbal smoking products:

Smoking this product is dangerous to your health.
It produces tar and carbon monoxide.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement and on any package that, through the use of such phrases as "no nicotine," "nicotine-free," "no tobacco," "tobacco-free," "herbal," or substantially similar terms, represents that an herbal smoking product has no tobacco or nicotine.

Provided, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such herbal smoking products do not pose any material health risks.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however,* that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases as "no nicotine," "nicotine-free," "no tobacco," "tobacco-free," "herbal," or substantially similar terms, that an herbal smoking product has no nicotine or tobacco, where such representation is accompanied by the disclosure mandated by this provision.

III.

IT IS FURTHER ORDERED that respondents, 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 herbal smoking product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product does not present the health risks associated with smoking tobacco cigarettes; or

B. About the health risks associated with the use of such product,

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondents shall:

A. Provide, within forty-five (45) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A to each retailer, distributor, or other purchaser for resale to whom respondents have supplied Pure or Glory tobacco cigarettes, or Herbal Gold or Magic herbal cigarettes, since January 1, 1998. Respondents shall send the notice by first class mail. The mailing shall not include any other documents.

B. Discontinue dealing with any retailer, distributor, or other purchaser for resale once respondents have actual

knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has continued to use or disseminate:

(1) any of respondents' advertisements for any of respondents' tobacco products that:

a) represents, through the use of such phrases as "no additives," "100% tobacco," "additive-free," "pure tobacco," "does not contain additives," "no chemicals," "no flavorings," "no preservatives," or substantially similar terms, that the tobacco products have no additives, chemicals or preservatives; and

b) does not include the disclosure specified in Part I of this order; or

(2) any of respondents' advertisements for any of respondents' herbal smoking products that:

a) represents, through the use of such phrases as "no nicotine," "nicotine-free," "no tobacco," "tobacco-free," "herbal," or substantially similar terms, that the herbal smoking products have no tobacco; and

b) does not include the disclosure specified in Part II of this order;

unless, upon notification by respondents, such retailer, distributor, or other purchaser for resale immediately ceases using or disseminating such advertisements. If, after such notification, respondents obtain actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has not permanently ceased using or disseminating such advertisements, respondents

must immediately and permanently discontinue dealing with such retailer, distributor, or other purchaser for resale.

C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

(1) copies of all notification letters sent to retailers, distributors, or other purchasers for resale pursuant to subparagraph A of this part; and

(2) copies of all communications with retailers, distributors, or other purchasers for resale pursuant to subparagraph B of this part.

V.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and packaging containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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

complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

VII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to the sale of any of its tobacco products or herbal smoking products for which the composition or formula has been changed in such a manner as may affect compliance obligations arising under this order, including but not limited to the addition of any additives to any variety of such products. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided*, *however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Joseph Pandolfino, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall, within sixty (60) days after the date of 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.

XI.

This order will terminate on June 14, 2020, 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 effect the duration of:

A. Any Part 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 Part.

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 Part as though the complaint had never been 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Alternative Cigarettes, Inc., and its President, Joseph Pandolfino (hereinafter AAlternative Cigarettes@). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations for Alternative Cigarettes= Pure and Glory tobacco cigarettes, and the company=s Herbal Gold and Magic herbal cigarettes. Alternative Cigarettes advertised that Pure and Glory cigarettes contain no additives. According to the FTC complaint, through these advertisements respondents represented that because Pure and Glory cigarettes contain no additives, smoking them is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives. The complaint alleges that respondents did not have a reasonable basis for the representation at the time it was made. Among other reasons, according to the complaint, the smoke from Pure and Glory cigarettes, like the smoke from all cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide.

The FTC complaint further alleges that Alternative Cigarettes represented that smoking Herbal Gold and Magic herbal cigarettes does not pose the health risks associated with smoking tobacco cigarettes. According to the complaint, this claim is false, as Herbal Gold and Magic cigarette smoke, like the smoke from

tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide.

The proposed consent order contains provisions designed to prevent Alternative Cigarettes from engaging in similar acts and practices in the future. Part I of the order requires Alternative Cigarettes to include the following disclosure, clearly and prominently, in certain advertising for its tobacco cigarettes: "No additives in our tobacco does NOT mean a safer cigarette." (The order requires a similar disclosure in advertising for other tobacco products Alternative Cigarettes advertises as having no additives.) The disclosure must be included in all tobacco advertising that represents (through such phrases as "no additives" or "100% tobacco") that the product has no additives. Part I exempts Alternative Cigarettes from the disclosure requirement: (1) for cigarette advertisements not required to bear the Surgeon General's health warning; and (2) if Alternative Cigarettes possesses scientific evidence demonstrating that its "no additives" cigarette poses materially lower health risks than other cigarettes of the same type. In general, the disclosure required by Part I must be in the same type size and style as the Surgeon General=s warning and must appear within a rectangular box that is no less than 40% of the size of the box containing the Surgeon General's warning.

Part II of the order requires Alternative Cigarettes to include the following disclosure, clearly and prominently, in advertising and on packaging for herbal cigarettes: "Herbal cigarettes are dangerous to your health. They produce tar and carbon monoxide." (The order requires a similar disclosure for other herbal smoking products.) The disclosure must be included in all advertising and on packaging for herbal smoking products that represent (through such phrases as "no tobacco," "tobacco-free," or "herbal") that the product has no tobacco. Part II also contains an exemption from the disclosure requirement if Alternative Cigarettes possesses scientific evidence demonstrating that such herbal smoking products do not pose any material health risks. In general, the disclosure required by Part II must be in the same

type size and style as the Surgeon General=s warning and for advertisements must appear within a rectangular box that is the same size as the box containing the Surgeon General's warning.

Part III of the order requires Alternative Cigarettes to possess competent and reliable scientific evidence prior to: (1) claiming that any herbal smoking product does not present the health risks associated with smoking tobacco cigarettes; or (2) making any claim about the health risks associated with the use of any herbal smoking product.

Part IV requires Alternative Cigarettes to send a letter to its purchasers for resale notifying them that they should discontinue the use of certain existing Alternative Cigarettes advertisements and promotional materials and that Alternative Cigarettes is required to stop doing business with purchasers for resale that do not comply with this request.

Parts V VIII of the order contain requirements that Alternative Cigarettes keep copies of relevant advertisements and materials substantiating claims made in the advertisements; provide copies of the order to certain of its current and future personnel; notify the Commission of changes in the composition or formula of its tobacco products or herbal smoking products that may affect compliance with the order; and notify the Commission of any changes in the corporate structure that might affect compliance with the order. Part IX requires that the individual respondent notify the Commission of changes in his employment status for a period of ten years. Part X requires Alternative Cigarettes to file one or more reports detailing compliance with the order. Part XI provides that the order will terminate after twenty (20) years under certain circumstances.

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

IN THE MATTER OF

EFAMOL NUTRACEUTICALS, INC.

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

Docket C-3958; File No. 9923027
Complaint, June 22, 2000--Decision, June 22, 2000

This consent order requires Respondent Efamol Nutraceuticals, Inc. to possess competent and reliable scientific evidence for any claim about the health benefits, efficacy or safety of any food, drug or dietary supplement that contains essential fatty acids. The order permits respondent to make drug claims that have been approved by the FDA pursuant to either a new drug application or a tentative final or final standard and to make claims that the FDA has approved pursuant to the Nutrition Labeling and Education Act of 1990.

Participants

For the Commission: *Matthew D. Gold, Linda K. Badger, Kerry O'Brien.*

For the Respondents: *Stephen H. McNamara* and *A. Wes Siegner, Jr., Hyman, Phelps & McNamara, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Efamol Nutraceuticals, Inc. ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Respondent Efamol Nutraceuticals, Inc., is a Delaware corporation with its principal office or place of business at 23 Dry Dock Avenue, 2nd Floor, Boston, Massachusetts 02210.

Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed numerous dietary supplements to the public, all of which contain essential fatty acids. Included among respondent's products are "Efalex" and "Efalex Focus." Respondent has marketed Efalex and Efalex Focus to parents of children with Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder ("ADD/ADHD"). Efalex and Efalex Focus are "foods" and/or "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

Respondent has disseminated or has caused to be disseminated advertisements for Efalex and Efalex Focus, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. "LONG-TERM SIDE EFFECTS MAY INCLUDE:
HUGGING YOUR MOM.

When your child is bouncing off the walls, hyper and aggressive, do you go crazy wishing he'd just let you love him? Efalex™ is a dietary supplement that manages fatty acid deficiency in ADD/ADHD. It's safe and gentle, and it's available today without a prescription. In capsules or liquid. Because hugging your mom is the best medicine of all. To find out more, call 1 888 EFAMOL 1 or visit www.efamol.com."

(Exhibit A, Print Advertisement).

B. "FREAK

Why would anyone say such a thing? He's a beautiful kid. But sometimes beautiful kids suffer from really ugly attention and behavior problems. Luckily, Efalex™ is here. This safe, gentle, dietary supplement, now available in capsules or liquid, manages fatty acid deficiency in ADD/ADHD. Because he's not a monster, a demon, a weirdo. He's your child. Call 1 888 EFAMOL 1 or visit www.efamol.com."

(Exhibit B, Print Advertisement).

C. "You'd Try Anything to Help Your Child with ADHD. Try This.

Studies show that some children with Attention Deficit Hyperactivity Disorder (ADHD) have a fatty acid deficiency. This is because they have problems converting essential fatty acids into the long chain forms the body needs to maintain optimum eye and brain function.

Only Efalex provides the precise combination of these important fatty acids -- G.A., DHA, and AA -- to properly manage this deficiency.

Efalex has been used by thousands of children in the United Kingdom, other parts of Europe and Australia. Manufactured by Efamol, the world leader in fatty acid research, Efalex is a safe, gentle way to manage fatty acid deficiency.

Now Efalex is available at your local pharmacy in the vitamin/natural products section. For more

information on fatty acid deficiency and ADHD, call 1-888-EFAMOL-1 or visit www.efamol.com.

Efamol. Better Science for Better Nutrition."

(Exhibit C, Print Advertisement).

D. "Can you help him stay focused?

Today's children are intelligent, creative and more talented than ever, yet some find it difficult to focus on even the most everyday tasks. What causes this problem remains a mystery.

Nutritional research conducted at a major American university may offer hope. Studies have shown that essential fatty acids may play a role in maintaining eye and brain function. New research has shown that these nutrients may be low in some of today's overly active children.

More and more parents are finding out about Efalex™ Focus -- a new dietary supplement from Efamol Ltd., the world leader in essential fatty acid research.

Efalex™ Focus is a patented formula that provides an important balance of these fatty acids. It has been widely used in Europe and is now available in the U.S.

To learn more about Efalex™ Focus and essential fatty acids, or to locate a store near you, call 1-888-EFAMOL-1 or visit us at www.efamol.com."

(Exhibit D, Print Advertisement).

Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

A. Efalex and Efalex Focus can cure, prevent, treat or mitigate ADD/ADHD or its symptoms.

B. Efalex and Efalex Focus are effective in reducing attention and behavioral problems.

Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. There are no studies showing that children suffering from ADD/ADHD can be effectively treated by supplementation with essential fatty acids. Respondent relied on studies that do not purport to establish a link between essential fatty acid supplementation and an effect on ADD/ADHD or its symptoms. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

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.

THEREFORE, the Federal Trade Commission this twenty-second day of June, 2000, has issued this complaint against respondent.

By the Commission.

Complaint Exhibits

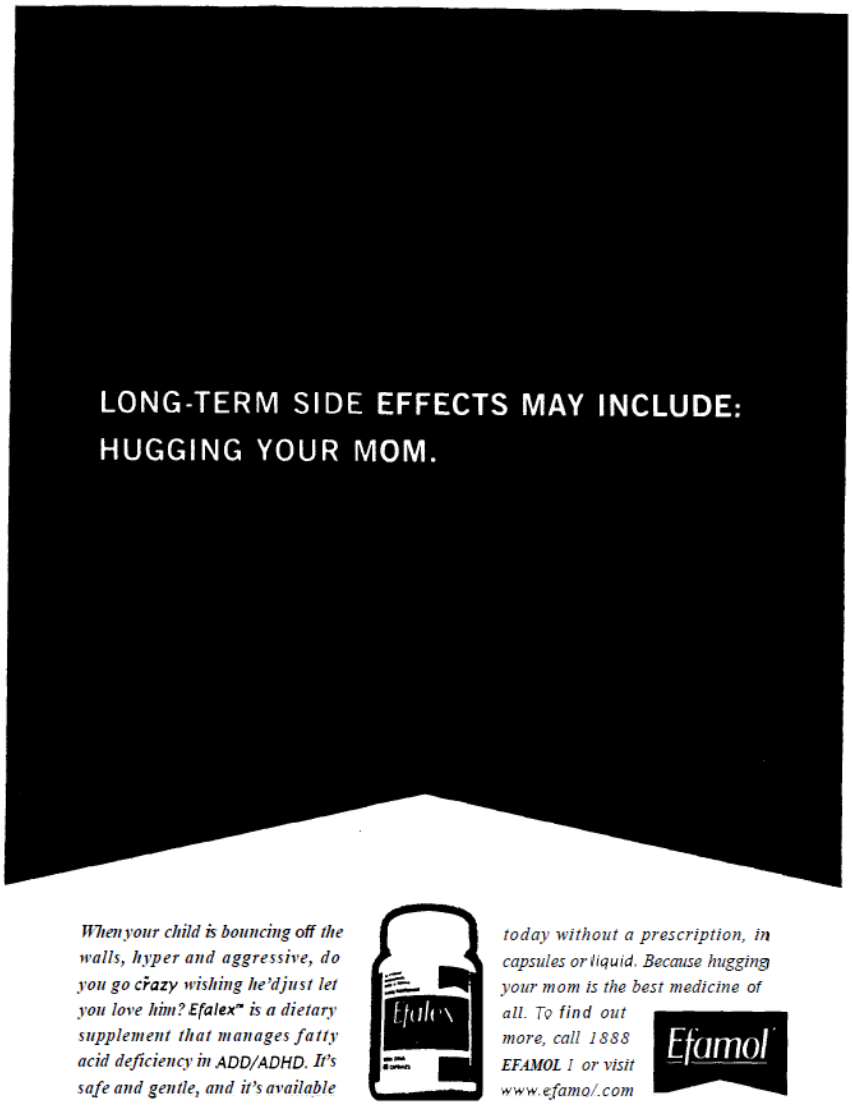


EXHIBIT A

Complaint Exhibits

Why would anyone say such a thing? He's a beautiful kid. But sometimes beautiful kids suffer from really ugly attention and behavior problems. Luckily, Efalex™ is here. This safe, gentle dietary supplement,

now available in capsules or liquid, manages fatty acid deficiency in ADD/ADHD. Because he's not a monster, a demon, a weirdo. He's your child. Call 1888 EFAMOL 1 or visit www.efamol.com

Efamol

NOW AVAILABLE AT CVS PHARMACY, RITE AID, ECKERD AND OTHER FINE STORES

EXHIBIT B

Complaint Exhibits

Complaint Exhibits

EXHIBIT D

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 Western Region 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Efamol Nutraceuticals, 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 23 Dry Dock Avenue, 2nd Floor, Boston, Massachusetts 02210.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that 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.

2. Unless otherwise specified, "Respondent" shall mean Efamol Nutraceuticals, Inc., its successors and assigns and its officers, agents, representatives and employees.

3. "Drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

4. "Food" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

5. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in

connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of "Efalex," "Efalex Focus," or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product can cure, prevent, treat or mitigate Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, or their symptoms;

B. Such product is effective in reducing attention and behavioral problems;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug or dietary supplement that contains essential fatty acids, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, efficacy or safety of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for 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.

IV.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for a period of five (5) years from the date of service of this order, deliver a copy of this order to all

current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of 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.

IX.

This order will terminate twenty on June 22, 2020, 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 Part 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 Part.

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 Part as though the complaint had never been 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Efamol Nutraceuticals, Inc., ("Efamol"). Efamol is a marketer of dietary supplement products, all of which contain essential fatty acids.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations for Efalex and Efalex Focus, two of Efamol's dietary supplement products. The advertisements claimed that these products can mitigate or cure the effects of Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder ("ADD/ADHD").

The proposed complaint alleges that Efamol could not substantiate the following claims: (1) that Efalex and Efalex Focus can cure, prevent, treat or mitigate ADD/ADHD or its symptoms; and (2) that Efalex and Efalex Focus are effective in reducing attention and behavioral problems. Part I of the proposed order would address these misrepresentations by prohibiting Efamol from making the claims in the future unless it possesses and relies upon competent and reliable scientific evidence that substantiates the claim.

Part II of the proposed order requires Efamol to possess competent and reliable scientific evidence for any claim about the health benefits, efficacy or safety of any food, drug or dietary supplement that contains essential fatty acids. Because all of Efamol's products contain essential fatty acids, this provision would apply to the company's entire current product line.

Part III of the proposed order contains language permitting Efamol to make drug claims that have been approved by the FDA pursuant to either a new drug application or a tentative final or final standard. Part IV states that Efamol would be permitted to make claims that the FDA has approved pursuant to the Nutrition Labeling and Education Act of 1990.

Parts V-VII of the proposed order contain requirements that Efamol keep copies of relevant advertisements and materials substantiating claims made in the advertisements; provide copies of the order to certain of its current and future personnel; and notify the Commission of changes in the corporate structure that might affect compliance with the order. Part VIII requires Efamol to file one or more reports detailing compliance with the order. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

IN THE MATTER OF

ZIM TEXTILE CORPORATION

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

Docket C-3960; File No. 0023082
Complaint, June 29, 2000--Decision, June 29, 2000

This consent order prohibits Respondent Zim Textile Corporation from future violations of the Textile Fiber Products Identification Act and Commission rules and regulations, found at 16 C.F.R. Part 303, implementing the requirements of the statute.

Participants

For the Commission: *Carol Jennings, Stephen Ecklund, Elaine D. Kolish,* and *BE.*

For the Respondents: *Jerry P. Wiskin, Simons & Wiskin.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Zim Textile Corporation (respondent) has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* (FTC Act) and the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.* (Textile Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New York corporation with its principal office or place of business at 300 Campus Drive, Suite E, Morganville, New Jersey 07751.

2. Respondent is a manufacturer and distributor of household textile products, including sheets and pillowcases. Respondent has manufactured, offered for sale, sold, and distributed textile products subject to the requirements of the Textile Act.

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.

4. Respondent has offered for sale and sold household textile products, subject to the requirements of the Textile Act, without disclosing on a tag or label affixed to the product the fiber content, the manufacturer or dealer identity, and the country of origin, thus violating 15 U.S.C. § 70b(b), and implementing regulations in 16 C.F.R. § 303.2.

5. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twenty-ninth day of June, 2000, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

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

Commission Act and the Textile Fiber Products Identification Act.

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a New York corporation with its principal office or place of business at 300 Campus Drive, Suite E, Morganville, New Jersey 07751.

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 Zim Textile Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary,

division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 C.F.R. Part 303, or as they may hereafter be amended.

II.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, for three (3) years after the date of issuance of this Order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this Order.

III.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, shall deliver a copy of this Order to all current and future principals, officers, and directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondent shall deliver this Order to current personnel within thirty (30) days after the date of service of this Order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment,

sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent Zim Textile Corporation, and its successors and assigns, shall, within sixty (60) days after the date of 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.

VI.

This Order will terminate on June 29, 2020, 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 Part 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 Part.

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 Part as though the complaint had never been 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.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from respondent Zim Textile Corporation.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns practices related to the manufacture, sale, and distribution of household textile products. The Commission's complaint charges that respondent violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.,* by offering for sale and selling household textile products without disclosing on a tag or label affixed to each such product the fiber content, the manufacturer or dealer identity, and the country of origin.

Part I of the proposed consent order prohibits future violations of the Textile Fiber Products Identification Act and Commission rules and regulations, found at 16 C.F.R. Part 303, implementing the requirements of the statute.

Part II of the proposed order requires the respondent, for three years after the date of issuance of the order, to maintain records demonstrating compliance with the order.

Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

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

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket C-3959; File No. 9810108
Complaint, June 29, 2000--Decision, June 29, 2000

This consent order addresses the anticompetitive effects of the 1994 acquisition by Respondent Service Corporation International, the nations largest chain of funeral homes, of LaGrone Funeral Home giving them a monopoly on funeral services in Roswell, New Mexico. Prompted by the Commission's investigation, Respondent sold Ballard Funeral Home, in Roswell, to Sentry Group Services, Inc. The order requires that, if Respondent acquires the Ballard Funeral Home pursuant to a default on Sentry's loan with Provident, a subsidiary of Respondent, Respondent must divest Ballard to a Commission-approved buyer within 90 days. Provident is also prohibited, by the order, from sharing information regarding Sentry with Respondent.

Participants

For the Commission: *Harold E. Kirtz, Randi M. Boorstein,* and *Gregory S. Vistnes.*

For the Respondents: *James M. Shelger, Service Corporation International,* and *David Clanton* and *David Laing, Baker & McKenzie.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act") and 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 Service Corporation International ("SCI") has acquired LaGrone Funeral

Home 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, 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 Service Corporation International

1. Respondent SCI (hereinafter "Respondent") 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 77019. Respondent had sales in 1998 of approximately $2.8 billion.

2. Respondent 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.

3. Respondent is, and at all times relevant herein has been, engaged in the provision of funeral services in Roswell, New Mexico.

II. The Acquisition

4. On or about May 17, 1994, Respondent acquired the LaGrone Funeral Home in Roswell, New Mexico. Respondent had entered the Roswell area with its purchase of the Ballard Funeral Home on or about February 1, 1979.

III. Trade and Commerce

5. The relevant line of commerce in which to analyze the acquisition is funeral services.

6. The relevant section of the country in which to analyze the acquisition in connection with the provision of funeral services is Roswell, New Mexico.

IV. Entry Conditions

7. Entry into the relevant market is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

V. Concentration

8. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm concentration ratios. The HHI increased from 5050 to 10,000 because of the acquisition.

VI. Effects of the Acquisition

9. The acquisition may have substantially lessened competition in the relevant market in the following ways, among others:

   (a) by eliminating direct competition between Respondent and LaGrone; and

   (b) by increasing the likelihood that Respondent has been unilaterally exercising and will continue to unilaterally exercise market power;

   each of which increases the likelihood that the prices of funeral services will increase and that services to customers of funeral services will decrease. In fact, prices charged for funeral services in the relevant market have already increased substantially.

10. In 1998, the Commission began a formal investigation of the Roswell, New Mexico, funeral services market. On September 28, 1999, Respondent divested the assets of Ballard Funeral Home.

VII. Violations Charged

11. The acquisition described in Paragraph 4 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission has caused this Complaint to be signed by the Secretary and its official seal to be affixed in Washington, D.C., this twenty-ninth day of June, 2000.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Respondent Service Corporation International of the assets of LaGrone Funeral Home, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition and the Southeast Region 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 Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed the Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues 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 77019.

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

ORDER

I.

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

A. "Respondent" or "SCI" means Service Corporation International, its directors, officers, employees, agents, representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by SCI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquisition" means the acquisition by SCI of LaGrone Funeral Home.

D. "Funeral Services" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: removal of the body from the place of death; 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 outer burial containers; and arrangements for and conveyance of the body to a cemetery or crematory for final disposition.

E. "Divested Assets" consists of Ballard Funeral Home, located in Roswell, New Mexico, and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized as part of Ballard Funeral Home.

F. "Provident" means Provident Services, Inc., a subsidiary of SCI.

G. "Sentry" means Sentry Group Services, Inc., which acquired the Divested Assets on September 28, 1999.

II.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Decision and Order becomes final, Respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any stock, share capital, equity or other interest, except for an interest obtained by Provident to secure financing as provided in Paragraph III. D. of this Decision and Order, in any concern, corporate or non-corporate, or any assets used or previously used (and still suitable for use), engaged at the time of such acquisition, or within the two (2) years preceding such acquisition, in the provision of funeral services in Chaves County, New Mexico.

B. The aforesaid 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 (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary

material (within the meaning of 16 C.F.R. §803.20), Respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. 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.

C. Provident shall keep information received from or made available to Sentry confidential from any person other than persons employed or retained by Provident who are or are expected to be engaged in reviewing, evaluating, approving, structuring, or administering the financing for Sentry. Provident shall not disclose any information received from or made available to Sentry to any officer, employee, or director of SCI or of any subsidiary or division of SCI other than Provident. Provident shall be permitted to disclose information received from or made available to Sentry (a) upon the order of any court or administrative agency, (b) upon the request or demand of a regulatory or other authority having jurisdiction over Provident, (c) to the extent reasonably required in connection with the exercise of any remedy under a loan agreement pertaining to any financing provided to Sentry, (d) to Provident's auditors or legal counsel, (e) in connection with the filing of any loan statement or similar document in connection with any public record filed in connection with financing provided to Sentry, and (f) in connection with any sale, participation, or syndication of any loan by Provident.

III.

IT IS FURTHER ORDERED that:

A. If Respondent re-obtains the Divested Assets by means of the interest held by Provident, Respondent shall divest absolutely and in good faith the Divested Assets no later than ninety (90)

days from the date on which Respondent obtains such interest to an acquirer ("the New Acquirer") that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. For purposes of Paragraph III. A., Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Divested Assets, pending the divestiture of the Divested Assets to the New Acquirer, and preserve the ability of these assets to compete at the same levels of sales, profitability, and market share as prior to the Acquisition, and shall not permit the destruction, removal, wasting, deterioration, or impairment of any of these assets, except for ordinary wear and tear that does not affect their viability, marketability, or competitiveness, and shall transfer each asset required to be divested pursuant to Paragraph III. A. of this Decision and Order to the New Acquirer in a manner that preserves the assets' marketability, viability, and competitiveness.

C. The purposes of this Paragraph III are to remedy the lessening of competition resulting from the Acquisition, as alleged in the Commission's complaint, and to ensure the continuation of the Divested Assets as an ongoing, viable enterprise engaged in the same business in which it was engaged at the time of the Acquisition.

D. For purposes of this Paragraph III., Provident shall be permitted to provide financing for, and to take and hold a security interest in, the Divested Assets to the New Acquirer, subject to the conditions set forth in Paragraph II. C. of this Decision and Order. In the event that Provident exercises the right under a loan agreement relating to financing provided to the New Acquirer to foreclose on a property, Provident shall divest all title and other interests in the property obtained through foreclosure in the manner set forth in Paragraph III of this Decision and Order. In

the event that SCI sells, divests, or otherwise disposes of Provident, and that SCI has no officers, directors, or employees in common with Provident, then the provisions of this Paragraph III. D., and of Paragraphs II. C. and V. A., shall no longer be operative.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent obtains the Divested Assets by means of the security interest that SCI retains in the Divested Assets through its financing of the divestiture of the Divested Assets by Provident and has not divested, absolutely and in good faith, the Divested Assets within ninety (90) days, the Commission may appoint a trustee to accomplish the required divestiture, at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

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, the Respondent shall consent to the appointment of a trustee in such action.

C. Neither the appointment of a trustee nor a decision not to appoint a trustee shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Decision and Order.

D. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV. A. or IV. B. of this Decision and 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 Divested 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 Decision and Order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV. D. 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 Divested 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 divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Paragraph III of this Decision and Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

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 Divested 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 losses, claims, damages, liabilities, 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 Decision and 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 Decision and Order.

11. In the event that the trustee determines that he or she is unable to divest the Divested Assets as described in Paragraph I. E. of this Decision and Order, the trustee may divest such additional assets of Respondent in that geographic area as necessary to satisfy the requirements of this Decision and Order.

12. The trustee shall have no obligation or authority to operate or maintain the Divested Assets.

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

V.

IT IS FURTHER ORDERED that:

A. In the event that Respondent obtains the Divested Assets because of the interest held by Provident, 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 III and IV of this Decision and Order within thirty (30) days of the date on which it obtains the Divested Assets and every thirty (30) days thereafter until it has fully complied with Paragraphs III and IV of this Decision and 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 III and IV of the Decision and 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. On the first November fifteenth after the date on which this Decision and Order is issued, annually for the next nine (9) years on November fifteenth, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent such as dissolution, assignment, sale resulting in the emergence of a successor entity, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this Decision and Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Decision and Order, upon written request to counsel, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facility and 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 Decision and Order; and

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

VIII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on June 29, 2010.

By the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement for public comment from Service Corporation International ("SCI") designed to remedy the anticompetitive effects arising from SCI's 1994 acquisition of the LaGrone Funeral Home ("LaGrone") in Roswell, New Mexico. SCI, headquartered in Houston, Texas, is the nation's largest chain of funeral homes and cemeteries. LaGrone, at the time of the acquisition, operated two funeral homes in New Mexico.

At the time of the acquisition, there were only two funeral homes operating in Roswell, New Mexico. SCI owned the Ballard Funeral Home. LaGrone owned the remaining funeral home. The acquisition gave SCI a monopoly in the provision of funeral services in Roswell. Funeral services include transporting the deceased from the place of death to the funeral home, embalming and otherwise preparing the body for burial, providing a casket, holding a viewing or other ceremony, and transporting the body to the cemetery or crematorium. Since the acquisition, no new entry into the provision of funeral services in Roswell has occurred. After the acquisition, prices for funeral services increased in Roswell.

On September 28, 1999, prompted by the Commission's investigation of the LaGrone acquisition, SCI sold the Ballard Funeral Home to Sentry Group Services, Inc. ("Sentry"). Sentry,

a privately-held company, owns and operates 37 funeral homes in Oklahoma, Texas, New Mexico, Kansas, and Colorado. Provident Services, Inc. ("Provident"), SCI's financing subsidiary, provided financing for Sentry's acquisition.[1]

To ensure that competition is fully restored in Roswell, the Commission's proposed Consent Order requires that, if SCI acquires the Ballard Funeral Home pursuant to a default on Sentry's loan with Provident, SCI must divest Ballard to a Commission-approved buyer within 90 days. In the event SCI does not accomplish the divestiture within 90 days, the proposed Consent Order provides that the Commission may appoint a trustee to divest Ballard. Moreover, the proposed Consent Order prohibits Provident from sharing information obtained from Sentry with SCI.

The proposed Consent Order also provides that, for a period of ten years, SCI must give prior notice to the Commission of any proposed acquisition of a funeral home serving Chaves County, New Mexico, where Roswell is located.

The proposed Consent Order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. The purpose of this analysis is to invite and facilitate public comment concerning the proposed Consent Order in order to aid the Commission in its determination of whether to

---

[1] Provident is kept separate and distinct from the operating divisions of SCI. Because there are unique financing needs in the funeral industry, Provident provides loan services for many transactions, including the construction or acquisition of funeral homes by a number of SCI's competitors. Consequently, Provident's loan agreement includes a provision guaranteeing the confidentiality of information provided to Provident by a borrowing funeral home operator.

make the proposed Consent Order final. It is not intended to constitute an official interpretation of the proposed Consent Order, nor is it intended to modify the terms in any way. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

DURA LUBE CORPORATION, ET AL.

Docket No. 9292. Order, January 19, 2000

Order withdrawing this matter from adjudication..

ORDER WITHDRAWING MATTER FROM ADJUDICATION

This matter is before the Commission upon the joint motion filed by Complaint Counsel and Counsel for Respondents that this matter be withdrawn from adjudication -- pursuant to Section 3.25(b) and (c) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(b), (c) (1999)
-- for the purpose of considering a proposed consent agreement executed by Complaint Counsel, Respondents, and Counsel for Respondents.

IT IS ORDERED that the aforesaid motion to withdraw this matter from adjudication be, and it hereby is, granted.

By the Commission.

IN THE MATTER OF

GENERAL NUTRITION CORPORATION, ALSO TRADING AS NATURAL SALES COMPANY AND DAVID B. SHAKARIAN

Docket No. C-1517. Order, January 31, 2000

Order withdrawing this matter from adjudication..

IN THE MATTER OF

GENERAL NUTRITION, INC.

Docket No. 9175. Order, January 31, 2000

Order withdrawing this matter from adjudication..

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN THE PROCEEDING AND MODIFY CEASE AND DESIST ORDER IN DOCKET NO. C-1517 AND DENYING REQUEST TO REOPEN AND MODIFY CEASE AND DESIST ORDER IN DOCKET NO. 9175

On May 7, 1999, General Nutrition, Inc. ("GNC") filed a request to reopen the proceedings in Docket No. C-15171 and 91752, and to modify the orders issued by the Commission, pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 9 45(b), and Section 2.51 of the

[1] 75 F.T.C. 529 (1969), *modified*, 77 F.T.C. 1458 (1970) ("1969 order").

[2] 111 F.T.C. 387 (1989) ("1989 order").

Commission's Rules of Practice, 16 C.F.R. 4 2.51.3 The request was placed on the public record for 30 days for comment. No comments were filed. GNC also requests that the Commission seek the Department of Justice's assistance in asking a federal court to modify a 1994 consent decree4 enjoining GNC from violating these two orders and h m making deceptive claims for any hair loss product.

I. THE ORDERS AND THE DECREE

The 1969 order applies to all food or drug preparations containing vitamins and/or minerals marketed by GNC and its "officers . . . agents, representatives and employees, directly or through any corporate or other device." Paragraph 1 (a) prohibits GNC from claiming the use of any such preparation will be of benefit in the prevention, relief or treatment of any symptom unless: (1) the claim is expressly limited to a symptom caused by a deficiency of one or more of the vitamins or iron provided by the preparation; and (2) GNC discloses that the preparation will not prevent, treat, or relieve the symptom for the vast majority of persons suffering from such symptom; and that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only by tests conducted under a physician's supervision. Paragraphs 1 (b)-(h) prohibit GNC from making specific false claims involving the body's ability to store vitamins B and C, the treatment of iron deficiency, and the diagnosis of iron or vitamin deficiencies.

Paragraph 2 prohibits GNC from disseminating any advertisement of a product advertised for sale by reason of its vitamin and/or mineral content which lists or refers to an

---

[3] Pursuant to Section 3.72(b)(3)(ii) of the Rules of Practice, 16 C.F.R. § 3.729b)(3)(ii), these two administrative orders will terminate no sooner than April 28,2014.

[4] Civil No. 94-686 (W.D. Pa. May 20,1994).

ingredient, except in the name of such product, the need for which in human nutrition has not been established, or an ingredient whose presence is without nutritional significance, unless the advertisement discloses that the presence of such ingredient is without nutritional significance. Paragraph 2 also prohibits GNC from misrepresenting that the need for an ingredient for human nutrition has been established. In addition, Paragraph 2 contains a safe harbor providing that any regulation by the FDA affirmatively permitting a claim of nutritional significance for a vitamin or mineral in a specified amount will be accepted as evidence that the presence of that amount of the specified nutrient has nutritional significance.

On August 19, 1993, Commission staff from the Bureau of Consumer Protection's Division of Enforcement issued an advisory opinion addressing the scope of Paragraph 1 (a) of the 1969 order.'5 The staffs advisory opinion states that Paragraph l(a) applies only to food and drug preparations containing vitamins and/or minerals for which claims are made, directly or by implication, that the vitamin[s] or mineral[s] present in such preparations will be of benefit in the prevention of tiredness, etc. Thus, as interpreted by Commission staff, Paragraph l(a) does not apply to a product marketed as effective in preventing tiredness provided the benefit is attributed to an ingredient other than any vitamins or minerals also present in the product.

The 1989 order is considerably broader than the 1969 order. Part I of the 1989 order prohibits GNC from making certain false cancer-related claims for "Healthy Greens" (a food supplement made from vegetables and containing various nutrients) or any substantially similar product. Part II prohibits GNC from making false claims relating to scientific evidence with respect to any product's ability to cure, treat, prevent or reduce the risk of

[5] See Letter from Justin Dingfelder, Asst. Dir., Div. of Enforcement, Bureau of Consumer Protection, FTC, to Christopher Smith, Arent Fox Kintner Plotkin & Kahn.

developing any disease. Part III prohibits GNC from making certain muscle building, fat or weight loss, and other health-related claims for any free form amino acid containing arginine, ornithine, tryptophane or a combination thereof. Part IV prohibits GNC from using the expression "Growth Hormone Releaser" or any similar expression as a brand name or product description, unless such product stimulates the production or release of greater amounts of human growth hormone in users than in non-users and GNC has substantiation for the claim. Part V prohibits GNC from making any unsubstantiated representation: (1) concerning any product's ability to cure, treat, prevent or reduce the risk of developing any disease; (2) that any product assists a user to lose or control weight or fat or suppress appetite; (3) that any product expands, extends, or prolongs life or retards aging; or (4) that any product aids a user in achieving greater or faster muscular development, greater endurance, strength, power or stamina, or shorter exercise recovery time.6

Like the 1969 order, Parts I through V of the 1989 order apply to GNC and its "officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device." Part VI required GNC to pay $600,000 to the American Diabetes Association, the American Cancer Society, and the American Heart Association. Parts VII to X require recordkeeping, notice of corporate status changes, the filing of a compliance report, and distribution of the order to GNC's divisions and distributors.

---

[6] Part V contains a " safe harbor" providing that GNC shall not be liable under this paragraph for any representation contained on a package label or package insert for a product that meets all of the following conditions: (1) the product is manufactured and distributed by a third party and is not manufactured or distributed exclusively for GNC; (2) the product is generally available at competing retail outlets; (3) the product is not identified with GNC and does not contain GNC's name or logo; (4) the product was not developed or manufactured at the instigation or with the assistance of GNC; and (5) the product representation is not otherwise advertised or promoted by GNC.

In 1994, the Commission brought an enforcement action against GNC alleging numerous violations of the 1969 and 1989 orders, as well as Sections 5(a) and 12 of the FTC Act. GNC settled the action by agreeing to pay a $2.4 million civil penalty and to the entry of an injunction prohibiting GNC and its "officers, agents, representatives and employees . . . directly or through any corporation, subsidiary, division, or other device" from violating the 1969 and 1989 orders. The injunction also prohibits false and unsubstantiated claims regarding the ability of any product or service to prevent, cure, relieve, reverse or reduce hair loss, or promote the growth of hair, where hair has already been lost. Paragraph 6 of the consent decree provides that: "In the event that either the 1989 or the 1970 Order [the 1969 order] is hereafter modified, defendant's compliance with such Order as so modified shall not be deemed a violation of this injunction."

II. STANDARD FOR REOPENING A FINAL ORDER

Section 5(b) of the FTC Act provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside if the respondent makes "a satisfactory showing that changed conditions of law or fact" so require.[7] A satisfactory showing sufficient to require reopening is made when

---

[7] Section 5(b), as amended in 1980, provides, in part:

> [T]he Commission may at any time . . . reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedure by requiring the Commission to reopen an order if the specified showing is made," S. Rep. 96-500,96th Cong., 2d Sess. 9-10 (1979), and the amendment added the requirement that the Commission act on petitions to reopen within 120 days of filing.

a request identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket
No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.

Generally in determining whether to modify an order based on a *change in fact*, the Commission requires that the change be one that was unforeseeable.8 In a dynamic economy, change is predictable and inevitable. But, the nature and type of change are not necessarily foreseeable. The Commission has recognized marketplace realities in evaluating whether petitions have demonstrated that a change was not reasonably foreseeable.

For example, in *Beneficial Corp.*, 108 F.T.C. 168, 171 (1986), the petitioners asked the Commission to reopen and modify a 1979 order addressing their marketing of tax return preparation services based on change in fact and law, and on public interest grounds. The petitioners argued, among other things, that their tax return preparing personnel were now required to undergo more extensive training compared to the training required at the time of the order's issuance. *Id.* at 171. The petitioners further argued that this constituted a change in fact warranting modification of Paragraph Six, which was an absolute prohibition against representations regarding the competence of the petitioners' tax return preparing personnel. The petitioners asked the Commission to modify Paragraph Six to prohibit them from "misrepresenting,

---

[8] *See Phillips Petroleum Co.*, 78 F.T.C. 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 1 19 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

in any manner, the competence or the ability of respondents' tax preparing personnel." *Id.* The Commission held that the petitioners had demonstrated a change in fact warranting modification of Paragraph Six of the order so that it would only prohibit misrepresentations of competence or ability.9

In determining whether to modify an order based on a *change in law*, the Commission decides whether the change brings the order into conflict with existing law. *Union Carbide Corp.*, 108 F.T.C. 184, 186 (1986). In *Kroger Co.*, 113 F.T.C. 772, 775-76 (1990), the Commission modified the order to make it consistent with the amended Unavailability Rule, 16 C.F.R. § 424, in part based on changed conditions of law. In its petition, Kroger argued that it was in the position of violating the order by complying with the amended Rule or violating the amended Rule by complying with the order. *Id.* at 774. The Commission concluded that the amendments to the Rule brought the terms of the order into conflict with the Rule. *Id.* at 776. In *Bulova Watch Co.*, 102 F.T.C. 1834 (1983), the Commission found that the Supreme Court's ruling in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 US. 36, 57-59 (1977), that non-price vertical restraints such as transshipment restrictions are not *per se* illegal, but instead should be evaluated pursuant to the rule of reason, constituted a change in law warranting deletion of the order's transshipment provisions. Thus, a change in law may warrant modification of an order if, because of a change in law, the order prohibits conduct that would or could be permissible absent the order (even if it is possible to

---

[9] *See also Union Carbide Corp.*, 108 F.T.C. 184, 188 (1986)(petitioner's sale of welding products and gas welding apparatus operations warranted deletion of references to these product lines from the order on change in fact and public interest grounds); *General Mills Fun Group, Inc.*, 106 F.T.C. 607 (1985)(sale of the subsidiary that had engaged in violative conduct deemed a change in fact warranting modification); *Genstar Ltd.*, 104 F.T.C. 264 (1984)(increased capacity in the relevant market required reopening and modification of the order); *AHC Pharmcal*, 101 F.T.C. 40 (1983)(corrective advertising requirement deleted in part because of respondent's changed financial condition).

comply with the order and the changed law simultaneously). A change in law need not result in a direct conflict to warrant reopening. In *ITT Continental Baking Co.*, 102 F.T.C. 1298 (1983), the Commission held that the passage of the Hart-Scott-Rodino Act constituted a change in law requiring an order modification because it overlapped with the order's disclosure requirements.

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. The Commission recently reopened and modified an order on public interest grounds, because the reasons to modify the order outweighed the reasons to retain it as written. *Schnuck Markets, Inc.*, Docket No. C-3585 (June 2, 1998) (modifying prohibition on removal of equipment from supermarkets owned by respondent to allow respondent to make a specified charitable donation to a college of used equipment from a store closed for nearly three years). There, the Commission concluded that there was only a slight possibility that the original purpose of the prohibition -- to make it more likely that any supermarket closed by respondent would be reopened as a supermarket by someone else -- would be affected by the modification, and this possibility was outweighed by the possible detrimental impact on the respondent's public image and the public benefits to the college of retaining the prohibition. *Id.* at 3.

The language of Section 5(b) indicates that the requester has the burden of making "a satisfactory showing" of changed conditions to obtain reopening of the order. *See Gautreaux v. Pierce*, 535 F. Supp. 423,426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by

means other than conclusory statements, why an order should be modified.10

If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and finality of Commission orders.11

III. PETITIONER'S REQUEST AND ANALYSIS

GNC alleges that changes in law and fact, as well as public interest considerations, warrant reopening and modifying the orders and decree. GNC requests that the Commission modify the 1969 order by:

---

[10] The legislative history of amended Section 5(b), S. Rep. No. 96-500,96th Cong., 2d Sess. 9-10 (1979), states:

> Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed Conditions require the requested modification of the order.

[11] *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281,296 (1974) ("sound basis for. . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718,721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

(1) replacing Paragraph 1, which prohibits a number of specific claims and requires certain triggered disclosures, with a provision prohibiting GNC from making any unsubstantiated claim that the presence of any vitamin or mineral will prevent, relieve, or treat any symptom or that the presence of any vitamin or mineral deficiency can be self-diagnosed;

(2) deleting Paragraph 2, a disclosure requirement regarding the nutritional significance of certain food ingredients, and Paragraphs 3 and 4, two provisions that are no longer necessary in light of the proposed changes to Paragraph 1 and the deletion of Paragraph 2;

(3) adding "safe harbors" providing that nothing in the order shall prohbit GNC from making any representation: (a) that is specifically permitted in labeling by regulations promulgated by the Food and Drug Administration ("FDA") pursuant to the Nutritional Labeling and Education Act of 1990 or sections 303-304 of the Food and Drug Administration Modernization Act of 1997; or (b) that is permitted in labeling under any tentative final or final standard or monograph promulgated by the FDA, or under any new drug application approved by the FDA;

(4) adding three definitions and deleting two administrative provisions imposing one-time requirements that GNC distribute the order and file a compliance report; and

(5) dropping the individual respondent who is now deceased.

In addition, GNC requests that the Commission modify the 1969 and 1989 orders and seek modification of the 1994 consent decree to add a new provision limiting GNC's liability for the actions of its franchisees and licensees. This provision would require GNC to bind its franchisees and licensees contractually to

comply with the respective order or decree, notify non-complying franchisees and licensees that they are violating the respective order or decree, and report noncomplying franchisees and licensees to the FTC if they continue to violate the respective order or decree after receiving such notice. It would also provide that GNC's compliance with the new provision shall constitute an affirmative defense to any civil penalty action arising from the conduct of a franchisee or licensee provided GNC has not authorized, approved or ratified the conduct and has reported that conduct promptly to the FTC.

On August 30, 1999, GNC submitted a new proposed provision limiting its liability for the conduct of its franchisees and licensees. Unlike GNC's first proposed modification, this new provision would require GNC to monitor advertising of its franchisees and licensees. It would also provide that the affirmative defense is not available to GNC unless the company has "diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about the cessation of that conduct by the franchisee or licensee" in cases where the franchisee or licensee conduct constitutes a material or repeated violation of the order.

A. GNC's Proposed Modifications of the 1969 Order

1. GNC's Request and Rationale

GNC requests that the Commission modify the 1969 order by replacing it with the following language:

ORDER

For 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

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.

B. Unless otherwise specified, "respondent" shall mean General Nutrition, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

C. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 0 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising of any food, dietary supplement, or drug containing any vitamin or mineral, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and as "dietary supplement" is defined in Section 201(ff) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 9 321(ff), in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That the presence of any vitamin or mineral in any such food, dietary supplement, or drug will be of benefit in the prevention, relief or treatment of tiredness, listlessness, lack of normal appetite, "depleted" feeling, "run-down" feeling, easy fatigability or any other symptom; or

B. That the presence of any vitamin or mineral deficiency can be self-diagnosed;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard or monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

# # #

GNC asserts that the proposed modification would simplify the order and reconcile the scope of Paragraph 1 with staff's 1993 advisory opinion, and that the modification is warranted on public interest grounds. GNC maintains that Paragraph 1 as currently worded is ambiguous in that it does not precisely define the advertising claims that trigger the disclosure requirement. GNC relies on *Encyclopedia Britannica, Inc.*, 111 F.T.C. 1 (1988), a case where the Commission reopened and modified the order on public interest grounds to effectively eliminate any conceivable ambiguity in a provision requiring verbal disclosures during telephone sales presentations by establishing a bright line standard to measure future compliance. GNC contends that it is impractical for it to make the lengthy disclosures required by Part l(a), and

that as a result, this provision operates in effect as a ban on the claims triggering the disclosure requirement.12 GNC further maintains that it cannot rely on the 1993 staff advisory opinion described earlier because the staff's interpretation of the order may change in the future. GNC thus argues that there is an affirmative need to modify this provision to provide legal certainty regarding the scope of the provision.

GNC asserts that deletion of Paragraph 2 is warranted on public interest and change in law grounds. GNC relies on *Firestone Tire & Rubber Co.*, 114 F.T.C. 450 (1991), a case where the Commission reopened and set aside an order as to respondent Shell Oil Co. on change in law grounds. The Commission set aside the order as to Shell because the legal standard for liability relating to tying and nonprice vertical restraints had changed. GNC argues that the Paragraph 2 affirmative disclosure requirement no longer comports with the current state of Food and Drug Administration ("FDA") regulations pertaining to dietary supplements, and that it is contrary to the regulatory scheme for supplements created by the Dietary Supplement Health and Education Act of 1994 ("DSHEA"). GNC maintains that the parties intended Paragraph 2 to track the then-current FDA regulations concerning the labeling of products containing vitamins and minerals. At that time, the FDA required labeling disclaimers for certain vitamin and mineral ingredients for which no need in human nutrition has been established. Because the FDA no longer requires such disclaimers, GNC contends the Commission should delete Paragraph 2. If the Commission does not delete Paragraph 2 as

---

[12] As noted earlier, Paragraph l(a) requires GNC to disclose that the preparation will not prevent, treat, or relieve the symptom for the vast majority of persons suffering from such symptom; and that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only by tests conducted under a physician's supervision.

requested, GNC will be subject to disclosure requirements to which the rest of the supplement industry is no longer subject to as a result of DSHEA and the changes in FDA regulations.

GNC also argues that the disclosures required by Paragraph 2 conflict with disclosures required by DSHEA and could generate confusion. DSHEA requires the following disclaimer to appear in conjunction with claims of nutritional support: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease." GNC contends that the disclaimer required by Paragraph 2 (i.e. this ingredient is without nutritional significance) conflicts with the DSHEA disclaimer. To illustrate this point, GNC offers a hypothetical example involving the FDA's proposal to permit the statement "to meet nutritional needs during pregnancy" on labeling for a supplement provided the statement can be properly substantiated. GNC asserts that it could have substantiation for this statement as to a particular vitamin or mineral, yet be unable to establish a need in human nutrition for the vitamin or mineral. If so, GNC contends, its advertising would confuse consumers by stating "Product X contains ingredient Y which helps meet nutritional needs during pregnancy" along with the DSHEA disclaimer and the Paragraph 2 disclaimer "this ingredient is without nutritional significance.13

GNC also argues that modifying Paragraph 2 would serve the public interest by enabling GNC to market products in accordance with DSHEA without risking a regulatory challenge from the FTC based on the Paragraph 2 disclosure requirement, and that GNC

[13] As explained in more detail below, GNC's argument lacks merit. If GNC can substantiate a claim that a particular vitamin or mineral helps meet nutritional needs during pregnancy and the FDA permits such a claim to be made, it arguably follows that a need for the vitamin or mineral in human nutrition has been established. If the need for a particular vitamin or mineral has been established, Paragraph 2 does not require GNC to make any disclosures in advertising for such vitamin or mineral. GNC would not have to disclose which symptoms, if any, are prevented, relieved or treated by the vitamin or mineral.

has therefore demonstrated an affirmative need to modify Paragraph 2. GNC maintains that the modification would also serve the public interest by preventing any potential confusion about the value of certain vitamins and minerals stemming from the Paragraph 2 disclosure requirement.

2. Analysis

GNC has demonstrated that changes in law and the public interest warrant reopening the 1969 order. Without modification, the 1969 order potentially could prohibit truthful advertising claims and require disclosure of inaccurate or irrelevant information to consumers.

a. Paragraph 1

The public interest warrants modification of Paragraph 1. Paragraph 1 (a) of the 1969 order prohibits GNC from disseminating an advertisement claiming that the use of any food or drug preparation will be of benefit in the prevention, relief or treatment of any symptom unless: (1) the claim is expressly limited to a symptom caused by a deficiency of one or more of the vitamins or iron provided by the preparation; and (2) GNC makes certain disclosures. Theoretically, this provision as interpreted by Commission staff in 1993 could prohibit a truthful claim that a vitamin or iron prevents, relieves or treats a symptom (e.g., a situation where there is evidence that taking more than the recommended daily allowance of a vitamin would help prevent, relieve, or treat a symptom). The modification sought by GNC would enable it to make any substantiated symptom prevention, relief or treatment claim for a vitamin or mineral, regardless of whether such symptom is related to a vitamin or mineral deficiency.

In addition, the substitute language would not require GNC to make the three lengthy disclosures required by Paragraph l (a) of the order. GNC must make these disclosures if the triggering claim is for any vitamin or for iron. As a result, the order could require GNC to make irrelevant or even inaccurate disclosures. For example, if GNC advertised truthfully that a vitamin helps prevent a symptom other than fatigue, Paragraph 1 (a)(1) of the order would require GNC to disclose that for the great majority of consumers the product will be of no benefit in the prevention of such symptom. This disclosure could be inaccurate. Such a claim would also trigger the requirement in Paragraph l (a)(2) that GNC disclose that the presence of iron deficiency anemia or iron deficiency of any degree cannot be self-diagnosed and can be determined only by means of medical or laboratory tests conducted by or under the supervision of a physician. This disclosure could be irrelevant to the claim that triggers it. This claim would also trigger the requirement in Paragraph l(a)(3) that GNC disclose that the presence of a deficiency of the B vitamins, or of any vitamin, cannot be self-diagnosed and can be determined only by means of medical or laboratory tests conducted by or under the supervision of a physician. This disclosure could be of dubious value to consumers considering supplementation.

Paragraph l (a) of the order is even more problematic if one interprets it literally instead of interpreting it as the Commission staff did in its 1993 advisory opinion. Interpreted literally, Paragraph l (a) would require GNC to make the disclosures described above in advertising for a product containing an ingredient that is effective in treating a symptom and one or more vitamins or iron for which no claim regarding the treatment of any symptom is made. It would make no sense to require GNC to make the Paragraph l (a) disclosures in this context. For example, if GNC marketed a product containing an ingredient proven effective in treating nasal congestion plus vitamins or iron, there would be no reason to require a disclosure that the great majority of persons suffering from nasal congestion will not benefit from the product. This disclosure would contradict the truthful claim

being made for the product and could confuse consumers. Similarly, there would be no reason to require a disclosure that the presence of an iron or vitamin deficiency cannot be self-diagnosed and can be determined only through medical tests. This disclosure would be irrelevant to the efficacy claims being made for the product.

Paragraphs l(b)-(h) of the order prohibit a number of specific claims relating to the body's ability to store any B Complex Vitamin or Vitamin C; the effectiveness of ingredients other than iron in treating iron deficiency anemia; vitamin or mineral deficiencies accompanying iron deficiency; and the ability of consumers to self-diagnose vitamin or iron deficiencies. These provisions could at some point prohibit truthful claims if, for example, scientific advances make it possible for consumers to self-diagnose deficiencies without the aid of a physician. The proposed modification of the order simplifies these provisions by replacing them with a substantiation requirement for symptom prevention, relief and treatment claims as well as claims that the presence of a vitamin or mineral deficiency can be self-diagnosed.

For these reasons, we conclude that the public interest warrants modification of Paragraph 1. The order as modified will require GNC to substantiate the relevant claims, but will no longer prohibit truthful claims nor require disclosure of inaccurate or irrelevant information.

b. Paragraph 2

GNC correctly asserts that FDA regulation of dietary supplements has changed substantially since 1970, the last time the Commission modified Paragraph 2. As a result of these changes in FDA regulation, Paragraph 2 requires GNC to make disclosures that other supplement companies need not make. Although it is not uncommon for companies under FTC order to

be in this position, in this case Paragraph 2 was initially drafted to ensure that GNC's advertising contained the same disclosures required in labeling by the FDA.14

In 1970 FDA regulations required the labeling disclosure: "The need for X in human nutrition has not been established" for vitamin and mineral ingredients for which no minimum daily requirement had been established.15 This appears to have been consistent with the prevailing scientific view that the benefits of supplements were limited to prevention of deficiencies. The enactment of DSHEA in 1994 reflected a broader view of the benefits of supplements. DSHEA explicitly permits statements of nutritional support16 on supplement labeling regardless of whether the FDA has recognized the ingredient in question to be of significant nutritional value. FDA has revised its regulations to be consistent with DSHEA and no longer requires the nutritional significance disclaimer on food supplement labels.

In passing DSHEA in 1994, Congress stated that the "Federal Government should not take any actions to impose unreasonable regulatory barriers limiting or slowing the flow of safe products

---

[14] GNC's April 1970 Motion for Amendment to Order to Cease and Desist asserts that the "sole purpose. . . of Paragraph 2 of the Order was to bring any listing of ingredients in any advertisement predicated upon alleged vitamin or mineral efficacy into conformity with any listing of ingredients shown on the labels for the advertised products." The FTC staff's Answer to Respondents' Motion for Amendment to Order to Cease and Desist did not dispute this assertion. In 1970 the Commission modified the order by, among other things, adding a safe harbor providing that any FDA regulation permitting claims of nutritional significance of a vitamin or mineral in a specified amount will be accepted as evidence that the presence of that amount of the specified nutrient has nutritional significance.

[15] 21 C.F.R. §§ 125.3(a)(2), 125.4(a)(2) (1970).

[16] A claim of "nutritional support" is a term used in DSHEA to describe a claim regarding an effect on the structure or function of the human body, as opposed to a claim about the prevention or cure of disease.

and accurate information to consumers." Section 6 of DSHEA allows a statement for a dietary supplement to be made if:

> (A) the statement claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States, describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans, characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, or describes general well-being from consumption of a nutrient or dietary ingredient,
> (B) the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading, and
> (C) the statement contains, prominently displayed and in boldface type, the following: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease."

Section 7 of DSHEA provides that ingredients for which a recommendation for daily consumption has been established are listed first. Other ingredients are listed next. DSHEA requires listing such ingredients but does not require or prohibit disclosures regarding the absence of nutritional significance.

Subsequent to the enactment of DSHEA, the FDA modified its regulations in several respects. For example, FDA deleted 21 C.F.R. § 101.9(k)(5), a provision stating that a food is misbranded if its label or labeling represents, suggests, or implies that "the food has dietary properties when such properties are of no significant value or need in human nutrition," to eliminate any inconsistency between FDA regulations and Section 6 of DSHEA.

Paragraph 2 of the 1969 order is not directly inconsistent with DSHEA, given the latter's application to the FDA and not the FTC. However, Paragraph 2 is inconsistent with Congress' intent that the federal government not impose unreasonable limits on the provision of accurate information to consumers, because it could chill advertising permitted under the DSHEA. If GNC lists an ingredient, it must, unlike its competitors operating under amended FDA regulations, disclose that the presence of the ingredient is without nutritional significance unless the need for the ingredient has been established.

Accordingly, we conclude the passage of DSHEA and the evolution of FDA regulations constitute a change in law warranting modification of Paragraph 2. This provision was designed to track the FDA regulations in effect in 1970 so as to ensure that GNC's advertising set forth the same disclosures required on labels by FDA. The FDA disclosure requirements effective in 1970 no longer exist. Therefore, the law has changed in that companies marketing food supplements are no longer required to make these disclosures on their product labels.

In addition, public interest considerations support the modification sought by GNC. Paragraph 2 requires GNC to make advertising disclosures that its competitors need not make and that may in some instances confuse consumers regarding the value of certain nutrients. Deletion of Paragraph 2 would promote a level playing field in the supplement industry by eliminating disclosure requirements based on defunct FDA regulations and applicable only to GNC.

c. Other Issues

GNC proposes two FDA safe harbors commonly included in orders addressing claims for food and drug products. The NLEA safe harbor is standard, except that it also covers any representation for any product that is specifically permitted in labeling for such product by FDA regulations promulgated

pursuant to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997 ("FDAMA"). Sections 303-304 of FDAMA permit advertisers to make health claims for their food products if such claims are based on current, published, authoritative statements from certain federal scientific bodies, as well as from the National Academy of Sciences. This safe harbor applies only to any claim that FDA has "specifically permitted" by promulgating a regulation permitting the claim pursuant to the NLEA or FDAMA. This safe harbor would not apply to a claim that FDA has permitted by taking no action with respect to the claim.

GNC also proposes to add three standard definitions of "competent and reliable scientific evidence," "the respondent," and "commerce"; and to delete two administrative provisions that imposed one-time obligations on GNC to distribute the order and file a compliance report. In addition, GNC proposes to drop the individual respondent who is now deceased.

Finally, GNC proposes to delete Paragraphs 3 and 4 of the order. Paragraph 3 prohibits the dissemination of advertisements containing statements which are inconsistent with any of the affirmative disclosures required by Paragraphs 1 or 2 of the order. This paragraph would serve no purpose after elimination of the disclosure requirements in Paragraphs 1 and 2. Paragraph 4 prohibits the dissemination of any advertisement which contains any of the representations prohibited by Paragraphs 1 and 2 or that fails to comply with the disclosure requirements in Paragraphs 1 and 2. This paragraph merely restates the prohibition on making claims prohibited by Paragraph 1 and requires compliance with disclosure requirements that will no longer exist.

The changes discussed above serve the public interest by simplifying the order, deleting requirements already fulfilled by

GNC or made obsolete by the death of the individual respondent, and conforming the order to modem practice.

B. GNC's Proposed Limitation of its Liability for the Conduct of Franchisees and Licensees

1 . GNC's Request and Rationale

GNC also requests that the Commission reopen the 1969 and 1989 orders and add a new provision limiting its liability for the conduct of GNC franchisees and licensees. In addition, GNC requests that the Commission seek modification of the 1994 consent decree by adding an identical provision. GNC's petition proposes to add the following provision to each order and the decree:

> Respondent shall distribute a copy of this Order to each of its franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this Order,
>
> Respondent may satisfy this contractual requirement by incorporating such Order requirements into its Franchisee Operations Manual or license agreements with its licensees; and
>
> Respondent shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the Order provisions; respondent may satisfy this requirement by (1) taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any Order provision that such franchisee or licensee is not in compliance with the Order provisions and that disciplinary action may result from such noncompliance; and (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;

provided, however, that respondent's compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondent's franchisees or licensees that violates this Order where respondent: (a) has not authorized, approved or ratified that conduct; and (b) has reported that conduct promptly to the Federal Trade Commission under this Part.

On August 30, 1999, GNC submitted a new proposed provision limiting its liability for the conduct of its franchisees and licensees and advised that this new provision replaces the provision set forth in the petition:

Respondent shall distribute a copy of this Order to each of its franchisees and licensees;
Respondent shall contractually bind its franchisees to comply with the requirements of this Order; Respondent shall contractually bind its licensees to comply with the Order as it pertains to licensed products;

Respondent may satisfy this contractual requirement by incorporating such Order requirements into its Franchisee Operations Manual or license agreement with its licensees; and

Respondent shall further use its best efforts to obtain its franchisees' and licensees' compliance with this Order by doing the following:

(1) Respondent shall distribute a copy of this Order to each of its franchisees or licensees;

(2) Respondent shall review advertising and promotional materials submitted to it from its franchisees or licensees prior to dissemination and publication to determine compliance with the requirements of this Order;

(3) Respondent shall notify any franchisee or licensee in writing if any advertising or promotional material does not comply with the requirements of this Order and that it should not be disseminated or published;

(4) Respondent shall monitor franchisee and licensee advertising and where it finds advertising that has not been submitted to it and which it believes is not in compliance with the requirements of this Order, it will notify such franchisee or licensee in writing of its findings and that such advertising should be withdrawn;

(5) Respondent shall maintain separate files for each franchisee or licensee containing copies of any correspondence relating to any advertising and promotional materials with respect to the issues raised by this Order for a period of three (3) years; and

(6) Upon request, Respondent shall make these files available to the Commission staff for inspection and copying.

Provided, however, that Respondent's compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of Respondent's franchisees or licensees that violates this Order where Respondent: (a) has not authorized, approved or ratified that conduct; (b) has 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, has 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.

# # #

GNC asserts that this modification is warranted on public interest and change in fact grounds. To support its contention that the public interest warrants this modification, GNC relies on *Tarra Hall Clothes, Inc.*, 115 F.T.C. 920 (1992), a case where the Commission reopened and modified the order on public interest grounds. The Commission modified a requirement that prohibited the importation of wool products unless the respondents filed a bond with the Secretary of the Treasury by limiting the scope of the bonding requirement to recycled wool products. The Commission held that the public interest may warrant a modification if intrinsic fairness dictates the modification.

GNC argues that the relief it seeks is consistent with the relief obtained by the respondents in *Tarra Hall*. GNC explains that, just as the *Tarra Hall* respondents did not seek the elimination of the bonding requirement, GNC does not seek to abdicate all responsibility for its franchisees' and licensees' conduct. Instead, GNC maintains, it only seeks to avoid liability for the unlawful conduct of franchisees and licensees if it has not authorized, approved or ratified the conduct and takes other actions as explained above.

GNC contends that it has demonstrated an affirmative need to modify the orders and decree in this way so as to prevent the imposition of strict liability for the acts of its franchisees and licensees. GNC asserts that it has over 1,200 domestic franchises, and plans to add an additional 240 franchises during the current fiscal year. GNC also asserts that it has established a strategic alliance with Rite Aid Corporation in which Rite Aid as a licensee is expected to open GNC stores inside 1,500 Rite Aid locations

during the next three years. GNC claims that it cannot exercise sufficient control over these franchises and licensees to ensure compliance with the orders and decree. Thus, GNC maintains, fairness dictates that it should not be strictly liable for the acts of its franchisees and licensees.

GNC also contends that it is unreasonable to hold it liable for the acts of its franchisees and licensees because they are not its agents. GNC argues that it does not exert sufficient control over the day-today operations of the franchisees and licensees to establish an agency relationship. GNC submitted a copy of its standard franchise agreement and cites several court cases addressing whether an agency relationship exists.

GNC also argues that the Commission has reopened and modified orders on public interest grounds to bring them into conformity with Commission policy. In *Schnuck Markets*, GNC notes, the Commission modified the order to convert the prior approval requirement into a prior notice requirement, to make the order consistent with the Commission's *Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*. GNC contends that the Commission has also set aside or modified several orders prohibiting price restrictions in cooperative advertising programs to bring the orders into conformity with the Commission's change in policy regarding the legal standard applied to such restrictions.

In this respect, GNC asserts that the modification it seeks is consistent with current Commission policy as expressed by a number of existing Commission orders against respondents that market products or services through a franchise system. GNC cites a number of recent orders containing provisions purportedly similar to the one it seeks. GNC also maintains that the modification would serve the public interest by clarifying the orders and the decree, none of which mention franchises. As a result, GNC argues, it must conduct its business in regulatory uncertainty. The addition of the requested provision would clarify

GNC's exposure under the order and be consistent with Commission policy as expressed in other Commission orders.

Finally, GNC maintains that the initiation and enormous expansion of its franchise operations constitute a change in fact warranting the requested modifications. GNC asserts that it could not have foreseen the initiation and expansion of its franchise operations at the time it agreed to the issuance of the 1969 and 1989 orders. GNC states that it did not initiate its franchise operations until mid-1988, over a year after GNC executed the consent agreement leading to the 1989 order. Although GNC's franchise operations existed when it agreed to the 1994 consent decree, GNC claims that it raised but did not press the franchise issue because both it and Commission staff agreed that the franchise issue would be more appropriately addressed for the two orders and the decree collectively at some future time.17

2. Analysis

GNC has not demonstrated that the public interest or changes in fact warrant reopening and modification of the two orders or the decree by adding a provision limiting GNC's liability for the conduct of its franchisees and licensees.

a. There Are No Public Interest Grounds for Modifying the Orders or Decree

GNC maintains that public interest considerations warrant modification of the orders by addition of an affirmative-defense

---

[17] In 1994 Commission staff reviewed a draft order modification petition similar to the one currently pending before the Commission. At that time Commission staff advised GNC in writing that it could not support GNC's petition, concluding among other things that GNC would be liable for the acts of its franchisees.

provision that protects GNC from liability for order violations, based on the actions of its franchisees and licensees, as long as GNC engages in specified types of monitoring of those entities. In support of this contention, GNC advances four arguments: (1) it would be unfair for the Commission to hold GNC strictly liable for the transgressions of its franchisees and licensees, because of the reduced control GNC exercises over those entities in comparison with its company-owned stores; (2) it would be unreasonable for GNC to be liable for the actions of its franchisees and licensees since no agency relationship exists between GNC and those entities; (3) provisions similar to the ones that GNC seeks appear in other Commission orders against companies that operate through franchisees or licensees, establishing a Commission policy favoring such provisions; (4) the requested modifications would clarify the terms of the orders. We find these arguments unpersuasive.[18]

(1) No Inequity Would Result from Any Determination that GNC Is Liable for Order Violations Based on Actions of Its Franchisees or Licensees

GNC's first argument misconceives the import of the absence from the orders of any provision relating to GNC's potential liability for the actions of its franchisees or licensees. The premise of GNC's argument is that, by their silence on this subject, the orders make it "strictly liable for its franchisees' and licensees' Order violations." That is a misreading of the orders. The orders, with minor variations in wording, impose compliance obligations

[18] GNC also seeks to derive support for its position from *Tarra Hall Clothes, Inc.*, 115 F.T.C. 920 (1992), a case where the Commission reopened and modified the order on public interest grounds. The only point of similarity between *Tarra Hall* and the present matter is that in the former the respondent sought, and in the latter GNC seeks, what GNC describes as "a limitation, not an elimination" of an existing order requirement. The unexceptional proposition that the Commission may sometimes agree to a limited modification of an order does nothing to advance GNC's argument.

upon GNC and its "officers, . . . agents, representatives and employees, directly or through any corporate or other device." Insofar as such language renders GNC liable for the acts of its franchisees and licensees, it simply reflects the well-established principle that a respondent may, where the public interest requires, be held liable under the FTC Act for violations committed by its agents or other similarly related entities or individuals, even where the respondent alleges that it cannot control or prevent those violations. The issue of GNC's liability for the actions of its franchisees and licensees is one that cannot be resolved in the abstract, but would depend on the particular facts and circumstances giving rise to a civil penalty action.[19] Therefore, contrary to the premise of GNC's argument, the orders in their present form do not make GNC "strictly liable" for any order violations committed by its franchisees or licensees.

To the extent that GNC views its potential liability for the actions of its franchisees and licensees as "unfair," its disagreement is not with anything contained in the orders, which

---

[19] We note that Commission staff have previously advised GNC of their view that GNC is in fact liable for the acts of its franchisees. See *supra* note 17. The question whether GNC may be held to have violated the orders by virtue of the actions of its franchisees and licensees is, of course, ultimately one for the courts to decide. In deciding such an issue, the courts may consider, for example, the extent to which the violative actions appear to be authorized by the respondent and the nature of the benefit, if any, the respondent may derive from those actions. *See, e.g., Goodman v. FTC*, 244 F.2d 584,593 (9th Cir. 1957) (salesmen who worked for the respondent as independent contractors appeared to be the respondent's authorized agents, "so far as the public was concerned"); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 12-13 (2d Cir. 1954) (despite respondent's "honest" efforts to detect and prevent its salesmen from making certain misrepresentations, ''they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the [FTC] Act.").

are silent on this point, but rather with the law of vicarious liability. GNC's argument therefore presents no grounds for modifying the orders.

(2) GNC's Contention that It Is Not in an Agency Relationship with Its Franchisees and Licensees Is of No Relevance

GNC's argument that the degree of its control over its franchisees and licensees is insufficient to establish an agency relationship under common law, whether correct or not, does not supply any basis for modifying the orders. As noted above, the orders are silent on this point. GNC's disagreement with the law of vicarious liability cannot justify any modification of the orders.

(3) There Is No Commission Policy Favoring Inclusion in Orders of the Provisions that GNC Seeks

GNC cites several Commission orders that contain provisions similar to the modification it proposes for its own orders, and argues that its orders should be modified to bring them into conformity with what it characterizes as ''Commission policy." There is no such policy. While pointing to four[20] Commission orders that contain an affirmative defense provision of the sort

[20] GNC cites six Commission orders that it claims "contain language substantially similar to that requested by GNC." But only four of those orders include an affirmative-defense provision. *See Diet Workshop, Inc.*, 121 F.T.C. 726 (1996); *Formu-3 Int'l, Inc.*, 119 F.T.C. 449 (1995); *Diet Center, Inc.*, 116 F.T.C. 1453 (1993); and *Physicians Weight Loss Centers, Inc.*, 116 F.T.C. 1484 (1993). The other two orders require the respondents to monitor their franchisees' and licensees' compliance with the orders, but do not offer any affirmative defense to civil penalty liability based on actions of those franchisees and licensees. *See Jenny Craig, Inc.*, Docket No. 9260 (Feb. 27, 1998); *Beverly Hills Weight Loss Clinics Int'l, Inc.*, 118 F.T.C. 213 (1994). *Weight Watchers Int'l, Inc.*, Docket No. 9261 (Dec. 24, 1997), upon which GNC further relies, likewise contains no affirmative defense provision.

GNC seeks, GNC ignores the vastly greater number of orders that, like its own, are silent as to the respondent's responsibility for the actions of its franchisees and licensees.21 The orders that GNC cites are unusual, in that they limit the application of the law of vicarious liability that the Commission would otherwise apply if it sought to hold GNC liable for the actions of its franchisees and licensees.22 While a divergence from the ordinary rules of liability may be appropriate in limited circumstances, it is not Commission policy to insulate respondents from liability in this way,23 nor has GNC demonstrated why such a divergence would be warranted here.

(4) No Clarification of the Orders Is Required

As noted above, the orders' silence concerning GNC's liability for actions of its franchisees and licensees that violate the orders means that the existing law of vicarious liability under the FTC Act will determine whether GNC is liable for such actions. The orders therefore do not give rise to any lack of clarity beyond

---

[21] *See, e.g., Sun Co.*, 115 F.T.C. 560 (1992); *Unocal Corp.*, 117 F.T.C. 500 (1994). Although respondents in both of these cases market gasoline through franchise operations, the cited orders do not include the kind of "affirmative defense" provision that GNC seeks here.

[22] Furthermore, the affirmative defense that GNC seeks could also have the peculiar result of insulating GNC from liability based on actions by its franchisees or licensees that violate the orders, while GNC would remain liable for those entities' violations of Section 5 of the FTC Act that happen to fall outside the terms of the order.

[23] In approving a relatively recent consent order, the members of the Commission expressed their views that self-imposed limitations on the Commission's exercise of its prosecutorial discretion are highly disfavored. *See Civic Development Group, Inc.*, C-3810, Concurring Statement of Chairman Robert Pitofsky and Commissioner Sheila F. Anthony and Concurring Statement of Commissioner Mozelle W. Thompson (March 18, 1998).

that which necessarily exists with respect to application of a legal standard that depends upon the factual circumstances presented.

b. There Is No Change in Fact Warranting Modification of the Orders or Decree

GNC reports that its sales network now consists of about 3,700 stores, of which over 1,200 are operated by franchises. GNC's petition asserts that it plans to add an additional 240 franchises during the current fiscal year. In addition, during the next three years, GNC plans to add 1,500 stores operated by Rite Aid as a licensee.

Neither the creation and expansion of its franchise operation nor the Rite Aid licensing arrangement constitutes a change in fact warranting modification of the orders or the decree. The 1ikelihood that GNC would operate through franchisees and licensees was reasonably foreseeable at the time GNC agreed to the 1989 order, and its operation through franchisees was actually known at the time GNC agreed to the entry of the 1994 decree. GNC argues that it did not open its first franchise store until mid-1988, nearly a year and a half after it executed the consent agreement that gave rise to the 1989 order. The consent agreement was executed on February 2, 1987, and was provisionally approved and placed on the public record on June 13, 1988. If GNC opened its first franchise store in mid-1988, it seems unlikely that GNC could not have reasonably foreseen the creation of the franchise operation in early 1987, especially when competitors such as Great Earth International24 were marketing their products through franchises. In addition, GNC had the opportunity to seek revisions to the proposed order while the consent agreement was subject to public comment from June to August 1988. GNC did not take this opportunity to ask the Commission to include a provision limiting its liability for the

[24] See *Great Earth Int'l, Inc.*, 110 F.T.C. 188 (1988).

conduct of franchisees and licensees, even though GNC opened its first franchise store in mid- 1988, and must have contemplated and planned this development for some period of time in advance.

IV. CONCLUSION

The Commission concludes that the 1969 order should be reopened and modified as described above. The Commission further finds that GNC has not established any grounds, predicated on the public interest or change in fact, for modifying the 1969 or 1989 orders by adding a provision limiting GNC's liability for order violations on the part of its franchisees and licensees. The Commission accordingly concludes that the 1969 and 1989 orders should not be reopened and modified with respect to the requested limitation on liability, and that there are no grounds for assisting GNC to seek court modification of the 1994 consent decree.

It is therefore ordered, That the proceeding is hereby reopened and the order issued on April 4, 1969, and previously modified on November 4,1970, is hereby modified to read as follows:

ORDER

For 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 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.

B. Unless otherwise specified, "respondent" shall mean General Nutrition, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

C. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 0 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising of any food, dietary supplement, or drug containing any vitamin or mineral, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, and as "dietary supplement" is defined in Section 201(ff) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(ff), in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That the presence of any vitamin or mineral in any such food, dietary supplement, or drug will be of benefit in the prevention, relief or treatment of tiredness, listlessness, lack of normal appetite, "depleted" feeling, "run-down" feeling, easy fatigability or any other symptom; or

B. That the presence of my vitamin or mineral deficiency can be self-diagnosed;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in

labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 or to Sections 303-304 of the Food and Drug Administration Modernization Act of 1997.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard or monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

By the Commission.

IN THE MATTER OF

DEBT COLLECTION COORDINATION PROJECT

FTC File No. P964811. *Decision, March 31, 2000*

RESPONSE TO THE REQUEST BY THE AMERICAN COLLECTORS ASSOCIATION FOR AN ADVISORY OPINION

This is in response to the American Collectors Association's ("ACA's") request for two Commission advisory opinions ("Request") regarding the Fair Debt Collection Practices Act ("FDCPA"), which the association submitted pursuant to Sections 1.1 - 1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1 - 1.4. The two issues will be addressed in the order in which they were presented.

FIRST ISSUE:

> Does Section 809(b) of the FDCPA permit a collection agency to either demand payment or take legal action during the pendency of the thirty (30) day period for disputing a debt in situations where a debtor has not notified the collection agency that the debt is disputed?

[The] starting point in every case involving construction of a statute is the language itself." *Southeastern Community College v. Davis*, 442 U.S. 397,405 (1979) (quoting *Blue Chip Stamp v. Manor Drug Stores,* 421 U.S. 723,756 (1975) (Powell, J., concurring)). The language of Section 809(b) provides that, ''[i]f the consumer notifies the debt collector in writing within the thirty-day period" that the debt is disputed, the debt collector must cease collection of the debt until verification of the debt is obtained and mailed to the consumer[1]. Where Congress intended

[1] Section 809(b), 15 U.S.C. § 1692g(b), provides:

that debt collectors cease their collection efforts during the thirty-day dispute period, it so specified: if, and only if, a consumer sends the debt collector a notice in writing. Congress did not specify that collectors must cease collection efforts during the dispute period even if consumers send nothing in writing.

The Commission has voiced this opinion in recent annual reports to Congress mandated by the FDCPA. As the Commission stated in the 1999 report, for example, "Nothing within the language of the statute indicates that Congress intended an absolute bar to any appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt." Letter from Chairman Robert Pitofsky to the Honorable Albert Gore, Jr. regarding Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act, at 10 (Mar. 19, 1999) ("1999 Annual Report"). Because there appears to be some confusion regarding whether the thirty-day period is a dispute period or a grace period, the Commission has recommended in recent annual reports that Congress clarify the FDCPA by adding a provision expressly permitting appropriate collection activity within the thirty-day period if the debt collector has not received a letter from the consumer disputing the debt. The Commission emphasized that the clarification should include a caveat that the collection activity should not overshadow or be inconsistent with the disclosure of

---

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof; is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the *debt,* or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor , is mailed to the consumer by the debt collector.

the consumer's right to dispute the debt specified. 1999 Annual Report at 10- 11.[2]

Federal circuit courts that have addressed this issue recently have arrived at the same conclusion. In a 1997 opinion, the Seventh Circuit stated that "[tlhe debt collector is perfectly free to sue within the thirty days, he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor." *Bartlett v. Heibl,* 128 F3d 497,501 (7th Cir. 1997) (Posner, J.). In the most recent federal appellate court pronouncement on the subject, the Sixth Circuit stated, "A debt collector does not have to stop its collection efforts [during the thirty-day period] to comply with the Act. Instead, it must ensure that its efforts do not threaten a consumer's right to dispute the validity of his debt." *Smith v. Computer Credit, Inc.,* 167 F.3d 1052, 1054 (6th Cir. 1999).

The Commission continues to believe that the thirty-day time frame set forth in Section 809 is a dispute period within which the consumer may insist that the collector verify the debt, and not a grace period within which collection efforts are prohibited. In

---

[2] In the Staff *Commentary on* the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097(1988) ("Staff Commentary"), and staff opinion letters, Commission staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period. See 53 Fed. Reg. at 50,109, comment 809(b)-1 ("A debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he receives a notice from the consumer."); letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29,1997):

> We interpret the "thirty-day period" as a period within which consumers must dispute their debts in writing in order to avail themselves of their Section 809(b) rights, but not as a "grace" period. Thus, we believe that there is nothing in the Act that prevents you from filing suit during this period, so long as you do not make any representations that contradict Section 809(b).

response to the ACA's question, therefore, the Commission opines that Section 809(b) does permit a collection agency to either demand payment or take legal action during the thirty-day period for disputing a debt when a consumer from whom the collection agency is attempting to collect a debt has not notified the collection agency that the debt is disputed. The collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by Section 809(a).

SECOND ISSUE:

> Where an attorney debt collector institutes legal proceedings against a debtor but has no prior communications with the debtor, are the requirements for the validation of debts set forth in Section 809 of the FDCFA supreme to state law or state court rules that otherwise prohibit the inclusion of the validation notice on court documents?

In responding to this issue, the Commission notes first that Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), provides:

> (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –
>
> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt,

> or any portion thereof, the debt will be assumed to be valid by the debt collector,
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Section 803(2) of the FDCPA, 15 U.S.C. § 1692a(2), defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In its Staff Commentary, Commission staff stated that the term "communication" "does not include formal legal action (e.g., filing of a lawsuit or other petition/pleadings with a court; service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such Service)." 53 Fed. Reg. at 50101, comment 803(2)-2. Similarly, in the introductory portion of the Staff Commentary, Commission staff opined that "[a]ttorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered."[3] Id. at 50,100.

Seven years after the Staff Commentary was issued, the United States Supreme Court held that the FDCPA's definition of

---

[3] The introductory comments were not part of the Commentary itself. The statement in the Commentary that the introductory remark referred to provided that the term "debt collector" does not include "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debt to judgment." 53 Fed. Reg. at 50,102, comment 803(6)-2.

"debt collector," Section 803(6), 15 U.S.C. § 1692a(6), "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291,299 (1995). In arriving at this conclusion, the Court explicitly considered and rejected Commission staffs introductory remark regarding the coverage of litigation attorneys. Id. at 298. In light of *Heintz*, the Commission concludes that, if an attorney debt collector serves on a consumer a court document "conveying [] information regarding a debt," that court document is a "communication" for purposes of the FDCPA.[4]

If an attorney debt collector has had no prior communications with a consumer before serving a summons or other court document on the consumer, that document would constitute the "initial communication" with the consumer if it conveys information regarding a debt. The attorney would therefore have to include the written notice mandated by Section 809(a) (often referred to as the "validation notice") in the court document itself or send it to the consumer "within five days after the initial communication."

According to the ACA's Request, some "state laws or state court rules [] prohibit the inclusion of additional language such as the validation notice on documents filed with courts." Request at 9. The association asks whether the requirements of Section 809(a) are "supreme to," and thus preempt, these state laws or state court rules. Id. Preemption cases generally proceed

---

[4] In an Opinion letter issued after the *Heintz* decision, Commission staff opined that "all pleadings must be considered 'communications' if they convey 'information regarding a debt directly or indirectly to any person through any medium.'" Letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29,1997). See also *Mendus v. Morgan & Associates*, 1999 Okla. Civ. App. LEXIS 140, at *19 (Okla. Civ. App. 1999) ("[A] pleading or a summons is a 'communication' under the [FDCPA].).

from "the starting presumption that Congress does not intend to supplant state laws." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).[5] According to the Court in *English v. General Electric Co.*, 496 U.S. 72 (1990):

> [S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation. . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." . . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements,

[5] This presumption does not apply to all cases. In particular, the Supreme Court recently held that it does not apply to state laws bearing upon national and international maritime commerce. *United States v. Locke ,* 120 S. Ct. 1135,1148 (2000). *Locke* was apparently based on the relatively large traditional federal role in this area and the relatively small traditional state role, *see id.* at 1147-48, and does not affect the current analysis.

> or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 7849 (omission in internal quotation in original) (citations omitted).

The preemption provision of the FDCPA, Section 816,15 U.S.C. § 1692n, provides:

> This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

The Commission does not believe that this section expressly preempts state laws and court rules that prohibit attorney debt collectors from including validation notices in court documents. The quoted provision makes express that Congress did not intend to preempt the field, but allowed only for conflict preemption. However, there is no conflict preemption here.

First, there is no conflict preemption based on impossibility of compliance because it is possible for attorney debt collectors to comply with both the federal provision and the state provisions.[6]

---

[6] See *Codar, Inc. v. Arizona, No*. 94-16902,1996 U.S. App. LEXIS 21536, at *14-15 (9th Cir. Aug. 19,1996) (memorandum) (Arizona laws requiring debt collectors to be licensed in the state before they may contact consumers preempted by Section 816 to the extent they prevent unlicensed out-of-state collector from providing Section 809(a) validation notices to Arizona

Instead of including such notices in court documents, attorney debt collectors in jurisdictions that prohibit validation notices in court documents may deliver the notices to consumers via some other medium - either before serving the court document on the consumer or, if the court document is truly the first communication with the consumer, within five days of serving the court document.[7]

Second, there is no conflict preemption based on state law standing as an obstacle to the full accomplishment and execution of Congressional purposes and objectives. As Congress declared in Section 802(e) of the FDCPA, 15 U.S.C. § 1692(e), the purpose of the panoply of protections under the federal debt collection statute is:

> to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

---

residents who contact such debt collectors to discuss alleged debts; preemption because unlicensed out-of-state collectors that send validation notice would violate state law).

[7] The Request refers to a Commission staff opinion letter which advised that, "[u]nder the principles that the Supreme Court set out in *Heintz v. Jenkins,* law firms that are 'debt collectors' presumably must include Section 809 notices in connection with every summons, if the summons is the first communication with the consumer in connection with the collection of a debt." Letter from Thomas E. Kane to Gordon N.J. Kroft (Mar. 8, 1996). While the letter was not binding on the Commission it does accurately interpret the statute. An attorney debt collector must provide the validation notice "in connection with every summons," if the summons is the first communication with the consumer in connection with the debt. As the Commission notes here, however, the validation notice need not be included in the summons itself. It may be delivered either before or within five days after the summons is served on the consumer.

The state provisions about which you inquire do not prevent consumers from receiving the full panoply of protections from abusive debt collection practices afforded by the FDCPA. The only FDCPA provision that could be affected by these state laws and court rules is Section 809(a). As noted above, an attorney debt collector who is prohibited from including the validation notice in court documents may deliver the notice to consumers before serving the consumer with the court document or, if the court document is the first communication with the consumer, within five days after serving the court document. Thus, even in a jurisdiction that prohibits validation notices in court documents, a consumer will receive the validation notice and learn, for example, that the debt collector must provide the consumer with written verification of the debt if the consumer disputes the debt within thirty days. State legislation that prohibits validation notices in court documents also does not stand as an obstacle to the promotion of "consistent State action to protect consumers against debt collection abuses." Consumers will receive their validation notices in jurisdictions that prohibit validation notices in court documents as well as in jurisdictions that permit the practice.

After reviewing state laws and court rules that prohibit validation notices in court documents under a preemption analysis, the Commission concludes that such state legislation is not preempted by the FDCPA.

By direction of the Commission.

IN THE MATTER OF

J SAINSBURY PLC, ET AL.

FTC File No. 991 0075. *Decision, April 5, 2000*

LETTER GRANTING COMMISSION APPROVAL FOR DIVESTITURE.

Dear Mr. Koonce,

This letter responds to the Application for Approval of Divestiture Pursuant to Agreement Containing Consent Order (*'Application'*) that you filed on December 3, 1999, on behalf of J Sainsbury plc and Shaw's Supermarkets, Inc. ("Respondents") seeking prior approval by the Federal Trade Commission of the divestiture of Shaw's Supermarket located at 10 Technology Drive, Route 85, Hudson, Massachusetts 01749 (as identified in Schedule D of the above referenced Agreement Containing Consent Order ("Order")) to the Stop & Shop Supermarket Company[1]. The Order requires prior Commission approval of the divestiture by Respondents.

After consideration of the proposed transaction as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve Respondents' Application. In according its approval to this transaction, the Commission has relied upon the information submitted and representations made in connection with Respondents' Application, and has assumed them to be accurate and complete.

By direction of the Commission.

---

[1] On March 1, 2000, Respondents filed the necessary agreement with the landlord consenting to the assignment of the relevant lease from the Respondents to Stop & Shop.

IN THE MATTER OF

HARBOUR GROUP INVESTMENTS, L.P.

Docket No. 9244. Order, May 22, 2000

Order reopening and modifying order.

ORDER REOPENING AND MODIFYING ORDER

On February 16, 2000, Meade Instruments Corporation ("Meade"), the successor to the respondent named in the consent order issued by the Commission on August 19, 1991, in Docket No. 9244 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Meade 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 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995) ("Prior Approval Policy Statement"). Meade's Petition requests that the Commission reopen and modify the Order so as to remove the prior approval requirement contained in Paragraph II of the Order, which currently requires Meade to seek the prior approval of the Commission before directly or indirectly, through subsidiaries or otherwise, acquiring the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the United States in the manufacture or sale of mid-sized Schmidt-Cassegrain telescopes with apertures of eight (8) to eleven (11) inches used for astronomical viewing ("SCTs"). The thirty-day public comment period on Meade's Petition ended on March 24, 2000. No comments were received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

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. 60 Fed. Reg. at 39,746. 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." *Id*. 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." 60 Fed. Reg. at 39,746. 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*. 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. *Id*.

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." 60 Fed. Reg. at 39,746. 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 Prior Approval Policy Statement. *Id*.

The complaint in this matter alleged that the entry of Harbour Group Investments, L.P. ("Harbour Group"), the predecessor to Meade, into a joint venture with Diethelm Holding (U.S.A.) Ltd ("Diethelm") would have violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition and tending to create a monopoly in the market for SCTs in the United States.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. Prior notification is appropriate for acquisitions in the relevant markets because the record evidences a credible risk that Meade could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The complaint in this matter alleged that, in 1990, Harbour Group and Diethelm collectively had sales of only $4.1 million in the relevant market, but had sufficient market share to create a "virtual monopoly" in that market if the transaction had been consummated. This is an indication that acquisitions in the relevant market could fall below the sheaf-transaction threshold in the HSR Act. By letter dated March 22, 2000, Meade agreed to accept a prior notification requirement as a

substitute for the prior approval requirement. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to replace the original prior approval requirement with a prior notification requirement.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that Paragraph II of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IT IS FURTHER ORDERED that, for a period commencing on the date this order becomes final and continuing for ten (10) years, Harbour Group shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, acquire the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary come of business, of any company engaged in the manufacture or sale of SCTs in the United States. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

The prior notification required by this Paragraph II 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 (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.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

ANDRX CORP.
AND
HOECHST MARION ROUSSEL, INC

FTC File No. 981 0368 Decision, January 19, 2000

RESPONSE TO HOECHST MARION ROUSSEL, INC.'S REQUEST FOR FULL COMMISSION REVIEW OF DENIAL OF PETITION TO QUASH

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") *Request for Full Commission Review of Denial of Petition to Quash* ("Appeal"). The Appeal seeks review of the November 1, 1999 letter ruling by Commissioner Anthony ("Initial Ruling") denying the September 15, 1999 *Petition of Hoechst Marion Roussel, Inc. to Quash* ("Petition") the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Subpoena"), outside counsel to Hoechst. For the reasons set forth below, the Commission affirms the Initial Ruling and sets January 27, 2000 at 9:00 a.m. as the new date and time for Spears to appear and give testimony. Petitioner's request for oral argument is denied.

I. Background

The focus of this investigation is a September, 1997 agreement between Hoechst and Andrx Corporation (the "Agreement"). As the Initial Ruling states: "The Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends." Initial Ruling at 2. In its Appeal, Hoechst does not dispute that Spears

took the lead in negotiating and drafting the Agreement on behalf of Hoechst or that Spears is the most knowledgeable Hoechst representative with respect to many of the negotiations and drafts. *See id.* at 2, 5.

Rather, Hoechst argues that the Commission must apply the heightened standards used by *some* federal courts in considering whether to permit depositions of opposing counsel in the context of civil litigation. Appeal at 3-6, 11-12. Hoechst further maintains that these standards are not met here. *Id.* at 6-8. Hoechst also argues: (1) that, even if the Commission is unwilling to quash the Subpoena, it should limit the scope of the questioning; and (2) that forcing Spears to assert any applicable privileges in response to specific questions is inappropriate. The Commission rejects each of these arguments.

II. Analysis

A. An Administrative Investigation Is Not Equivalent to Civil Discovery.

Hoechst argues that certain federal court precedent regarding subpoenas directed to opposing counsel "apply to agency investigatory subpoenas . . . ." Appeal at 6 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)). First, to the extent Hoechst is arguing that the Commission is bound to follow this precedent, it is wrong. The Commission is an independent federal agency with its own procedural Rules, not a part of the federal judiciary obliged to apply the Federal Rules of Civil Procedure. Moreover, the precedent upon which Hoechst relies is merely one of two conflicting lines of authority in the federal courts on a question the Supreme Court has not addressed. *See generally Sparton Corp. v. United States,* 44 Fed. Cl. 557, 560 (Ct. Cl. 1999) (collecting cases on both sides of the conflict).

Second, as Commissioner Anthony noted in the Initial Ruling, the aims and limits of administrative investigations often diverge from those of civil litigation. *See* Initial Ruling at 7-8. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at determining whether violations of law likely exist that should be pursued through litigation.[1] The Commission must take these differences into account in determining the persuasive significance of precedent established under the Federal Rules of Civil Procedure to an administrative investigation governed by the Commission's Rules.

B. The *Shelton* Case Is Inapplicable Here.

The normal standards governing subpoenas both in administrative investigations and in civil litigation place on the party opposing the subpoena "the difficult burden of showing that the demands are unduly burdensome or unreasonably broad." *FTC v. Shaffner,* 626 F.2d 32, 38 (7th Cir. 1980). Hoechst, however, advocates the special standards proposed by the Eighth Circuit in *Shelton* for limiting depositions of opposing counsel and urges the Commission to apply those standards to investigational hearings of counsel representing parties under investigation. We decline to do so.

Shelton was a tort suit arising from a Jeep roll-over accident. The district court granted default judgment against the manufacturer after the manufacturer's in-house counsel, during her deposition, refused to state whether she was aware of the existence of any documents relating to roll-over tests or accidents in her client's files. The only issue on appeal was whether the

[1] As the Supreme Court explained fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

attorney's mere acknowledgment of the existence of the documents would constitute work product. The court concluded that because such acknowledgment would reveal the counsel's mental impressions ("mental selective process" in culling certain documents from the voluminous files reviewed during litigation), it was privileged. 805 F.2d at 1326, 1329. In dicta, the court disapproved of depositions of opposing counsel "as a negative development in the area of litigation" and proposed that such depositions should be permitted only where "the party seeking to take the deposition has shown that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327.[2]

This formulation has been criticized by several other federal courts. *See, e.g.*, *qad.inc v. ALN Associates, Inc.*, 132 F.R.D. 492, 495 (N.D. Ill. 1990) ("This Court's disagreement with a principle stated in such broadbrush terms is respectful but profound. What *Shelton* says may fairly (and properly) reflect an attitude of protecting our brethren at the bar, all other things being equal. But stated as a rule of law it must be viewed as wrong . . . ."); *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996); *Kaiser v. Mutual Life Ins. Co. of New York*, 161 F.R.D. 378 (S.D. Ind. 1994); *see also First Security Sav. v. Kansas Bankers Surety Co.,* 115 F.R.D. 181, 182-83 (D. Neb. 1987) (interpreting *Shelton* as not intended to effect a change in the general burden of persuasion for attorney depositions).[3]

---

[2] The *Shelton* court also stated: "To be sure, the Federal Rules of Civil Procedure do not specifically prohibit the taking of opposing counsel's deposition" and "We do not hold that opposing trial counsel is absolutely immune from being deposed." 805 F.2d at 1327.

[3] Other courts of appeals have declined to take sides in this conflict. *See Nguyen v. Excel Corp.,* 1999 U.S. App. Lexis 32457, *23 (5th Cir. 1999) (assuming, without deciding, "the applicability of the *Shelton* inquiry");

At least in the context of administrative investigative subpoenas, the Commission believes that the approach of these latter courts is preferable. The *Shelton* dicta appear to reverse the normal burden of persuasion on subpoenas and add a novel requirement that the party seeking information prove before obtaining it that it is "crucial" to the case. In doing so, the Eighth Circuit was reacting to concerns that private litigants were abusing the discovery process by frequently noticing depositions of opposing counsel as a means of harassment. *See* 805 F.2d at 1327, 1330. The Commission does not frequently issue subpoenas to counsel, nor does it do so in bad faith. Moreover, since Commission investigations are aimed at determining whether to bring a case, it would be premature to require at the investigatory stage a showing that the information sought "is crucial to the preparation of the case."

1. Unlike the Attorney in *Shelton*, Spears Was a Direct Participant.

A key distinction between *Shelton* and the instant matter is that the attorney in *Shelton* was not a material witness or actor in conduct prior to the proceeding in which her testimony was sought. The *Shelton* attorney was merely being deposed about her client's honesty in responding to discovery. *See* 805 F.2d at 1330. Here, Commission counsel seeks to question Spears about his first-hand participation in the formation of the agreement at the heart of this investigation, which was negotiated, drafted, and executed before the investigation began. As one court aptly noted, "[e]ven cases in the *Shelton* line recognize that, if an attorney is a witness or actor in prelitigation conduct, he may be deposed the same as any other witness." *Kaiser*, 161 F.R.D. at 382 (citations omitted); *see also Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (*Shelton* standards do not bar depositions of opposing counsel "where attorneys take part

---

Boughton v. Cotter Corp., 65 F.3d 823, 829 n.7 (10th Cir. 1995) (declining to take sides between the *Shelton* dicta and *qad.inc*).

in significant, relevant pre-events and the attorney-client privilege does not apply to the testimony sought"); *Johnston Dev. Group v. Carpenters Local 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990) ("The deposition of the attorney may be 'both necessary and appropriate' where the attorney may be a fact witness, such as an 'actor or viewer,' rather than one who was not a party to any of the underlying transactions giving rise to the action, or whose role in a transaction was speculative and not central to the dispute . . . ."); *In re Tutu Water Wells Contamination*, 184 F.R.D. 266, 267 (D.V.I. 1999) ("protective order will not issue where the attorney's conduct is the basis for the claim or defense or where the attorney observed or participated in the underlying transaction or occurrence giving rise to the cause of action").

In its Appeal, Hoechst argues that Spears cannot be considered an actor or participant "merely because he may have negotiated and or drafted any of the subject documents in the course of his representational duties." Appeal at 7, n.9. On the contrary, a negotiator and drafter of an agreement *is* an actor and participant in the formation of that agreement. That participant's status as counsel does not exempt him from questioning in discovery or, for that matter, administrative investigations. *See, e.g., United Phosphorus, Ltd. v. Midland Fumigant, Inc.,* 164 F.R.D. 245, 248 (D. Kan. 1995) ("Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation.").

The case of *Rainbow Investors v. Fuji Trucolor*, 168 F.R.D. 34 (W.D. La. 1996), is instructive. There, defendants noticed the opposing counsel's deposition and the plaintiffs moved for a protective order. Finding, among other things, that the attorney played a "key role" "in negotiating the transaction which lies at the

heart of this dispute," the court denied the motion and ordered the deposition to proceed. *Id.* at 38; *accord, Tutu*, 184 F.R.D. at 267-68 (deposition of attorney ordered where attorneys "were actors or witnesses to the agreement giving rise to the cause of action . . . ."). In reaching its ruling, the *Rainbow Investors* court declined to follow the *Shelton* court in its apparent reversal of the burden of persuasion. Instead, it explained:

> Federal Rule of Civil Procedure 26(b)(1) allows for discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Moreover, the Federal Rules of Civil Procedure do not specifically prohibit taking the deposition of counsel. Thus, the party seeking the protective order to preclude their attorney's deposition bears the burden under Rule 26(c) of demonstrating good cause to preclude or limit the testimony.

168 F.R.D. at 36 (citations omitted); *see also Johnston*, 130 F.R.D. at 352-53 ("The preclusion of attorney depositions is to be analyzed with the same standards as any other protective order motion, with the movant bearing the burden of persuasion under Rule 26(c) . . . ."); *Kaiser,* 161 F.R.D. at 380 ("The burden is on the Rule 26(c) movant to establish adequate grounds ('good cause') for an order protecting against discovery.").

The *Rainbow Investors* court then found that the "plaintiff ha[d] failed to make the required showing of good cause . . . ." 168 F.R.D. at 37. Spears is situated similarly to the attorney in *Rainbow Investors*,[4] and the same approach is appropriate here.

---

[4] Some of the similarities are striking. For example, the defendants in *Rainbow Investors* took the deposition of the plaintiff corporation's president, and during that deposition "defendants learned that [the attorney] may possess vital information unknown even to [the president] regarding the negotiation of the [asset sale agreement]." *Id.* at 37; *see also Nguyen,* 1999 U.S. App. Lexis 32457, *23-*24 (approving a deposition of defense counsel "even assuming the applicability of the *Shelton* inquiry" where the defendant had not established

Addressing privilege concerns, the *Rainbow Investors* court held that bona fide attorney-client communications regarding the negotiations were privileged. But "[i]nsofar as [the attorney] was acting more as a negotiator in a business activity on [his client's] behalf than as their attorney, any knowledge possessed by [the attorney] in this regard is discoverable. Moreover, any non-privileged communications between [the attorney] and [the other party to the agreement] are also discoverable." *Id.* at 37. The same is true here: while communications between Spears and Hoechst during the negotiation of the Agreement, to the extent not otherwise subject to waiver, are likely to be privileged, Spears' actions as a negotiator and his communications with Andrx's representatives are proper subjects for inquiry by Commission counsel.

2. The *Shelton* Dicta Are Inconsistent with the Commission's Rules.

Hoechst argues that investigative subpoenas to counsel for a party under investigation should not be enforced unless the FTC attorneys conducting the investigation on behalf of the Commission satisfy the Commission that the *Shelton* factors are met. Appeal at 6 & n.6.[5] Whatever the merits of the *Shelton* dicta

---

that "its executives could . . . respond meaningfully to the questions to be posed"). Here, [investigational hearings] [redacted] revealed that Spears was the only source of vital information regarding the Agreement at issue here. *See* Initial Ruling at 2, 5.

[5] Lest there be any confusion, we note that investigative subpoenas are not issued by FTC staff, but by the Commission. All FTC investigative subpoenas are reviewed and executed by a Commissioner, acting as the Commission's delegate, based upon information provided by Commission staff as to the need to direct compulsory process to the recipient and upon a compulsory process resolution approved by the full Commission.

and their apparent burden-shifting under the Federal Rules of Civil Procedure, their approach cannot be reconciled with the Commission's Rules.

Section 2.7(d) of the Commission's Rules, 16 C.F.R. § 2.7(d) (1999), places the burden on the petitioner to show with particularity why a subpoena should be limited or quashed.[6] In the Commission's view, this provision precludes a burden-shifting approach. Instead, the Commission interprets Rule 2.7(d) as requiring *the party seeking to avoid appearance or production obligations* to show good cause according to traditional criteria, as elaborated in *Johnston*:

> The party seeking to block its attorney's deposition concerning relevant information will succeed if it establishes undue burden or oppression measured by (1) the relative quality of information in the attorney's knowledge, that is, whether the deposition would be disproportional to the discovering party's needs; (2) the availability of the information from other sources that are less intrusive into the adversarial process; and (3) the harm to the party's representational rights of its attorney if called upon to give a deposition testimony.

130 F.R.D. at 353.

All three of these concerns were addressed at length in the Initial Ruling, and we affirm and hereby adopt those findings.

---

[6] Section 2.7(d)(1) provides, in relevant part:

> Any petition to limit or quash any investigational subpoena . . . shall set forth all assertions of privilege or other factual and legal objections to the subpoena . . . , including all appropriate arguments, affidavits and other supporting documentation.

Specifically, (1) the information possessed by Spears is central to the subject of the investigation, namely the Agreement, Initial Ruling at 4-5, 8; (2) the information is not available from another source, *id*. at 5, 8; and (3) representational harm is speculative,[7] *id.* at 5-6. On appeal, Hoechst does not even argue that Spears lacks relevant information[8] or that the Spears information could

---

[7] *See Rainbow Investors*, 168 F.R.D. at 37-38 ("although the prospect of oppression is present in the examination of opposing counsel, I find that the risk is justified here due to the key role [the attorney] played in negotiating the transaction which lies at the heart of this dispute"); *see also Frazier v. S.E. Pa. Transp. Auth.,* 161 F.R.D. 309, 314 (E.D. Pa. 1995) (rejecting the potential disqualification argument "because of the flimsy nature of its premise: whether [the attorney] is compelled to testify at trial depends not on whether his deposition is taken, but on the nature of the information he possesses"); *Bogan*, 152 F.R.D. at. 14 ("The fact that an attorney is deposed, or that an adversary claims the testimony is or may be material, does not establish that the attorney should be a witness at trial or must be disqualified. This remedy is not to be lightly imposed.").

[8] Instead, Hoechst argues that the staff has failed to show that the information Spears possesses is "critical to the staff's investigation." Appeal at 6. As noted above, we hold that the staff bears no such burden. Rather, it is Hoechst that is obliged to show that the harm it will suffer as a result of the hearing outweighs the importance of the information that Spears has to offer. Of course, as with all subpoenas, staff must satisfy the executing Commissioner that the subpoena is appropriate and necessary. The status of the recipient as counsel to the target would certainly be a significant factor weighing in the Commissioner's review.

Hoechst further argues that the Commission does not need the Spears testimony because, Hoechst alleges, the staff has already decided to recommend suit. *Id.* First, whether or not staff has made, or decided to make, a recommendation is a confidential internal matter, and the Commission declines to respond to rumors or allegations regarding such matters. Second, even when a recommendation is made, the investigatory phase is not over until the Commission votes on the recommendation. The Commission, and not the staff, determines whether the evidence amassed by staff provides reason to believe that a violation has occurred. Indeed, the staff is obligated to continue to gather all relevant information to inform the Commission's ultimate decision

be obtained from other sources. Nor does it offer any further evidence demonstrating how the hearing would oppress Hoechst. In short, Hoechst has failed to carry its burden of showing good cause for the Commission to quash or limit the Subpoena.

C. Scope and Duration Restrictions.

As an alternative to its argument that the *Shelton* standards apply and preclude the hearing altogether, Hoechst argues that the scope and duration of the hearing should be limited. Appeal at 8-9. We decline to do so because Hoechst has not met its burden to demonstrate the need for such limitations and because we find that no such limitations are necessary or appropriate.

First, Hoechst has failed to propose any specific substantive limitations other than to suggest that inquiries be limited to non-privileged matters in light of general "dangers inherent in attorney depositions." *Id.* at 9. A petitioner seeking to limit a subpoena must present specific proposals for limitation and support those proposals with facts and reasoned argument. *See* 16 C.F.R. 2.7(d)(1). Hoechst has failed to discharge that burden.

---

right up until the final vote is cast regarding the issuance or non-issuance of a complaint.

Second, limiting the lines of inquiry in advance is unnecessary to protect applicable privileges and inappropriate.[9] It is unnecessary, because Hoechst or Spears is free to assert an appropriate claim of privilege during the investigational hearing in lieu of a response to a specific question. *See* Section D, *infra*; *see also* Letter from B. Albert to M. Koon, September 3, 1999, at 2. In addition, such a limitation is inappropriate because the Commission as the investigator is not in the position to know what areas are likely to be privileged or if a privilege will be waived. A general limitation specifying no more than "only non-privileged matters" is, therefore, essentially meaningless. Moreover, the Commission will not impose a prior restraint that would hobble staff in carrying out its duty to pursue all relevant lines of inquiry. *See United Phosphorus,* 164 F.R.D. at 250 ("The court is unwilling to preclude plaintiff from discovery of facts which may be relevant in this case simply because defendant has chosen Mr. Tillotson to represent it as counsel in this matter notwithstanding his personal knowledge of the underlying facts which are related to the action."). We concur with the *qad.inc* court, which "reject[ed] any prior restraint in favor of permitting the deposition to go forward, with any individualized objections to be dealt with during its regular course." 132 F.R.D. at 495.

D. Spears Must Assert Privileges in Response to Specific Questions at the Hearing.

---

[9] In its Appeal, Hoechst contends that the Commission's desire for testimony regarding discussions between the representatives of the two parties to the Agreement and the drafts exchanged between those representatives "underscores that the focus of the subpoena is on attorney work product and attorney-client communications." Appeal at 7. Discussions with third parties and documents shared with them are not, however, generally privileged. If any specific communications are privileged, specific objections can be asserted at the appropriate time, as discussed below.

Hoechst argues that because "seemingly innocent questions may trench upon privileged matters" and present a "trap for the unwary," requiring the invocation of privileges in response to specific questions is inappropriate.[10] Appeal at 9-11. We disagree.

The general rule in the federal courts is equally applicable here: "Protective orders suppressing depositions are rarely granted; deponents are expected instead to assert their objections during the deposition and allow the questioning parties to develop circumstantial facts in order to explore the propriety of the assertion of the privilege, immunity or other objection." *Kaiser*, 161 F.R.D. at 380, *citing* 8 Fed'l Prac. & Proc. § 2037 at 272. This principle applies with full force when the person giving testimony is an attorney. *See Bogan*, 152 F.R.D. at. 14 ("Counsel whose deposition is sought concededly participated in disputed pre-litigation events which at least may relate to issues raised in this litigation. If questions put at the deposition relate to privileged matters, a proper objection can be interposed at that time."). As one district court explained:

> [C]hallenges to the taking of an attorney's deposition, based upon claims that any of the attorney's testimony will involve disclosure of privileged information or "work product," have been held to be premature. . . . [C]ompletely preventing the taking of a deposition on either of the above grounds would tend to limit or fix the

[10] Hoechst argues that the Commission's Rules require privilege objections to be asserted in petitions to quash, and, therefore, requiring privilege claims to be asserted in response to specific questions during a hearing is at odds with the Rules. Appeal at 10. While some privilege claims – most notably those asserted in response to subpoenas *duces tecum* – might well be made in a petition to quash, the specific rule dealing with testimony, Section 2.9, states with regard to claims of privilege: "Where it is claimed . . . that the witness is privileged to refuse to answer a question . . . the witness or counsel for the witness may object on the record to the question . . . and may state briefly and precisely the ground therefor." 16 C.F.R. § 2.9(b)(2) (1999).

> scope of the examination before it began and would usurp the court's role in deciding whether certain questions seek privileged information. *The more appropriate method is to allow the deposition to be taken and permit the attorney to claim privilege in the face of certain questions if necessary.*

Hunt Intern. Resources Corp. v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983) (emphasis added, citations omitted).

In addition, staff has worked cooperatively with other witnesses in this matter to deal with potential privilege issues, and the Commission is confident that the same consideration will be extended to Spears.

III. Conclusion

The Commission does not routinely issue investigative subpoenas to counsel for targets in its investigations. Nor does it take lightly the privilege and burden issues potentially raised by such subpoenas. However, where, as here, counsel for a party has acted as the target's agent in conduct that is the subject of the investigation, the attorney is a proper witness and may be a necessary one. This is even more true where, as here, the attorney is the *only* source for certain key information. The Commission will not reverse the burden with respect to investigatory hearings of attorneys; as with all other witnesses, the burden is on the witness, or other objecting party, to show that the hearing should not take place or should be limited. The Commission rejects the notion that a prior restraint is necessary to deal with any privilege or burden issues that an investigatory hearing of counsel might raise. Instead, burden issues should be addressed by a petition to quash in advance of the hearing, and privilege claims should be made in response to individual questions posed at the hearing. A

more restrictive approach would unduly interfere with the Commission's ability to carry out its mandate to investigate potential anticompetitive practices that may seriously harm consumers.

The Commission concludes that Commissioner Anthony's November 1, 1999 Initial Ruling fairly and properly considered and addressed all of Petitioner's arguments. Accordingly, the full Commission hereby affirms the Initial Ruling. The Commission amends that ruling only insofar as it set November 17, 1999 as the new return date. The new return date is January 27, 2000.

By direction of the Commission.

THE KEN ROBERTS COMPANY, THE UNITED STATES CHART COMPANY, THE KEN ROBERTS INSTITUTE, INC., AND THE TED WARREN CORPORATION

FTC File No. 992 3259 Decision, February 25, 2000

RESPONSE TO THE KEN ROBERTS COMPANY, THE UNITED STATES CHART COMPANY, THE KEN ROBERTS INSTITUTE, INC. AND THE TED WARREN CORPORATION PETITION TO QUASH CIVIL INVESTIGATIVE DEMANDS

Dear Messrs. Goteiner and Fong:

This letter advises you of the Federal Trade Commission's ruling on the petition of The Ken Roberts Company, The United States Chart Company, The Ken Roberts Institute, Inc. and The Ted Warren Corporation (collectively "petitioners") to quash civil investigative demands ("CIDs") in the above-referenced matter (the "petition"). The petition is **denied** for the reasons stated below.[1] The new deadline for petitioners to respond to, and otherwise comply with, the CIDs is **March 17, 2000.**

Because the petition raised questions regarding the jurisdiction of the Commission, Commissioner Sheila F. Anthony, the

[1] Petitioners' request for oral argument is also denied. Petitioners set forth their arguments in substantial detail in their thirty-seven page petition. Moreover, petitioners state that "the fundamental and dispositive jurisdictional issues are unalloyed questions of law, and . . . that no additional facts are necessary to decide whether this investigation is preempted by the CFTC and the SEC." Petition at 2. Additional argument is therefore unnecessary and would only further delay this investigation.

Commission's delegate for ruling on petitions to quash, referred this petition to the full Commission for a determination. *See* 16 C.F.R. § 2.7(d)(4). Accordingly, this decision was reached by the full Commission, and petitioner does not have the right to request further review of this matter by the full Commission. *See* 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioners are companies that sell various sets of instructional materials, including written materials, videos, cassettes, and online and facsimile updates, that purport to teach customers how to make significant sums of money by trading commodities or stocks. Petitioners advertise and market those materials on several web sites that allow customers to order their products online or by telephone, facsimile, or mail. The web sites also include numerous earnings claims and customer testimonials.

On September 30, 1999, the Commission issued CIDs for written interrogatories and documentary material to petitioners seeking substantiation for, *inter alia*, eighteen earnings claims and dozens of customer testimonials. Petitioners submitted responses to some of the interrogatories (subject to their jurisdictional concerns) on October 15, 1999, and October 22, 1999, and filed their petition to quash all the CIDs on October 28, 1999.[2] Although petitioners present their arguments in several different ways, their basic contention in the petition is that the Commission is barred from investigating their advertising and marketing practices because the Commodity Exchange Act ("CEA") provides the Commodity Futures Trading Commission ("CFTC") with exclusive jurisdiction with respect to the advertising and marketing practices of commodities trading advisers ("CTAs").[3]

[2] The Commission provided petitioners with two extensions for producing the documents requested in the CIDs for documentary materials as well as two additional extensions for filing their petition to quash.

[3] This is not the first time that the Commission has investigated or sought to prevent deceptive practices by a CTA. Indeed, the Commission has brought

Petition at 7-33. Petitioners also make a brief argument to the effect that the FTC is barred from investigating investment advisers because the Securities and Exchange Commission ("SEC") has exclusive jurisdiction to regulate the advertising and marketing practices of investment advisers. *Id.* at 33-36.

After careful review of the CIDs, the petition, the declarations and various correspondence filed with the petition, and the relevant statutes and case law, the Commission finds that none of petitioners' arguments provides a basis for quashing the CIDs.

II. ANALYSIS

Section 5 of the Federal Trade Commission Act ("FTC Act") gives the Commission broad authority to "prevent persons, partnerships, or corporations" 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) (1999). Section 5 also sets forth a few limited exceptions to this grant of authority: the Commission is not empowered to prevent deceptive or unfair practices by banks, savings and loan institutions, federal credit unions, common carriers and air carriers, insofar as those entities are subject to specified regulations, or by anyone subject to the Packers and Stockyards Act. *Id.*

The Commission's investigative authority is even broader. Section 6 of the FTC Act, 15 U.S.C. § 46 (1999), gives the Commission the power to:

---

several actions against defendants in the commodity futures industry. *See, e.g., FTC v. Osborne*, No. 94-55615, 1995 U.S. App. LEXIS 31570 (9th Cir. Oct. 27, 1995) (upholding injunction against defendant corporations for deceptive trade practices in the sale of options for precious metals to consumer investors).

> gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Absent a specific statutory exemption, the Commission thus has authority to investigate or prohibit deceptive practices by any person or commercial enterprise.[4] *See Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876 (8th Cir. 1977) (noting that "the investigatory power granted the FTC under 15 U.S.C. § 46 reaches further than the regulatory power granted it under 15 U.S.C. § 4" in holding that FTC had authority to investigate meat packer).[5]

---

[4] A few other industries, such as the insurance industry, are also partially or wholly excluded from the Commission's investigative and enforcement authority by virtue of other explicit statutory provisions. *See, e.g.,* 15 U.S.C. § 1012 (1999) (FTC Act applies to insurance business only insofar as business is not regulated by state law).

[5] Importantly, the fact that another agency also has regulatory power over a specific industry does not bar the FTC from investigating a company in that field as well. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) ("this is an area of overlapping agency jurisdiction under different statutory mandates"). For example, the FTC and the Securities and Exchange Commission ("SEC") have, on occasion, both taken action against the same defendant. *See, e.g., Securities and Exchange Comm'n v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir. 1973) (upholding preliminary injunction against fraudulent sales scheme); *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975) (order requiring party to cease engaging in unfair and misleading commercial practices); *see also Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (FTC can regulate drug-related advertising regardless of Food and Drug Administration's regulation of advertisers; "[n]owhere in the case law or in the FTC's grant of authority is there even a hint that the FTC's jurisdiction is so constricted").

Among the Commission's investigatory powers is the ability to use CIDs to gather information and to enforce those demands in federal district court. *See* 15 U.S.C. § 20. In deciding whether to enforce compulsory process issued by the Commission, the federal courts apply a deferential standard, asking only whether (a) the investigation at issue is within the Commission's authority, (b) the information sought is reasonably relevant to the investigation, and (c) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). In this matter, petitioners argue that the investigation does not fall within the Commission's authority.[6] According to petitioners, the CFTC's exclusive jurisdiction over the commodity futures market under Section 2(i) of the CEA bars an FTC investigation of their advertising practices. However, because the FTC Act gives the FTC broad authority to investigate and prohibit unfair trade practices in all areas of commerce except those specifically excluded, this argument can only succeed if petitioners can demonstrate that the CEA expressly or impliedly repealed the FTC Act as it applies to CTAs. As detailed below, petitioners are unable to do so.[7]

---

[6] Petitioners also state in the petition that the Commission's investigation is "duplicative" of the efforts of the CFTC, which has also sought documents from petitioners on numerous occasions. Petition at 3-7. Because the Commission's investigation is not directed at the same practices as the CFTC's, only some of the document requests overlap. However, to the extent that petitioners are concerned that re-production of certain documents would be unduly burdensome, Commission staff has agreed to retrieve any overlapping documents sought by the Commission directly from the CFTC, and petitioners need not produce them again.

[7] Petitioners set forth their basic argument -- that the CEA's exclusive jurisdiction clause prohibits the Commission from investigating CTAs -- under several different argument headings. For the sake of clarity, our decision separates their arguments into three sections: express repeal (which addresses arguments made in Sections I.A, I.B and I.E of the petition), implied repeal

A. Express Repeal

Prior to 1974, commodities were generally regulated by the Commodity Exchange Authority (the AAuthority@), which was statutorily authorized to regulate futures trading on certain agricultural products. Because the Authority=s jurisdiction was quite narrow, however, a great deal of trading in the futures market was unregulated and thus subject to dangerous speculation and manipulation. In 1974, Congress responded to this danger by overhauling the CEA and creating the CFTC. In doing so, Congress= stated intent was Ato institute a more comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.@ Commodity Futures Trading Comm=n v. Schor, 478 U.S. 833, 836 (1986) (citing H.R. Rep. No. 93-975, at 1 (1974)). Accordingly, a key provision in the new law was a Alimited grant of exclusive jurisdiction to the Commodity Futures Trading Commission@ to create uniform rules for the operation of the futures market. 120 Cong. Rec. 34,736 (1974) (statement of Rep. Poage). Under the new provision, the CFTC was given Aexclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market.@ 7 U.S.C. ' 2(i) (1999).

In order to ensure that the limited exclusive jurisdiction provision in the CEA was not misinterpreted as broadly preempting other federal laws and regulations, Congress went out of its way to make clear that its grant of exclusive jurisdiction did not abrogate other laws of general application. Accordingly, the statute provides that

> Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit

---

(which addresses arguments made in Section I.D.1 of the petition), and finally, preemption and the specific remedy rule (which addresses arguments made in Sections I.A, I.C and I.D.2 of the petition).

> the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

7 U.S.C. § 2(i) (1999). Congress thus provided that the CFTC's exclusive jurisdiction only applies to the regulation of the futures market itself (*i.e.*, promulgating rules and regulations) and does not, outside that narrow area, supersede any other federal regulatory authority. *See American Agric. Movement, Inc. v. Board of Trade of Chicago*, 977 F.2d 1147, 1157 (7th Cir. 1992) ("Laws of general application of course operate in a variety of arenas, and are preempted only when plaintiffs attempt to use them in a manner that would, in effect, regulate the futures markets.").

In analyzing the CFTC's jurisdiction, several courts have recognized that the CEA does not prevent a law enforcement agency (such as the Commission) from enforcing generally applicable laws against CTAs. According to the *Abrahams* decision,

> where the [CFTC's] jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal, is preempted. This frees the exchanges from having to conform their practices to conflicting agency standards. However, these decisions do not establish that law

> enforcement agencies are precluded from prosecuting alleged frauds under criminal provisions other than those contained in the Act.

Abrahams, 493 F. Supp. at 301.[8]

In sum, preserving the ability of other agencies such as the FTC to enforce general laws is consistent with the letter and the spirit of the CEA.[9] Accordingly, petitioners have failed to show that the CEA expressly repealed Sections 5 and 6 of the FTC Act.

B. Implied Repeal

Petitioners have also failed to show that the FTC's authority was impliedly repealed. "The law is well settled . . . that repeal by implication is not favored and that it follows only where the later act is clearly intended to be in substitution for the earlier act." U.S. v. Abrahams, 493 F. Supp. 296, 300 (S.D.N.Y. 1980). The Supreme Court has thus developed -- and lower federal courts have applied -- a very strict standard for finding implied repeal. Under this standard, we consider first whether "Congress expressed an intent partially to repeal" the prior statute, and second, "whether there is a repugnancy in the subject matter of the two statutes which would justify an implication of repeal." Id.;

---

[8] As part of their efforts to demonstrate that the Commission is barred from investigating their advertising and marketing practices, petitioners discuss, at considerable length, the anti-fraud provisions in the CEA. Among their arguments, petitioners state that the breadth of these provisions "is another strong indicator that the CFTC has occupied the field" of CTA advertising and solicitation. Petition at 14. As discussed in Part I.C, *infra*, however, the concept of field preemption does not apply to the relationship between two federal agencies. Moreover, as discussed in Part I.B, *infra*, the CEA and the FTC Act can both operate to regulate similar behavior as long as they are not repugnant to each other.

[9] Petitioners themselves inadvertently make this point by citing several cases recognizing that the CEA explicitly preserves the jurisdiction of federal courts to decide private rights of action involving the commodity futures trading industry that arise under other federal laws. Petition at 21 n. 11.

see also Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996) (citation omitted) (implied repeal occurs only where there is "an irreconcilable conflict between the two federal statutes at issue"); Strobl v. New York Mercantile Exchange, 768 F.2d 22, 27 (2d Cir. 1985) (repeal of a law is only to be implied when "there is a plain repugnancy" between two statutes) (citation omitted). In arguing that the CEA impliedly repealed Sections 5 and 6 of the FTC Act (insofar as they are applied to CTAs), petitioners have failed to provide any evidence that Congress intended to abrogate the Commission's authority under Sections 5 and 6 to prohibit unfair practices by CTAs. Moreover, the two statutes at issue in this matter (the FTC Act and the CEA) are in no way repugnant to each other.

First, in passing the CEA, Congress did not demonstrate any intent to repeal prior anti-fraud laws such as Section 5 of the FTC Act. To the contrary, as noted above, Section 2(i) of the CEA contains two savings clauses. The first preserves the jurisdiction of other federal agencies except as they are superseded by the limited grant of exclusive jurisdiction. The second unqualifiedly preserves the jurisdiction of the federal and state courts. The latter clause provides particularly strong textual support for the proposition that Congress did not intend to abrogate generally available federal causes of action -- such as, for example, FTC actions under Section 13(b), 15 U.S.C. § 53(b). Furthermore, in introducing the bill, Senator Talmadge, chairman of the Senate Committee on Agriculture and Forestry, emphasized that "it is not the intent of the committee to exempt persons in the futures trading industry from existing laws and regulations such as the antitrust laws." 120 Cong. Rec. 30,459 (1974) (statement of Sen. Talmadge). Thus, rather than suggest that it intended to repeal prior laws, Congress made clear its intent that CTAs continue to

comply with "existing laws and regulations," such as the FTC Act.[10]

Second, petitioners are unable to demonstrate the type of "repugnancy" between the CEA and FTC Act that is necessary for a finding of implied repeal. The Commission's investigation of petitioners is intended to enforce a general anti-fraud law; the Commission is not purporting to ***regulate*** advertising practices by CTAs.[11] Moreover, there is no "irreconcilable conflict" between the two statutes. To the contrary, insofar as the purpose of the FTC Act is to prohibit fraudulent trade practices, it actually supports (rather than conflicts with) the CEA, which also contains anti-fraud provisions. *See* 7 U.S.C. § 6b (1999) (making it

[10] Petitioners' argument that the creation of the CFTC in 1974 somehow abrogated the FTC's jurisdiction over CTAs is also rebutted by the fact that the FTC Act has been amended twice since 1974 to exclude savings and loan associations and federal credit unions from the FTC's jurisdiction. *See* 15 U.S.C. § 46(a) (1999). Had Congress also intended to exclude CTAs, it could have done so. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

[11] Petitioners consistently fail to distinguish between regulatory activity and law enforcement actions. For example, petitioners cite numerous cases for the proposition that only the CFTC can "exercise regulatory authority over the commodity futures trading industry and its activities." Petition at 20-22 (emphasis in original). These cases include *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345, 1349-50 (D. Nev. 1980), cited for the proposition that the "CFTC preempts all other agency regulation in the commodities field." Petition at 21. However, the *Mullis* case draws a distinction between the application of non-CEA statutes and the application of non-CFTC rules to the commodities industry, holding that federal courts have jurisdiction to hear cases brought under federal securities statutes (but not under SEC rules or regulations) where the dominant purpose of the security is for trading in commodity futures. *Mullis*, 492 F. Supp. at 1350-51. Because the Commission is investigating petitioners pursuant to the FTC Act and not a Commission rule or regulation, the reasoning of the *Mullis* court clearly allows this investigation to continue. We need not reach the question of whether the Commission could apply its own rules or regulations to petitioners' business practices.

unlawful to "cheat or defraud" another person in connection with the sale of a commodity).

Two federal courts faced with similar issues have held that the CEA did not impliedly repeal federal antitrust law or the federal mail fraud statute. *See Strobl*, 768 F.2d at 26-28; *U.S. v. Abrahams*, 493 F. Supp. at 296. In *Strobl*, the U.S. Court of Appeals for the Second Circuit held that an individual could bring claims under the Sherman Act and the Clayton Act in connection with alleged price manipulation that led to a 1976 default of potato futures. The court held that Congress did not intend to limit the application of the antitrust laws simply by establishing an overlapping regulatory scheme. *See Strobl*, 768 F.2d at 27. Rather, the correct test was whether the two statutes were in conflict, and the court held they were not. *Id.* The court's conclusion regarding price manipulation holds true for the advertising fraud at issue here as well.

> As price manipulation also violates antitrust laws, none of [the anti-manipulation] provisions [in the CEA] conflicts with the purposes and standards of the antitrust laws. There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former.

Strobl, 768 F.2d at 28.

The *Abrahams* court used similar logic in holding that the CEA does not bar the prosecution of CTAs under the mail fraud

statute. Like petitioners here, the defendant in *Abrahams* attempted to argue that the CEA's own fraud provisions were "intended by Congress to be the sole means by which fraudulent conduct in the commodities field . . . should be prosecuted." *Abrahams*, 493 F. Supp. at 299. The court disagreed. While recognizing that "where the Commission's jurisdiction is exclusive, the jurisdiction of other regulatory agencies, state and federal is preempted," the court found that such exclusive jurisdiction does not preclude law enforcement agencies "from prosecuting alleged frauds under criminal provisions other than those contained in the Act." *Id.* at 301 n.10. *See also Mullis*, 492 F. Supp. at 1349-50 (plaintiff could bring private right of action under securities statutes but not under SEC rules and regulations regarding a securities/commodities matter within the CFTC's exclusive jurisdiction).

The conclusion reached by the *Abrahams* court regarding the CEA and the mail fraud statute applies equally to the CEA and the FTC Act. "The mail fraud statute and the criminal provisions of the Act are not in conflict," the court held. "[I]nstead, they complement each other. The Court concludes that there is no conflict between the two statutory provisions which would justify an implication of repeal." *Id.* at 303. The CEA's fraud provisions and Sections 5 and 6 of the FTC Act similarly complement each other, and thus, here too, there is no conflict that would justify a finding of repeal.

C. Field Preemption and the Exclusive Remedy Rule

Petitioners also attempt to argue that the FTC is barred from investigating their advertising practices under a "field preemption" theory and under the "specific remedy rule." These arguments similarly fail.

First, the concept of field preemption, which is based on the Supremacy Clause of the Constitution, applies to the relationship between federal and state laws and not the relationship between

two different federal laws. *See American Mfg. Mut. Ins. Co. v. Tison Hog Market, Inc.*, 182 F.3d 1284, 1287-88 (11th Cir. 1999) ("Field preemption occurs when Congress regulates a field so pervasively . . . that an intent to preempt state law can be inferred."). Thus, petitioners' discussion regarding preemption is inapplicable to analyzing the relationship between federal agencies.[12]

Second, petitioners' argument regarding the "specific remedy rule" is just another twist on their "implied repeal" argument (*see* Section II.B, *supra*) and therefore fails for the same reasons. "[A]lthough the 'specific over general' principle is an accepted rule of statutory interpretation, it is not to be followed blindly." *Strobl*, 768 F.2d at 30 (holding that specific remedy rule does not bar application of antitrust laws to commodities futures trading). Rather, "[s]tatutes are to be construed together to effectuate, to the greatest extent possible, the legislative policies of both." *Id.* Because the CEA and the FTC Act can be construed together to

[12] In any event, the cases that petitioners cite in support of their field preemption argument do not buttress their conclusions. For example, petitioners cite to *Board of Trade of Chicago v. Securities and Exchange Comm'n*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), to support their argument that the savings clause in the CEA does not preserve this Commission's jurisdiction over their advertising practices. Petition at 13-14, 19-20. However, the *Chicago Board of Trade* decision merely considers whether the sale of Government National Mortgage Association mortgage-backed pass-through certificates ("GNMAs") are "transactions involving contracts of sale of a commodity for future delivery," and therefore fall within the CFTC's exclusive jurisdiction. *Id.* The court ruled that, because GNMA options should be included within the statutory definition of commodities for future delivery, the CFTC had exclusive jurisdiction, the savings clause did not apply and the SEC could not regulate their sale. *Id.* at 1161. Thus, the analysis of the CFTC's exclusive jurisdiction focused on what constitutes a commodity future -- not on what constitutes pervasive regulation -- and is therefore inapplicable to the issue at hand.

effectuate the legislative policies of both, the specific remedy rule is inapplicable.

D. Investment Advisers

Petitioners' final argument is that the Commission also lacks jurisdiction to investigate The Ken Roberts Institute, Inc. ("KRI") and the Ted Warren Corporation ("Warren"), the two petitioners that are involved in providing securities advice, because KRI and Warren "fall under the SEC's definition of 'investment advisers' and, as such, are subject to the exclusive regulation of the SEC." Petition at 33. Petitioners do not provide any statutes or case law in support of their statement that the SEC has exclusive jurisdiction over investment advisers, and we have found no legal authority in support of their views. Thus, even if KRI and Warren can be regulated by the SEC as investment advisers, that does not bar the FTC from investigating their advertising practices.

The one case petitioners rely upon in arguing for exclusive SEC jurisdiction, *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988), is not controlling. *Spinner* involved whether the Hawaii "baby FTC Act" applied to a private cause of action against an investment adviser -- and did not in any way rule on the jurisdiction of the Commission itself. *Id.* at 393. Rather, the court only considered this Commission's practices in light of a state statute that commands courts to be guided by judicial interpretations of the FTC Act. *Id.* at 389-90. Because the court found that the FTC Act has not been regularly applied to securities transactions, it did not allow the private cause of action to go forward under the "baby FTC Act." Importantly, the court did not rule on the jurisdiction of the Commission itself. Indeed, the *Spinner* decision itself recognizes that the FTC Act "read literally, would include security transactions." *Id.* at 392 n. 4. As noted above, the FTC and the SEC have brought cases against the

same entities, alleging violations of their respective statutes for the same conduct.[13] *See* note 5, *supra*.

III. CONCLUSION

The Commission's investigation of petitioners is a proper and statutorily authorized investigation. Neither the CFTC nor the SEC has exclusive authority to enforce laws of general applicability as they apply to CTAs or investment advisers.

For the foregoing reasons, the petition is **denied**, and pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), **petitioner is directed to comply with the CIDs on or before Friday, March 17, 2000.**

By direction of the Commission.

---

[13] In addition, the FTC and the SEC have participated in joint law enforcement efforts. In 1998 both agencies brought cases against sellers of investments in general partnerships or "private placement" stock offerings. *See, e.g., FTC v. Affordable Media, LLC,* 1999-1 Trade Cas. (CCH) ¶ 72,547 (11th Cir. 1999)(in upholding entry of preliminary injunction, court described defendants' sale of partnership units as a Ponzi Scheme); *Securities and Exchange Commission v. Rynell & Associates, Inc.,et al.,* Civil Action No. 98-6508 WMB (Cwx)(C.D. Cal., Aug. 11, 1998)(sale of general partnership units for movie "Desert Gold").

WILLIAM E. SHELL, M.D

FTC Docket No. C-3749 Decision, March 31, 2000

RESPONSE TO WILLIAM E. SHELL, M.D.'S PETITION TO LIMIT SUBPOENA *DUCES TECUM*

Dear Mr. Shaw:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition") you submitted on behalf of your client, William E. Shell, M.D. ("Petitioner") . The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). The Petition is denied for the reasons stated below.

Petitioner may request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] The filing of a request for review by the full Commission does not stay or otherwise affect the new return date, April 14, 2000, unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f).

I. BACKGROUND

Petitioner advertises, markets, and sells various products over the Internet through a web site called Targeted Medical Foods (targetedmedicalfoods.com). Petitioner represents that these products, such as Sentra-AM, Viralex, Vascular, and Lister B, aid the body's production of neurotransmitters and thereby prevent or mitigate specific diseases, including Chronic Fatigue Syndrome, fibromyalagia, erectile dysfunction, arteriosclerosis, high blood

[1] This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

pressure, cold sores, colds, and sore throats. The Commission is investigating whether any of Petitioner's claims and practices are deceptive and, therefore, constitute violations of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, as amended.

On December 20, 1999, pursuant to the Commission's September 7, 1999, omnibus resolution authorizing investigations of Internet Advertisers, Sellers, and Promoters, the Commission issued a subpoena *duces tecum* to the Petitioner. The Subpoena requests various documents, including sales figures, product labels, and advertising materials. The two specifications at the heart of this Petition call for (1) documents constituting the basis of evidence relied upon to substantiate Petitioner's claims regarding the products advertised on the Targeted Medical Foods web site, and (2) documentary materials that may limit or call into question those product claims.

Petitioner asks that these two specifications, numbered 1 and 2 in the Subpoena, be stricken or modified on the grounds that they are unduly burdensome. Specifically, Petitioner argues that the two specifications would require the downloading and printing of 45,000 pages of materials.

II. ANALYSIS

The issue at the heart of this investigation is whether Petitioner's claims about the products at issue are adequately substantiated. The two specifications Petitioner seeks to have stricken or modified are those seeking to elicit evidence on this central issue.

After reciting some general legal authorities and summarizing the two Subpoena specifications at issue, Petitioner's brief offers only *one sentence* in support of his burden argument: "the production of documents responsive to the First and Second

Requests of the Subpoena Duces Tecum requires downloading and printing of approximately 45,000 pages of materials and is therefore unduly burdensome as it hinders and disrupts the normal operations of Targeted Medical Foods." Memorandum of Points and Authorities in Support of Petition to Limit Subpoena Duces Tecum Issued to William E. Shell, M.D. at 3. This bald conclusory statement is simply insufficient to show that the specifications should be stricken or limited.

Rule 2.7(d)(1) provides, in relevant part, that petitions "shall set forth all assertions of privilege or other factual and legal objections to the subpoena ... , *including all appropriate arguments, affidavits and other supporting documentation*." 16 C.F.R. § 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement.

The burden of showing that a particular request for production within an administrative subpoena *duces tecum* is unreasonably burdensome, or requires an unreasonably burdensome amount of effort and expense, rests with the subpoenaed party. See FTC v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) (citing U.S. v. Powell, 379 U.S. 48, 58 (1964)). The petitioner has not met this burden. For example, Petitioner provides no file lists, examples of files, file summaries, man-hour cost projections or business analysis affidavits of any sort to support his claim that downloading the files relating to specifications one and two in the Subpoena will "unduly disrupt or seriously hinder normal operations" of his business. Instead, Petitioner merely offers a single conclusory statement with no supporting evidence. Reviewing courts have found such unsupported or vague assertions of excessive burden unconvincing and inadequate to support challenges to FTC compulsory process requests.[2]

---

[2] See, e.g., FTC v. Standard American, Inc., 306 F.2d 231, 235 (3rd Cir. 1962)(asserting that a corporation subpoenaed for documents by the FTC should have "met their burden of a showing of the unreasonableness of the Commission's demand," by making "a record that would convince (the District Court) of the measure of their grievance rather than ask (it)" to be assumed from the corporation's mere statement that it would be deprived of "thousands of current records in daily business use" without a "single shred of evidence.")

All compulsory process specifications require recipients to expend some effort and incur some expense. Compulsory process would be rendered useless if it could be avoided based upon nothing more than bald assertions that compliance would require the expenditure of time and resources.

III. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioner is directed to comply with the Subpoena on or before Friday, April 14, 2000.

By direction of the Commission.