IN THE MATTER OF

MEDICAL STAFF OF DOCTORS' HOSPITAL OF PRINCE GEORGE'S COUNTY

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

Docket C-3226. Complaint, April 14, 1988—Decision, April 14, 1988

This consent order prohibits, among other things, the medical staff of a hospital in Prince George's County, Maryland from engaging in concerted, coercive conduct to prevent or impede a health maintenance organization or others from offering health care services.

Appearances

For the Commission: *Jane R. Seymour.*

For the respondent: *Richard C. Morgan* and *H. Robert Halper, O'Connor & Hannan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Medical Staff of Doctors' Hospital of Prince George's County has violated the provisions of said Act, and it appearing that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Medical Staff of Doctors' Hospital of Prince George's County ("Medical Staff"), is an unincorporated association, organized and existing under the laws of the State of Maryland, and is located at Doctors' Hospital of Prince George's County ("Hospital") at 8118 Goodluck Road, Lanham, Maryland. The Medical Staff is composed of all physicians, dentists and podiatrists who have been granted privileges to treat patients at the Hospital.

PAR. 2. Most, if not all, members of the Medical Staff are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care providers in Prince George's County, Maryland. The Medical Staff's physi-

cian members constitute approximately half of the practicing physicians in Prince George's County.

PAR. 3. The Medical Staff engages in substantial activities for the economic benefit of its members. It is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. The acts and practices herein alleged are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. By impeding the operations of the Health Plan, an interstate business, as alleged herein, respondent has affected commerce. In addition, members of the Medical Staff charge fees and collect payments that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers and other payers. The Medical Staff's members also purchase and use drugs, supplies and other health care equipment manufactured outside the State of Maryland. The flow of such funds and equipment is affected by the acts and practices of the Medical Staff and its members as herein alleged.

PAR. 5. The Hospital is a general, acute-care hospital with 250 beds. It is owned by American Medical International, Inc. ("AMI"). At the time of the acts and practices herein alleged, AMI was also the majority owner of the George Washington University Health Plan ("the Health Plan"), a health maintenance organization ("HMO"). At the time of the herein alleged acts and practices, the Health Plan, which had approximately 19,000 members, had offices only in Washington, D.C. Federal Government employees and their dependents constitute a substantial portion of the Health Plan's members.

PAR. 6. In October 1985, the Health Plan announced its plan to open an HMO facility in Prince George's County. This HMO facility was to be the Health Plan's first facility in Prince George's County, and the Health Plan intended to staff it with full-time faculty members of George Washington University. The Health Plan's purpose in opening this HMO site was to expand its operations from Washington, D.C., into Maryland in order to enhance its competitive position in the populous suburban areas around Washington, D.C.

PAR. 7. Beginning at least as early as November 1985, the Medical Staff, acting as a combination of its members or in conspiracy with at least some of its members, attempted to and did prevent, impede, or limit the operations of the Health Plan in Prince George's County. The principal purpose of the Medical Staff and its members in engaging in this combination or conspiracy was to protect Medical Staff members from competition. The specific competitive concerns of the members of the Medical Staff included the following:

A. Members engaged in primary care were concerned that they would lose both present and potential patients to the new Prince George's County HMO facility;

B. Members who are specialists were concerned that they would lose referrals to specialists connected with George Washington University; and

C. Members did not want the Hospital's owner, AMI, to compete with them through the Health Plan.

PAR. 8. In furtherance of this combination or conspiracy, the then-President of the Medical Staff appointed an Ad Hoc Task Force to meet with AMI officials. In meetings between the Ad Hoc Task Force and AMI officials and in other contacts with AMI officials and others, representatives of the Medical Staff threatened, coerced and pressured AMI not to open its planned HMO facility in Prince George's County. Representatives of the Medical Staff threatened that the Medical Staff would act collectively to prevent AMI from opening the planned HMO facility, and if AMI opened the facility the members of the Medical Staff would force the Hospital to close.

PAR. 9. As a result of the combination, conspiracy, acts and practices herein described, AMI and the Health Plan suspended their plans to open a new HMO facility in Prince George's County. However, AMI could not totally abandon its plans to operate an HMO in Prince George's County because it had made a commitment to the Federal Office of Personnel Management to provide a Health Plan facility located in Prince George's County for Federal employees from January 1, 1986, to December 31, 1986. AMI therefore entered into a temporary, one-year arrangement with certain members of the Medical Staff to treat the Health Plan patients in the members' private offices. In January of 1986, the Health Plan began operations in Prince George's County pursuant to the temporary arrangement. This arrangement, however, did not provide advantages that the planned HMO facility would have provided.

PAR. 10. At the end of 1986, AMI announced that it had sold its majority interest in the Health Plan back to George Washington University. The University opened the previously planned HMO facility in Prince George's County in March of 1987.

PAR. 11. The effects, tendency or capacity of the combination, conspiracy, acts and practices described in paragraphs six through eight are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in Prince George's County and to deprive consumers of the benefits of competition in the following ways, among others:

A. Competition was restrained between physicians and the Health

Plan, and between the Health Plan and other prepaid health plans in Prince George's County;

B. The Health Plan's patients and other consumers were deprived of the benefits of competition, including certain benefits offered by the planned HMO facility; and

C. The Health Plan was restricted in its ability to serve consumers and compete in the provision of health care services.

PAR. 12. The combination, conspiracy, acts and practices herein described constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent, Medical Staff of Doctors' Hospital of Prince George's County, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures 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, Medical Staff of Doctors' Hospital of Prince George's County, an unincorporated association organized and existing under the laws of the State of Maryland, has its principal place of business

at Doctors' Hospital of Prince George's County, 8118 Goodluck Road, Lanham, Maryland.

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.

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

A. *"Medical Staff"* means the respondent Medical Staff of Doctors' Hospital of Prince George's County, its officers, agents, representatives, employees, committees, task forces, and its successors or assigns.

B. *"Corrective action"* means action taken pursuant to and in conformance with the Medical Staff's by-laws against any person with clinical privileges at Doctors' Hospital of Prince George's County who fails to provide evidence of malpractice insurance coverage or whose professional conduct or activities are detrimental to patient safety or to the delivery of quality patient care or are unreasonably disruptive to the operation of Doctors' Hospital of Prince George's County.

C. *"Integrated joint venture"* means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That the Medical Staff, directly, indirectly, or through any device, in connection with the provision of health care services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from organizing, facilitating, or acting in furtherance of any agreement or combination, either express or implied, among any physicians, to refuse, or threaten to refuse, to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by any health maintenance organization, hospital or other health care facility.

III.

A. *It is provided,* That this order shall not be construed to prohibit the Medical Staff or its members from engaging, pursuant to the Medical Staff's by-laws, in credentialling, corrective action, utilization review, quality assurance, peer review, or hospital policy-making at Doctors' Hospital of Prince George's County, where such conduct by the Medical Staff neither constitutes nor is part of any agreement, combination, or conspiracy the purpose or effect of which is to impede unreasonably the development or operation of any health maintenance organization, hospital or other health care facility.

B. *It is further provided,* That this order shall not be construed to prohibit the Medical Staff from facilitating the formation of an integrated joint venture that refuses to deal with any person or entity, as long as the physicians participating in the joint venture remain free to deal with any third-party payer other than through the joint venture.

IV.

A. *It is further ordered,* That within thirty (30) days after service of this order, the Medical Staff shall mail a copy of this order and the accompanying complaint to the Executive Director of Doctors' Hospital of Prince George's County, to the President of the George Washington University Health Plan, and to each of the Medical Staff's members.

B. *It is further ordered,* That the Medical Staff shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which the Medical Staff has complied and is complying with this order.

C. *It is further ordered,* That the Medical Staff shall promptly notify the Commission of any change in the Medical Staff's business address or of any proposed change in its organization that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

IN THE MATTER OF

MULTIPLE LISTING SERVICE MID COUNTY, INC.

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

Docket C-3227. Complaint, April 20, 1988—Decision, April 20, 1988

This consent order prohibits, among other things, a Brooklyn, N.Y. real estate firm from participating in various practices that have allegedly restrained price and service competition among residential real estate brokers. Respondent is prohibited from: requiring that any applicant or member operate a full time office; fixing, maintaining or recommending any division of commission between selling and listing brokers; adopting any policy that has the purpose or effect of exclusive agency listings; requiring any member to inform Mid County or any of its members of the commission agreed to between any listing broker and homeowner; and adopting any policy having the purpose or effect of delaying the solicitation of a listing agreement.

Appearances

For the Commission: *Michael J. Bloom* and *Alfred J. Ferrogari.*

For the respondent: *Bruce H. Schneider, Stroock, Stroock, & Lavan,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Multiple Listing Service Mid County Inc. ("Mid County"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) *"Multiple listing service"* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with other members.

(2) *"Broker"* shall mean any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or

offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) *"Applicant"* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York, and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

(4) *"Member"* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

(5) *"Listing agreement"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(6) *"Listing broker"* shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) *"Selling broker"* shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(8) *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(9) *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

(10) *"Mid County's Service Area"* shall mean the territory within which Mid County provides its multiple listing service.

PAR. 2. Mid County is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1706 Flatbush Avenue, Brooklyn, New York.

PAR. 3. Mid County is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses, and through the policies, acts and practices described below, Mid County and its members are involved with or affect:

(a) a substantial interstate flow of funds used in the financing of real estate located within Mid County's Service Area;

(b) a substantial amount of financing of real estate located within Mid County's Service Area that is guaranteed or insured under federal government programs;

(c) the sale of a substantial amount of title and homeowners' insurance by interstate insurers to owners of property located within Mid County's Service Area; and

(d) the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of respondent Mid County.

As a result, the general business practices of respondent and its members are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 5. Mid County is, and for some time has been, providing a multiple listing service for member real estate brokerage firms.

The member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate located within Mid County's Service Area, as well as other services designed to facilitate sales of such properties.

Each member agrees to submit all of its exclusive agency listings and exclusive right to sell listings pertaining to residential real estate located within Mid County's Service Area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed.

Only members may participate in the multiple listing service.

PAR. 6. Membership in Mid County's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in Mid County's Service Area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 7. Publication of listings on Mid County's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in Mid County's Service Area.

PAR. 8. Sales of real estate listings published on Mid County's multiple listing service totaled about $30.3 million in 1983, $38.9 million in 1984, and for 1986, reached $53.8 million. Almost the entire dollar volume of such listings consisted of sales of residential real estate located within Mid County's Service Area.

PAR. 9. Except to the extent that competition has been restrained as described herein, Mid County's members are and have been in

competition among themselves in the provision of residential real estate brokerage services within Mid County's Service Area.

PAR. 10. In adopting the policies and engaging in the practices described in paragraphs eleven through sixteen below, Mid County has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within Mid County's Service Area.

PAR. 11. Mid County required as a condition of membership in Mid County that each applicant operate a full-time real estate brokerage office.

The purposes, capacities, tendencies or effects of this requirement have been to impede new membership in Mid County and to impede entry into the business of brokering residential real estate sales in Mid County's Service Area.

PAR. 12. Mid County required that the listing broker retain no more than 40% of the commission due on the sale of residential real estate subject to an exclusive right to sell agreement, and that the remainder go to the selling broker.

Mid County required that the listing broker retain no more than 30% of the commission due on the sale of residential real estate subject to an exclusive agency listing, and that the remainder go to the selling broker.

The purposes, capacities, tendencies or effects of these limitations on the listing broker's ability to retain commissions have been to deprive consumers of the advantages of competition among Mid County's members to list and to sell residential real estate in Mid County's Service Area.

PAR. 13. Mid County subsequently revised its rules to provide that the listing broker shall have exclusive discretion as to the terms of the division of commissions. The term "exclusive discretion," in this context, may be construed as excluding the homeowner from any role in the determination of the division of commissions between the listing broker and the selling broker.

The capacities, tendencies or effects of this rule have been to deprive consumers of the competitive advantages of negotiating with the listing broker the division of commissions.

PAR. 14. Article 6 of Mid County's Code of Ethics states: "To prevent dissension and misunderstanding and to assure better service to the owner, the broker should urge the exclusive listing of property unless contrary to the best interests of the owner." The phrase "exclusive listing of property," in this context, may be construed as referring only to exclusive right to sell listings.

The capacities, tendencies or effects of Article 6 of Mid County's

Code of Ethics have been and are to discourage brokers from soliciting or accepting exclusive agency listings, and to deprive consumers of the advantages of competition with respect to the types of real estate brokerage services offered by Mid County's members.

PAR. 15. Mid County has required and continues to require that brokers disclose to one another, or to Mid County, the total commission or the split of commission.

The purposes, capacities, tendencies or effects of this policy or practice have been to fix commission rates, and to reduce the likelihood of discounting or other price competition among members of Mid County.

PAR. 16. Mid County enforced a rule prohibiting any member other than the listing broker from soliciting the listing of any property, the listing of which is filed with the multiple listing service, until the filed listing has expired.

The purposes, capacities, tendencies or effects of this practice have been to restrain competition by members other than listing brokers to obtain renewal of listings of properties located within Mid County's Service Area, to stabilize the price of brokerage services pertaining to the sale of residential real estate located in Mid County's Service Area, and to deprive owners of property located within Mid County's Service Area of the advantages of price and other forms of competition that otherwise would be offered.

PAR. 17. The policies, acts, practices, and combinations or conspiracies described in paragraphs ten through sixteen above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The alleged conduct may continue or recur in the absence of the relief requested.

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent Multiple Listing Service Mid County Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1706 Flatbush Avenue, Brooklyn, New York.

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

ORDER

Definitions

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

(1) *"Multiple listing service"* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with other members.

(2) *"Broker"* shall mean any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) *"Applicant"* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

(4) *"Member"* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

(5) *"Listing agreement"* shall mean any agreement between a real

estate broker and a property owner for the provision of real estate brokerage services.

(6) *"Listing broker"* shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) *"Selling broker"* shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(8) *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(9) *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

I.

It is ordered, That respondent Mid County, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with respondent's operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

(1) operate an office full-time or during customary or specified hours;

(2) derive any particular amount or portion of income from real estate brokerage; or

(3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

(B) Adopting any policy or taking any other action that has the

purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

(1) any broker's offering or accepting any exclusive agency listing; or

(2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying the solicitation of a listing agreement for any property; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

II.

It is further ordered, That respondent Mid County shall:

(A) Within thirty (30) days after this order becomes final, furnish

an announcement in the form shown in Appendix A to each member of Mid County.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and other of its materials to conform to the provisions of this order and provide each member with a copy of the amended by-laws, rules and regulations, and other materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each new member of Mid County within thirty (30) days of the new member's admission.

III.

It is further ordered, That respondent Mid County shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(B) In addition to the report required by paragraph III(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondent has complied with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

APPENDIX A

[Respondent's Regular Letterhead]

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices. To avoid litigation, Multiple Listing Service Mid County has entered into such a consent agreement. The agreement is not an admission that Mid County

or any of its members has violated any law. For your information, the substantive provisions of the consent decree are reproduced below:

ORDER

I.

It is ordered, That respondent Mid County, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with respondent's operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

(1) operate an office full-time or during customary or specified hours;
(2) derive any particular amount or portion of income from real estate brokerage; or
(3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

(B) Adopting any policy or taking any other action that has the purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

(1) any broker's offering or accepting any exclusive agency listing; or
(2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying the solicitation of a listing agreement for any property; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using infor-

mation provided to it by Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

Mid County previously revised several of its policies in response to concerns expressed by the Federal Trade Commission staff. Further, Mid County has now made additional changes to certain of its by-laws, rules, and regulations to comply with the consent agreement.

IN THE MATTER OF

FLORENCE MULTIPLE LISTING SERVICE, INC.

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

Docket C-3228. Complaint, April 20, 1988—Decision, April 20, 1988

This consent order prohibits, among other things, a Florence S.C. firm from conspiring to exclude certain licensed real estate brokers from membership in and use of the multiple listing service, and from restricting competition among multiple listing service members in the services they individually provide to the public. Respondent is also prohibited from requiring new members to have owned and operated a business for six months before application for membership and from insisting on a vote of FMLS members as a condition of membership.

Appearances

For the Commission: *Jacques Feuillan.*

For the respondent: *John A. McInnes, Florence Multiple Listing Service, Inc.,* Florence, S.C. and *Haigh Porter, Haigh Porter, P.C.,* Florence, S.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Florence Multiple Listing Service, Inc., a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

a. *"Listing"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

b. *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a specified broker as his or her exclusive agent for the sale of a property and contracts to pay to that broker an agreed commission if a ready, willing and able buyer is procured or if the property is sold, whether by the broker or by any other person, including the owner.

PAR. 2. Respondent Florence Multiple Listing Service ("FMLS") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of South Carolina. FMLS's principal office and place of business is located at 121 S. Warley Street, Florence, South Carolina, in Florence County. The 1986 population of Florence County was approximately 110,000, and the 1986 population of the City of Florence (which is that County's largest city) was approximately 30,000.

PAR. 3. FMLS is now, and since 1972 has been, providing a multiple listing service for its members' real estate brokerage firms in parts of Florence County, including the city of Florence and town of Timmonsville, and in Darlington County, including the City of Darlington ("the Florence area"). The 1986 population of the City of Darlington was approximately 8,000. The FMLS members' firms are owned and operated by real estate brokers. Each member of FMLS owns 250 shares of its stock, which are non-transferable except between the members and FMLS. Only members' firms may participate in the FMLS's multiple listing service. Each member agrees to submit his or her firm's Florence area exclusive right to sell listings for publication on the multiple listing service to the entire FMLS membership, and to share any brokerage commissions due with any member whose firm successfully locates a purchaser for any property so listed. FMLS charges its members a fee for each new listing published on its multiple listing service. Payment of the fee entitles the member to have his or her listing published for twelve successive months or until such time as the property is sold, whichever comes first.

PAR. 4. Membership in FMLS provides valuable competitive advantages in the brokering of residential real estate in the Florence area. FMLS membership significantly increases the opportunities of members' brokerage firms to enter into listings with residential property owners, as owners generally consider FMLS publication of listings to be the fastest, most effective and most convenient means of obtaining the broadest market exposure for residential property in the Florence area. FMLS membership also significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 5. FMLS is the only real estate multiple listing service serving the Florence area. As of July 1986, real estate brokers at forty-one firms—approximately 65 percent of real estate brokerage firms operating in the Florence area—were members of FMLS. Nearly all of the active, full-time residential real estate brokers doing business in that area work at those brokerage firms. In calendar year 1985, at least 75 percent of the total dollar volume of residential real estate sales in Florence County that were transacted using the services of a real estate brokerage firm involved listings that were published on the

FMLS. Also during 1985, at least 85 percent of the total dollar volume of residential real estate sales in Florence City involved listings published on the FMLS. Sales of residential real estate listings published on the FMLS totaled approximately $40 million in 1985.

PAR. 6. In the conduct of their businesses and through the policies, acts, and practices described below, FMLS and its members are involved with or affect:

a. a substantial interstate flow of funds used in the financing of Florence area real estate;

b. a substantial amount of Florence area real estate financing guaranteed or insured under Federal government programs;

c. the sale by interstate insurers to Florence area property owners of a substantial amount of title and homeowners' insurance; and

d. the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of FMLS.

As a result, the policies, acts and practices of FMLS and its members are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 7. Real estate brokers doing business in the State of South Carolina must be licensed by the South Carolina Real Estate Commission pursuant to state law. The state law licensing requirements include:

a. completion of prescribed courses of study;

b. three years experience as a licensed salesperson; and

c. passing a written examination.

PAR. 8. Except to the extent that competition has been restrained as described below, the FMLS members and their brokerage firms are now and have been in competition among themselves and with other brokers and brokerage firms with respect to the provision of residential real estate brokerage services in the Florence area.

PAR. 9. In adopting the policies and engaging in the acts and practices described in paragraphs 10 and 11 below, the FMLS has been and is now acting as a combination of its members, or in conspiracy with some of its members or others, to restrain trade in the provision of residential real estate brokerage services in the Florence area.

PAR. 10. FMLS requires each member to abide by its bylaws, rules and regulations. If any member or member's firm is found to be in violation of any FMLS rule or other FMLS policy, the member is subject to penalties or disciplinary action, including suspension or termination of membership.

PAR. 11. Since at least 1985, FMLS has:

a. maintained a bylaw that requires applicants for membership to

have "owned a real estate business" for at least six months prior to application;

b. maintained a bylaw providing that applicants who satisfy all other conditions of membership cannot become members unless they also receive an affirmative vote for admission from two-thirds of the FMLS members who choose to vote on the question;

c. maintained a bylaw that requires a member to agree that neither the member's firm nor any one in the member's firm join any multiple listing service or other real estate information exchange service that competes with FMLS;

d. maintained a bylaw that prohibits publication on the FMLS of information relating to any property offered for sale unless the seller has first agreed to grant the listing broker an exclusive right to sell listing; and

e. maintained a policy that, as a condition of membership in the FMLS, an applicant agree that neither the applicant's firm nor any one in the applicant's firm will own or operate a business that competes with real estate brokerage by, for example, assisting homeowners to market their homes without the traditional full array of brokerage services.

PAR. 12. The purposes, effects, tendency or capacity, of the combination or conspiracy alleged in paragraph 9 above and the policies, acts or practices of the FMLS described in paragraphs 10 and 11 above, have been and are to restrain competition unreasonably in one or more of the following ways, among others:

a. restraining or deterring the entry of new brokerage firms, and of new joint ventures or shared brokerage or multiple listing services, in competition with the FMLS multiple listing service;

b. limiting consumers' ability to choose among a variety of brokerage firms competing on the basis of price, contract terms and services;

c. restraining competition among brokerage firms based on willingness to offer or accept different contract terms that may be attractive and beneficial to consumers, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property through means alternative to a broker's services;

d. limiting the ability of consumers to negotiate lower prices for brokerage services or brokerage contract terms that may be more advantageous for them than an exclusive right to sell listing; and

e. limiting the ability of residential property sellers to compete with real estate brokers in locating purchasers.

PAR. 13. The policies, acts, practices, and combinations or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade

Commission Act, 15 U.S.C. 45. The alleged acts and practices, or the effects thereof, are continuing in nature and will continue in the absence of the relief herein requested.

Decision and Order

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Florence Multiple Listing Service, Inc. ("FMLS"), and FMLS having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedures 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. FMLS is organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its offices and principal place of business located at 121 South Warley Street, in the City of Florence, State of South Carolina.

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. *"Multiple listing service"* shall mean a clearinghouse through which members' real estate brokerage firms exchange information on listings of real estate properties and share sales commissions with members who locate purchasers.

2. *"Listing"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

3. *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

4. *"FMLS"* shall mean the Florence Multiple Listing Service, Inc. and its successors, assigns, officers, directors, committees, agents, representatives, members or employees.

I.

It is ordered, That respondent FMLS, directly, indirectly or through any device, in or in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, shall cease and desist from:

(A) Adopting, maintaining or enforcing any bylaw, rule, regulation, policy, agreement or understanding, or taking any other action that has the purpose or effect of:

(1) Conditioning membership in FMLS or use of its multiple listing service on the length of time any applicant has owned, operated or maintained a real estate brokerage firm or other business;

(2) Requiring as a condition of FMLS membership or use of its multiple listing service that applicants who satisfy FMLS's other conditions of membership receive the approval by vote of any portion of FMLS members; or

(3) Conditioning membership in FMLS or use of its multiple listing service on any person's refraining or withdrawing from ownership, operation or other association with any lawful business.

(B) Forbidding publication through respondent FMLS's multiple listing service of any exclusive agency listing, or restricting such publication in any way other than by requiring designation of the listing as one granting an exclusive agency or by imposing terms applicable to all listings accepted for publication by the FMLS multiple listing service.

II.

It is further ordered, That FMLS shall:

(A) Within ninety (90) days after this order becomes final, amend its policies, bylaws, guidelines, rules and regulations, and any other of its instructive or suggestive materials to conform to the provisions of this order.

(B) For a period of five (5) years after this order becomes final:

(1) provide to any applicant who has been denied membership prompt and clear written notice of the denial, specifying the membership requirements not met and explaining in what manner the requirements are not met; and

(2) maintain in one separate file, segregated by the names of the applicants, all documents and correspondence that discuss, refer, or relate to any denied or approved application.

(C) For a period of three (3) years after this order becomes final furnish promptly, by first-class mail, a copy of the announcement in the form shown in Appendix A to any person who inquires about, or who submits an application for, membership in the FMLS.

(D) For a period of three (3) years after this order becomes final furnish promptly, by first-class mail, a copy of this order to any person who requests a copy.

III.

It is further ordered, That FMLS shall:

(A) Within thirty (30) days after this order becomes final, mail an announcement in the form shown in Appendix A, and a copy of the Complaint and Decision and Order to each member of FMLS.

(B) Within ninety (90) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which FMLS has complied and is complying with this order.

(C) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in FMLS, such as dissolution, assign-

ment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in its incorporation that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

APPENDIX A

ANNOUNCEMENT

As you may be aware, the Florence Multiple Listing Service, Inc. ("FMLS") has entered into a consent agreement with the Federal Trade Commission that has now become final. Acceptance of this agreement is for settlement purposes and does not constitute an admission that the FMLS has violated the law. The following is a brief summary of the provisions of the order issued pursuant to the consent agreement:

1. Eligibility for membership: The FMLS no longer requires, as a condition of membership, that a broker have owned and operated a business for a six-month period or any other time period. In addition, the FMLS no longer requires that any applicant or member who satisfies FMLS's other conditions of membership receive the approval by vote of any portion of FMLS members. Specific eligibility or membership requirements are set forth in official FMLS bylaws and policies. If any membership application is denied, the FMLS promptly will provide to the applicant a written explanation of the specific reasons for the denial.

2. Property listings that limit or differ from an exclusive right to sell arrangement: The FMLS will not prohibit members from entering exclusive agency listings—listings in which the broker and owner contract that the owner will owe a reduced commission or no commission to the agent broker if the owner locates the purchaser entirely independent of the services of any real estate broker. The FMLS will publish all listings of this type but may give notice that the listing is an exclusive agency listing rather than an exclusive right to sell listing.

3. Broker's development of or participation in organizations, services, businesses or ventures that compete with one another or with the MLS: The FMLS will not prohibit members from operating or joining any lawful business.

The FTC does not endorse any practice of the FMLS. For more specific information, you should refer to the FTC order itself. [A copy of the order is attached.][1]

President

Florence Multiple Listing Service, Inc.

[1] The sentence enclosed in brackets is required to be included in this Announcement only when the Announcement is sent to members of respondent Florence Multiple Listing Service as required by Part III(A) of the proposed order to which this Announcement is attached as an appendix.

IN THE MATTER OF

NEC HOME ELECTRONICS (U.S.A.), INC.

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

Docket C-3229. Complaint, May 11, 1988—Decision, May 11, 1988

This consent order requires, among other things, a Delaware computer corporation, with its principal office in Wood Dale, Ill., to provide consumer redress and to contact each consumer who purchased a 32K board. The consent order also prohibits the respondent from falsely claiming that any of its computer hardware products currently has a stated memory capacity or other capability and from claiming that purchasers of its products have access to a stated memory capacity or other capability, unless the respondent has substantiation for the claim.

Appearances

For the Commission: *Jock K. Chung.*

For the respondent: *William Blumenthal* and *D.E. Rosenthal, Sutherland, Asbill & Brennan,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that NEC Home Electronics (U.S.A.), Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

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

1. *"RAM"* means random access memory, and refers to the memory capacity of a computer. RAM is measured in small, basic units of storage or memory called "bytes" or in K bytes (K = 1024 bytes).

PAR. 2. NEC Home Electronics (U.S.A.), Inc., is a Delaware corporation with its principal office or place of business at 1255 Michael Drive, Wood Dale, Illinois.

PAR. 3. Respondent imports, advertises, offers for sale and sells computer hardware and software products and accessories, including the NEC PC-8000 Series microcomputer system.

PAR. 4. From 1981 to 1984, respondent imported, advertised, offered for sale, sold and distributed the NEC PC-8001A microcomputer, the NEC PC-8012A input/output ("I/O") Unit and PC-8012A-02 32K

RAM memory boards as accessories to the I/O Units. During the above time period, respondent distributed and sold said microcomputer, I/O unit, and memory boards, as well as other PC–8000 Series accessories and related equipment, from its principal place of business to distributors, retailers and, ultimately, purchasers located in various states of the United States.

PAR. 5. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices set forth herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In connection with the marketing of computer products, respondent has disseminated and now disseminates advertisements and promotional material for the purpose of promoting the sale of its products.

PAR. 7. Typical statements in said advertisements and promotional materials, but not necessarily inclusive thereof, are found in the promotional materials attached hereto as Exhibits A and B. Among other things, these promotional materials contain the following unqualified descriptions of the RAM capacity for the PC–8001A microcomputer and the PC–8012A I/O Unit:

(a) PC–8001A: "RAM - 32K Bytes (expandable to 160K Bytes with PC–8012A I/O Unit);" and

(b) PC–8012A I/O Unit: "32K RAM (expandable to 128K with additional boards)."

PAR. 8. Through the use of the statements referred to in paragraph seven and others, respondent has represented, directly or by implication, that the average person, without any special expertise, could expand the memory capacity (RAM) of the PC–8001A microcomputer from 32K bytes to 160K bytes with the addition of the PC–8012A I/O Unit and memory boards.

PAR. 9. In truth and in fact, at the time of the dissemination of the foregoing representation, the average person, without any special expertise, could not expand the memory capacity (RAM) of the PC–8001A microcomputer from 32K bytes to 160K bytes with the addition of the PC–8012A I/O Unit and memory boards, because only a person who was a computer programmer or who had access to a sophisticated software operating system, which has never been made available for sale in the United States, could accomplish this expansion. Therefore, the representation referred to in paragraph eight was and is false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair and deceptive acts or practices in or af-

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

EXHIBIT A

Specifications

PC-8001A Microcomputer

CPU	μPD780c-1 (Z-80A compatible), 4MHz
ROM	24K Bytes
RAM	32K Bytes (expandable to 160K Bytes with PC-8012A I/O Unit.
CRT	Keyboard selectable 80 characters x 20 or 25 lines 72 characters x 20 or 25 lines 40 characters x 20 or 25 lines 36 characters x 20 or 25 lines 248-symbol character set. Includes complete English upper and lower case, complete ASCII, numerous Greek characters and graphics patterns Graphic function: 160 x 100 matrix Color: 8-colors. Black, blue, red, magenta, green, cyan, yellow, white. Other functions: Reverse, blink, secret
Cassette interface	FSK system (1200, 2400 Hz), 600 baud
Printer interface	Standard Centronics included
Keyboard	English upper/lower case characters, numeric keypad, control keys, screen editing function keys, and five programmable function keys
Serial interface	Built-in TTL-level serial port, 4800/2400/1200/600/300 baud. (Refer to user's manual for actual character transfer speed in terminal mode.)
Power Supply	AC 120V±10%, 60Hz
Dimensions	430mm (16.9") width x 260mm (10.2") depth x 80mm (3.1") height
Weight	Approximately 4Kg (8.8 lbs.)

N-BASIC Language Highlights

Number systems	Integer, floating-point octal and hexadecimal
Significant figures	16 digits maximum
Line numbering	Zero to 65529
Multi-statements	Included
Direct execution	Included
Variable names	Start with English letter, followed by any combination or length of English letters or numerals. Only the first two characters are significant.
Arrays	255 dimensions. Suffix from zero to 65535, limited by available memory.
Graphic functions	Draw lines and boxes. "GET @" stores graphics from screen into an array. "PUT @" places graphics from an array onto the screen.
Color function	Included (text and graphics)
Access to I/O, memory	Included (PEEK, POKE, OUT, INP)
Formatted output	Included (PRINT USING statement)
IF-THEN-ELSE	Included
Editing function	Screen editing from keyboard
Machine word monitor	Included
Terminal mode	Included (ASCII)
Disk file	Possible in both sequential and random access modes

NEC

NEC America, Inc.
1401 Estes Avenue

EXHIBIT B

Specifications

PC-8012A I/O unit

The PC-8012A I/O unit is designed to expand the memory capacity of the PC-8001A microcomputer, and to accommodate interfaces and peripherals.

ROM	2K PROM area (chips are optional)
RAM	32K RAM (expandable to 128K with additional boards)
FDC I/O port	(direct connection for the PC-8031A disk drive)
Interrupt control circuitry	8 priority levels implemented, 16 possible. (Real-time interrupt generating capability)
Expansion	7 slots available for expansion boards
Power supply	115v AC ±10%, 60Hz
Power consumption	15w (for rated load)
Operating temperature	0°C-35°C (32°F-95°F)
Operating humidity	20%-80% (with no condensation)
Storage temperature	−15°C-60°C (5°F-140°F)
Dimensions	430mm (17½") width x 320mm (12⅝") depth x 150mm (6") height
Weight	7 kg (15½ lbs.)

NEC America, Inc.
1401 Estes Avenue

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent NEC Home Electronics (U.S.A.), Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1255 Michael Drive, in the City of Wood Dale, State of Illinois.

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

ORDER

1. For the purposes of this order, all references to the "memory capacity" of a computer product shall include both its random access memory ("RAM") and its read only memory ("ROM").

I.

It is ordered, That respondent NEC Home Electronics (U.S.A.), Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation, manufacture, advertising, offering for sale, sale, or distribution of the PC–8000 Series microcomputer system, or any other computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. That any such product has a stated memory capacity, or has any other directly related capacity or capability, unless such representation is true.

b. That it is possible for a purchaser of any of respondent's products to use or access any stated capacity or capability or perform any stated directly related function, unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis for such representation.

c. That any such product will, in the future, have a stated memory capacity, or any other directly related capacity or capability, unless at the time such representation is made respondent possesses and relies upon a reasonable basis for said representation.

II.

It is further ordered, That:

a) Within ninety (90) days of the date of service on respondent of this order, respondent shall compile from its own records and those of its current and past distributors, dealerships and users' groups a current, up-to-date mailing list of each customer who purchased a PC–8012A–02 32K RAM Board(s) during the time period January 1, 1981 to December 31, 1984. If respondent does not possess or have access to the required customer records, then it shall, within a reasonable period of time, mail a letter to each current and past distributor or dealership and each company-sanctioned NECHE users' group at their present or last known business address requesting these records and shall compile a mailing list of retail customers based on the information received.

b) Within thirty (30) days of compiling the mailing list mentioned above, respondent shall send by first class mail to each customer named on the mailing list compiled in accordance with the requirements of paragraph II.a), above, a dated letter, plus an enclosed post-

card, in the form prescribed in Appendix A to this order. The letter shall bear the customer's name and address, as identified on the mailing list, and no information other than that required by this paragraph shall be included in or added to the letter or postcard, nor shall any other material be transmitted with the letter or postcard without the express written approval of Commission staff. In addition, the envelope shall state the customer's name and address and shall include the following statement, printed clearly and conspicuously in the lower, left-hand corner of the envelope: IMPORTANT INFORMATION INSIDE: REFUND OFFER

The required postcard shall be in the form and approximate same size as the one prescribed in Appendix A to this order. The postcard shall be postage-paid and contain respondent's address.

In the event that any of the above-mentioned letters are returned due to the inability of the post office to deliver or forward to the addressee, the respondent is ordered to compile a list of the names of all these addresses. If the respondent receives a 32K RAM board refund request from any customer whose name was on the mailing list but whose letter was returned as undelivered by the Post Office, then the respondent is ordered to complete a new mailing, in accordance with the provisions of this order, to the return address shown on the customer's purchase order or other correspondence. Respondent's obligation under this paragraph to complete a new mailing shall expire one year after service upon respondent of this order.

Pursuant to the requirements contained in the letter attached as Appendix A, and subject to any limitations listed below, respondent shall offer each customer named in the above-mentioned mailing list the following:

1. Respondent will remit to each customer who purchased PC–8012A–02 32K RAM board(s), a check calculated according to the following formula: If refund requests to NECHE for less than 100 RAM boards are made, then the customer will be given $150 per RAM board. If refund requests for more than 100 RAM boards are made, then the amount to be refunded will be calculated as follows:

$$\frac{\$15{,}000}{\begin{array}{l}\text{number of RAM board}\\ \text{refund requests}\\ \text{received within one}\\ \text{year of service of}\\ \text{this order}\end{array}} = \text{amount of refund per RAM board}$$

2. Respondent shall send out all checks within thirteen (13) months after service upon respondent of this order. For each customer whose

initial mailing was returned by the post office, but to whom respondent makes a subsequent mailing within one year after service upon respondent of this order, the redress check must be sent within thirty (30) days of respondent's receipt of the return postcard sent to that customer.

III.

It is further ordered, That respondent, its successors and assigns shall maintain accurate records of all materials that were relied upon by respondent in disseminating any representation covered by this order, as well as all materials and information used or relied upon in performing the redress obligations under Part II. of this order. With regard to the records used in performing the redress obligations, said records shall be retained for three years after service upon respondent of this order. With regard to the records relied upon in disseminating any representation covered by this order, such records shall be retained for three years from the date of respondent's last use of such representation. All of the above-mentioned records shall be made available to the Commission upon reasonable notice for inspection and copying.

IV.

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

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions.

VI.

It is further ordered, That respondent shall, within one hundred and twenty (120) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with all requirements of this order except paragraph II hereof. On or before eighteen months after service upon respondent of this order, respondent shall file with the Commission

a report, in writing, setting forth in detail the manner and form of its compliance with paragraph II of this order, said report to include, among other things, the number of purchasers to whom refund notices were delivered, the number of purchasers to whom refund checks were mailed, and the amount of each such refund check.

IN THE MATTER OF

SUN INDUSTRIES, INC.

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

Docket C-3230. Complaint, May 13, 1988—Decision, May 13, 1988

This consent order prohibits, among other things, a Jonesboro, AR., manufacturer and seller of tanning devices and related products from misrepresenting that the use of a tanning device does not pose a risk of any harmful side effects to users. The consent order also requires the respondent to include a warning statement in any advertisements or promotional materials used for its tanning devices.

Appearances

For the Commission: *Brinley H. Williams* and *Toby M. Levin.*

For the respondent: *Ray A. Goodwin, Goodwin, Hamilton & Moore,* Paragould, AR.

COMPLAINT

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

PARAGRAPH 1. Respondent is an Arkansas corporation, with its office and principal place of business located at 2409 Industrial Drive, P.O. Box 2026, Jonesboro, Arkansas.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold and distributed tanning devices and related products for the artificial tanning of humans, including tanning beds, facial units, overhead lamp systems, and other products to the public. These tanning devices are marketed under such trade names as SunTana Sun-System.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertisements and promotional materials for its tanning devices published in magazines and broadcasted on television across state lines, and disseminated in product brochures and other sales literature directly to consumers or to distributors for display or distribution

to consumers. Typical of respondent's advertisements, but not necessarily all - inclusive thereof, are the attached Exhibits A through G. The aforesaid advertisements contain the following statements or depictions:

1. "Our SunTana SunSystem guarantees you a glorious, radiant tan that you can keep all year long. A tan you achieve with soft, comfortable and SAFE U.V.A. light and without all the burning, peeling and flaking you get in natural sunlight." (Emphasis in original) (Exhibit A)

2. "[F]or efficient tanning year 'round without the harmful side effects often associated with natural sunlight." (Exhibit B)

3. "There has never been to our knowledge a case of skin cancer reported to have been caused by use of a SunTana sunbed." (Exhibit C)

4. "There's no harsh glare, so no goggles or eye shades are necessary!" (Exhibit D)

5. "You can lie in luxury on our special SunBed while our SAFE built in lamps make you beautifully brown!" (Emphasis in original) (Exhibit E)

6. "Introducing the year 'round tan by SunTana, makers of the remarkable, new European-style Sunmate. Enjoy the luxury and convenience of a proven and safe UVA tanning system. Achieve a magnificent, golden tan without burning." (Text of TV advertisement, Exhibit F).

7. "The days of lying outdoors in the heat, enduring the discomforts and damaging rays of sunlight are being replaced by proven, non-burning* SunTana SunSystems. (* When exposure times are followed properly.)" (Exhibit G)

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Use of respondent's tanning devices cannot increase the risk of developing skin cancer.

2. Respondent's tanning devices can be safely used without protective eyewear.

3. Respondent's tanning devices can be used without the risk of any harmful side effect associated with the sun.

PAR. 6. In truth and in fact:

1. Use of respondent's tanning devices can increase the risk of developing skin cancer.

2. Respondent's tanning devices cannot be safely used without protective eyewear.

3. Respondent's tanning devices cannot be used without the risk of any harmful side effect associated with the sun.

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

PAR. 7. Through the use of the representations referred to in paragraph five and others not specifically set forth herein, respondent has

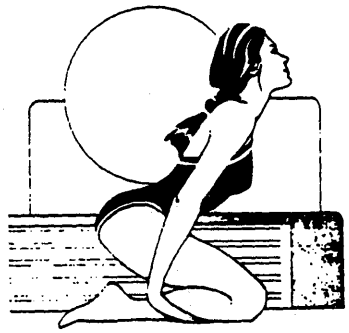
represented, directly or by implication, that at the time it made the representations it possessed and relied upon a reasonable basis consisting of competent and reliable scientific evidence for said representations.

PAR. 8. In truth and in fact, at the time it made the representation respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representation as set forth in paragraph seven was and is false and misleading.

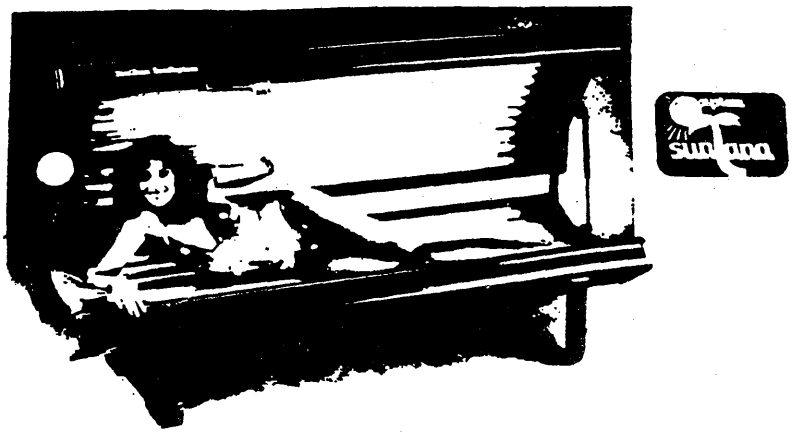
PAR. 9. In the advertising and sale of its tanning devices, respondent has used terms such as "safe" and "no harmful side effects" without disclosing that the use of such devices poses the risk of eye injury and the increased risk of skin cancer and skin aging. These facts would be material to consumers. The failure to disclose these facts, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A



Your Personal Invitation



. . . to a year 'round, beautiful tan!

Our SunTana SunSystem guarantees you a glorious, radiant tan that you can keep all year long. A tan you achieve with soft, comfortable and SAFE U.V.A. light and without all the burning, peeling and flaking you get in natural sunlight. Our SunSystem is GUARANTEED to tan anyone who tans in the sun. . . while you relax in cool comfort.

We'd like to tell you more about this exciting new way to tan. A single visit will convince you.

Call us or come by today. . .

EXHIBIT B

COMMON QUESTIONS ABOUT UVA SUNTANNING

Q. "I have never heard of the tanning machine . . . is this something new?"

A. NO. Dermatologists for several years have used UV light for therapy. Since its inception, the suntanning unit has become quite common in Europe for efficient tanning year 'round without the harmful side effects often associated with natural sunlight. Last year, alone, over 90,000 were sold in Europe valued at over 100 million dollars.

Q. "Can the SunTana SunSystem burn?"

A. When exposure times are used properly, you **cannot** burn with the SunSystem. Our SunSystem artificially duplicates the n[illegible]ount of UV light to stimulate the melanin in the skin. Once stimulated, the UVA acts upon the melanin to produce a rich, deep tan. At the same time, the carefully controlled temperature of the system helps to promote the tanning process and prevents dry skin.

Q. "Should suntan cremes, lotions, or oils be used with the SunSystem?"

A. Since the long wavelength UVA of the SunSystem will not burn your skin, it is recommended that you **do not** use any cremes, oils, or lotions during tanning sessions. Most of these contain sunscreens and will provide a physical barrier on the skin and prevent the UVA from penetrating and inducing a tan. Equally important, many facial makeups have oil bases and should be removed prior to a session. It is recommended that, following a tanning session, a skin moisturizer be applied. This promotes a smoother, more even looking tan and will promote the process.

WE CERTIFY THAT THIS PRODUCT COMPLIES WITH THE FEDERAL PERFORMANCE STANDARD 21 CFR 1040.20 EXCEPT WITH RESPECT TO THOSE CHARACTERISTICS AUTHORIZED BY VARIANCE NO. 80-EP-0137 EFFECTIVE MAR 17 1981

"When exposure times are [illegible]

Q. "How do the SunBeds differ from the tanning booths?"

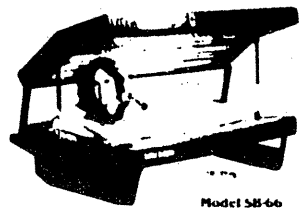
A. There is a great deal of difference. The majority of booths utilize the UV lamp that emits a very large and strong dose of "B" light that falls in the 280-315 nanometer range. The treatments are usually very short – just a few minutes (2 to 3 minutes). The reason is that the rays are so strong that you cannot tolerate the heat or the harsh UVB exposure and there's a possibility that you would burn. In summary, the UVB system has been popular, but medical authorities are quite concerned about the long term effects of this type of radiation.

Q. "What are the SunBed measurements?"

A. The contour curved SunBed measures 85 inches long, just 28¼ inches wide, and stands only 14 inches tall. The system utilizes eight (8) 6-ft. lamps, operates on standard 115-volt household current, and weighs approximately 150 pounds. Actual cost of operation is minimal – about $3 to $4 per month.

Q. "Can I add the optional top unit at a later date?"

A. YES. The SB-6 is designed so the top unit can be added to provide you a complete SunSystem. Together, the system utilizes sixteen (16) lamps and operates on standard 115 volt household current. The SB-6 or SB-66 makes an excellent tanning unit for the home.



Model SB-66

Q. "Do you need to wear any type of eye protection?"

A. Since the Bureau of Radiological Health requires that in the United States we provide goggles with each of our SunSystems and advise using them whenever taking a tanning session.

Q. "Is UVA as dependable as the various claims have indicated?"

A. Our answer is "YES." A few medical authorities have indicated some UVA lamps on the market will result in chronic changes such as aging or skin cancer even with repeated and prolonged usage over a number of years. In addition, several skin types will show skin tone change after the first or second exposure.

Q. "How much time is required for a treatment, and how often must I use the SunSystem?"

A. A tan is relative to each individual and treatment length varies with each person. We [illegible]rst ten (1[illegible] sessions consecutively. Fair complexion individuals need to begin with 15 minutes for the first and second session and gradually increase to 30 minutes for the 8th through the 10th session. For average complexion individuals, we suggest 20 minutes for first and second session and 30 minutes for subsequent sessions. For dark complexion individuals who already have a developed tan, 30 minute sesions are alright. Once you have reached a desired tan, one or two sessions every two weeks will keep your tan at the desired intensity.

SunTana SunSystem
P.O. Box 2026
Jonesboro, AR 72401
Toll Free 800-643-0086

EXHIBIT C

[redacted]

Q. Does use of the SunSystem cause skin cancer?

A. There has never been to our knowledge a case of skin cancer reported to have been caused by use of a SunTana sunbed. In the ultraviolet light spectrum of sunlight, there is ultraviolet light in what is called UVB wavelengths, which burn the skin and in different, less dangerous wavelengths called UVA. Early UV tanning devices emitted light in UVB wavelengths and did sometimes cause burns. SunTana's lamps emit ultraviolet light in the UVB range only to the extent of 2%, the bulk of the emissions being in the UVA wavelength range. UVA lamps will tan the skin and when used as directed will not burn the skin as the UVB lamps do.

EXHIBIT D

SUGGESTED RADIO COPY

60 SECOND SUNTANNING SPOT.

ANNOUNCER: Remember how hard you worked last summer . . . all the long hours you put in . . . all the glare from the hot sun and the sweat trickling down your back . . . Just to get a suntan?!!!

(Music: Upbeat and Catchy)

ANNOUNCER: Now getting a suntan can be fun at ___(name)___! You can get the best of the sun, without the bother! With our exclusive European Tanning Process, you can relax on our special SunBed, even read a book, while you receive a rich golden tan! There's no harsh glare, so no goggles or eye shades are necessary! And quite cooling fans keep the temperatures paradise-perfect! At ___(name)___, we can give you something the sun can't . . . . . A Guarantee! You are guaranteed a darker skin tone or your money back! Pale faces are our specialty!! And there's absolutely no burning! Go to where the sun always shines, where you can get the best of the sun, without bother! A suntan is fun at ___(name)___! And that's a guarantee! Call 000-0000 for your place in the sun today!!!! ___(name)___, ___(town)___!!

(Music up to completion)

EXHIBIT E

SUGGESTED RADIO COPY

60 SECOND INTRODUCTORY SPOT

ANNOUNCER: Beautiful Tan!

(Theme established then under)

ANNOUNCER: Getting a tan can be fun and easy! _____(Name)_____ is proud to announce that they are open and ready for business in _____(town)_____ at _____(address)_____.

The tan you worked for all last summer can be deep and dark this summer.

_____(name)_____ features an exclusive European tanning process. There are no dangers of overexposure or burning that other tanning salon treatments can bring! There are no boring stand-up sessions at _____(name)_____! You can lie in luxury on our special SunBed while our SAFE built in lamps make you beautifully brown! You can look good all summer long! Let _____(name)_____ help you keep your tan all year long! Call soon for your appointment.

_____. _____. . . . _____. _____.

EXHIBIT F

SunTana 30 Second TV Spot

Herget Marketing, January 20, 1984

Introducing the year 'round tan by SunTana, makers of the remarkable, new, European-style Sunmate. Enjoy the luxury and convenience of a proven and safe UVA tanning system. Achieve a magnificent, golden tan without burning. Order your Sunmate now.

Incredibly low price of $795. Freight and shipping extra. Toll-free number 1–800–643–0086.

EXHIBIT G

TAN
Year 'Round

More and more Americans are discovering the convenience and benefits of year 'round indoor tanning.

If you tan in natural sunlight, our European-styled SunTana SunSystem guarantees you a glorious, radiant tan you can keep all year long. The days of lying outdoors in the heat, enduring the discomforts and damaging rays of sunlight are being replaced by proven, non-burning* SunTana SunSystems.

Call or come by today and let us prove it to you.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sun Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arkansas. Sun Industries has its offices and principal place of business at 2409 Industrial Drive, P.O. Box 2026, Jonesboro, Arkansas.

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

ORDER

DEFINITION

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

"*Tanning device*" means any product designed to incorporate one or more ultraviolet lamps and intended for irradiation of any part of the living human body by ultraviolet radiation to induce skin tanning.

I.

It is ordered, That respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, through the use of the word safe or any other word or words of similar meaning, that use of any such tanning device does not pose a risk of any harmful side effect to the user.

II.

It is further ordered, That respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, that:

a. Use of any such device does not increase the risk of developing skin cancer; and

b. Protective eye wear is not needed when using any such device.

III.

It is further ordered, That for one year after the date of service of this order respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to prominently disclose in any print advertisement, film, video tape or any other promotional material the following statement:

> NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

IV.

It is further ordered, That commencing one year after the date of service of this order respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making in any print advertisement, film, video tape or any other promotional material any representation, directly or by implication, that the tanning device is safe or safer than other devices or methods of tanning or that the device has health benefits unless the following statement is given:

> NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

V.

It is further ordered, That respondent Sun Industries, Inc., its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, do forthwith cease and desist from making, directly or by implication, any health or safety representation unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for each such representation, consisting of reliable and competent scientific evidence that substantiates such representation; provided however, that to the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results.

VI.

It is further ordered, That respondent shall distribute a copy of this order to each current officer, employee, agent and or representative having sales or promotional responsibilities with respect to the subject matter of this order, and to each dealer, distributor, and purchaser or lessee for commercial use, of its tanning devices (such as health clubs, tanning salons, beauty salons, catalogue houses, and tanning device retailers) known through existing company records to be in operation on the effective date of this order.

VII.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent, its successors and assigns shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys, or other materials in its possession or control or of which it has knowledge that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

VIII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for three (3) years from the last date of dissemination of the material a copy of each nonidentical form of promotional and training material disseminated by respondent and upon request make such material available to the Federal Trade Commission or its staff for inspection and copying.

IX.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain, for three (3) years and upon request make available to the Federal Trade Commission for inspection and copying records of the name and last known address of each dealer, distributor and purchaser or lessee for commercial use of respondent's sunlamp products.

X.

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

XI.

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

IN THE MATTER OF

OGILVY & MATHER INTERNATIONAL, INC.

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

Docket 9149. Consent Order, Jan. 4, 1983—Modifying Order, May 24, 1988

The Federal Trade Commission has modified a portion of a 1983 consent order (101 FTC 1) with Ogilvy & Mather International, Inc., the advertising agency for Thompson Medical Co., Inc., the makers of the topically applied analgesic "Aspercreme", by making two modifications in accordance with paragraph eight of the consent order so that the Ogilvy order matches the language in the Thompson order.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On February 5, 1981, the Commission issued its complaint in this proceeding alleging that Thompson Medical Co., Inc. ("Thompson"), and its advertising agency, Ogilvy & Mather International, Inc. ("Ogilvy"), had made false and deceptive representations in advertising materials for Thompson's over-the-counter topically applied analgesic "Aspercreme" in violation of Section 5 of the FTC Act, 15 U.S.C. 45 ("Section 5"). On October 4, 1982, the Commission accepted from Ogilvy an "Agreement Containing Consent Order to Cease and Desist" for public comment and on January 4, 1983, issued the negotiated consent order. The litigation against Thompson continued.

Paragraph 8 of the Ogilvy consent agreement specified that:

8. No part or provision of this Order shall become binding upon respondent until the effective date of a final order to cease and desist against Thompson Medical Company, Inc. or its successors or assigns. If a final order against Thompson Medical Company, Inc. in this proceeding contains a provision different from the provision that correspond [s] to the provision in Part I(A) of this Order or contains a definition of "competent and reliable scientific or medical evidence" that differs from Part II of this Order, then this Order shall be reopened for the sole purpose of conforming said provision or said definition in this Order with the corresponding provision or definition in the Thompson Medical Company, Inc. order. In the event that the Complaint in this matter against Thompson Medical Company, Inc. is dismissed in whole, then the Commission, upon the application of respondent, shall set aside this Order.

On November 24, 1984, the Commission issued a cease-and-desist order against Thompson. 104 FTC 648. Thompson petitioned for review of the order, which was affirmed by the Court of Appeals. 791 F.2d 189 (D.C. Cir. 1986). Thompson then petitioned for *certiorari*, and

the Commission's order became final in early 1987 after the Supreme Court denied that petition. 107 S.Ct. 1289 (1987). Consistent with paragraph 8 of the Ogilvy consent agreement, the Commission's order against Ogilvy became effective at the same time as the *Thompson* order.

On November 17, 1987, Ogilvy filed a request that the Commission reopen this proceeding and modify the 1983 consent order against Ogilvy. The request cites paragraph 8 of the "Agreement Containing Consent Order to Cease and Desist" ("consent agreement") as justification for certain modifications to Parts IA and II of the order and also asserts that changed conditions of fact and law and the public interest justify modification of other parts of the order.

The Commission's order against Ogilvy comprises seven parts. Part I prohibits respondent from misrepresenting the ingredients of any drug product, from misrepresenting that any drug product is new or involves any new principle, and from misrepresenting any test or study of any drug product or the effectiveness of any drug product. Part II of the order prohibits certain effectiveness and side effect claims for any topically applied drug product unless the claims are substantiated. Parts III, IV, V and VII of the order impose record-keeping requirements and mandate notification of the Commission concerning corporate changes and distribution of copies of the order and require submission of compliance reports. Part VI of the order states that the order does not apply to three named corporate subsidiaries of Ogilvy.

Ogilvy first seeks modifications of Parts IA and II of the order, which it believes should be granted on the basis of paragraph 8 of its consent agreement, quoted above. The modification to Part IA would replace the current language banning use of the tradename "Aspercreme" for a product that does not contain therapeutically significant quantities of aspirin with language permitting use of that tradename for such a product, provided the advertising and labeling using the tradename "clearly and prominently disclose that the product does not contain aspirin." The modified language would include explicit directions concerning the permissible disclosures for television, radio and print advertising and for labels. The requested modifications to Part IA of the order will conform a portion of the order against Ogilvy covered by paragraph 8 of Ogilvy's consent agreement to the parallel *Thompson* language, and the Commission agrees that the changes are justified.

Ogilvy also requests that the Commission modify to reflect the *Thompson* decree the language in Part II of the order requiring that clinical studies conform to the requirements set forth in 21 CFR 314 and 330. Ogilvy's proposed order would require clinical studies to

conform to "acceptable designs and protocols." This change too will conform a portion of the *Ogilvy* order covered by paragraph 8 of the consent agreement to the parallel provision of the *Thompson* order, and the Commission agrees that it is justified.

Ogilvy further requests that Part VI of the order be modified. Part VI of the present order excepts from the scope of the decree "three subsidiary corporations wholly owned by respondent unless a product otherwise covered by the order is assigned or transferred from respondent to one" of them. Ogilvy seeks to except two additional subsidiaries from the scope of the order. One, Rolf Warner Rosenthal, Inc., was acquired after the order was issued and specializes in advertising of prescription drugs to health care professionals. The other, Euramerica, Inc., did not engage in advertising at the time the order was issued, but now performs some advertising activities. Ogilvy asserts that both subsidiaries are "independent" and that the "intent of Part VI is to exempt all independent Ogilvy subsidiaries." Request for Modification at 9.

Ogilvy asserts that its acquisition of Rolf Warner Rosenthal, Inc., and its conversion of Euramerica, Inc., to an advertising subsidiary constitute changed facts that under Section 5 require the Commission to reopen and modify the order. Nothing in the consent agreement and order suggests that the Commission's intent to exempt "independent" subsidiaries. Ogilvy has not suggested any other reason to construe the order this way, nor does it suggest what an "independent" subsidiary is under the terms of the order. Nothing in the consent agreement or the order compels the Commission to exempt additional subsidiaries of Ogilvy simply on a showing that they exist. The acquisition of Rolf Warner Rosenthal, Inc., and the conversion of Euramerica are not, therefore, changes of fact that require granting Ogilvy's request for modification.

Absent a showing of changed fact or law, the Commission may modify its orders if it concludes that to do so would be in the public interest. To meet its burden in this respect, Ogilvy must show that if the two additional subsidiaries are not exempted from the order, it will sustain competitive harm that is greater than or different from the harm that it reasonably might have expected at the time it agreed to the consent order. *See, e.g., Damon Corp.*, 101 FTC 689 (1983) (show cause order). Ogilvy has not carried this burden. Indeed, it has shown only that whatever harm the two new subsidiaries will sustain is the same as that currently being suffered by the company itself. According to Ogilvy, that alleged harm stems principally from the fact that the *Ogilvy* order is less stringent than certain orders in subsequent and unrelated Commission cases against competing advertising agencies.

Ogilvy submitted an affidavit from its Chairman stating that current clients have "expressed concern over the breadth of Ogilvy's order" (Phillips Aff. ¶8) and, specifically, that "the breadth of the order will chill Ogilvy's creative efforts . . . as Ogilvy seeks to avoid even the possibility of a civil penalty proceeding." Phillips Aff. ¶9. The company also has stated that the harm that would be suffered by the two new subsidiaries if the Commission refused to extend the current exemption would be the same as that being sustained by Ogilvy itself.

The Commission concludes that Ogilvy has provided no reason to treat the two subsidiaries differently from the company itself. Nor has Ogilvy shown that such harm as it has alleged is different from, or more severe than, it reasonably might have anticipated at the time the order issued. We therefore decline to grant the modification expanding the subsidiary exemption.

Ogilvy also seeks modification of several other portions of its order to conform it to the *Thompson* decree. These modifications are not covered by paragraph 8 of the consent agreement because they do not appear in the parts of the order to which that paragraph is expressly directed. Ogilvy argues that these modifications are justified based on the Commission's action in *Benton & Bowles, Inc.*, 82 FTC 1437 (1973), 102 FTC 1837 (1983). In that case, the Commission issued similar complaints against an advertiser, Sterling Drug Co., and Benton & Bowles, one of its advertising agencies. Benton & Bowles agreed to a consent order, but Sterling continued to litigate and ultimately prevailed with respect to some of the allegations. The Commission dismissed those portions of the *Sterling* complaint and then vacated the *Benton & Bowles* consent order because it had derived from the portions of the *Benton & Bowles* complaint that were the same as the portions dismissed in *Sterling*.

This part of the company's request for modification would effect the following changes in the order:

Part IC: Deletion of bans on certain claims concerning efficacy based on the newness of drug or newness of mechanical principles, leaving in effect ban on claims concerning efficacy based on new scientific principles, adding the limiting description "over-the-counter" to modify "drug" and revising the existing geographic limitation to conform to the *Thompson* language: *i.e.*, "available for purchase in the United States" rather than "nationally available for purchase;"

Parts IIC and D: Deletion of bans on certain claims concerning side effects;

Part IF: Deletion of ban on claims made without substantiation concerning the mode of action by which a drug treats a condition;

Parts IIA and B: Deletion of coverage in provision banning decep-

tive effectiveness claims of claims relating to a drug's ability to treat or relieve "any other disease or condition" in addition to "symptoms of any musculoskeletal disorder;

Parts IB and D: Deletion of redundant prohibitions concerning misrepresentations as to the presence of an ingredient and substitution of the combined provision in Part ID of the *Thompson* order; and

Part VII: Substituting the *Thompson* requirement for filing compliance reports within 60 days of service "and at such other times as the Commission may require" for the present requirement that they be filed within 60 days after the order becomes final and "annually thereafter for three years."

As in the Commission's decision vacating the *Benton & Bowles* order, the dismissal of certain allegations in the *Thompson* complaint is a change of law that requires modifying those parts of the order that relate to the complaint allegations that were dismissed. The Commission agrees, therefore, that the changes described above relating to Parts IC and IIC and D are appropriate.

The remaining modifications described above do not relate to complaint allegations that were dismissed, but rather, to allegations that resulted in less rigorous order provisions in the *Thompson* decree than those agreed to by Ogilvy. Although these modifications do not stem from dismissed complaint allegations, Ogilvy appears to argue that *Benton & Bowles* is controlling precedent. It also argues that "as a matter of fundamental fairness Ogilvy should not be punished more severely than the advertiser." Request for Modification at 20. We do not adopt either of these proffered justifications for the requested changes.

The Commission's action in *Benton & Bowles* does not compel us to conform the orders of advertising agencies and their advertisers except in the narrow circumstances in which the complaint allegations against the advertiser were replicated in the complaint against the agency, where the allegations in the advertiser's complaint were dismissed, and where the record showed no basis for imposing disparate relief on the two parties. We therefore decline to grant these modifications on the basis of that decision.

We also do not subscribe to the notion that "fundamental fairness" necessarily compels the Commission, as a general matter, to conform its orders against advertisers and their advertising agencies. Each respondent stands on its own, and the Commission may decide that it is appropriate to impose more stringent order provisions for either the advertiser or its agency. The only restriction is that the relief against any party must be reasonably related to the unlawful conduct found. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611–13 (1946); *see also*

FTC v. *National Lead Co.*, 352 U.S. 419, 428–31 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Paragraph 8 of Ogilvy's consent agreement specifies two portions of its consent order that were to be modified to conform to any more lenient language that subsequently might be made applicable to Thompson. The company has not shown why, at this time, the Commission should ignore the expressly limited language in paragraph 8 and modify other provisions in the order absent a demonstration that the modifications are justified on grounds of changed fact or law or the public interest. As explained elsewhere in this order, the Commission has concluded that Ogilvy has not shown that the current order is causing it any harm that is different from or more severe than it reasonably could have anticipated when it signed the consent agreement. Therefore, we have decided to deny the company's request for these changes.

Finally, Ogilvy requests modification of the preamble to Part I of the order—language not covered by paragraph 8 of the consent agreement—to limit the scope of its coverage even more narrowly than the scope of the order against *Thompson*. The *Ogilvy* order applies to all "drugs." The *Thompson* order applies to all "OTC drugs." Ogilvy seeks to have this language modified to cover only "OTC topically applied analgesic drugs." It argues that this request is warranted because the coverage of the orders against two of the three advertising agencies in the Commission's recent "analgesics" cases[1] and the coverage of the order against Sterling Drug, one of the advertisers, were limited to "internal analgesic drugs."[2]

The Commission's decision to limit the orders in the "analgesics" cases relied on by Ogilvy is not a change of fact or law that would require modification of the scope of the *Ogilvy* order. The order against American Home Products Corp. and its advertising agency, C.T. Clyne, which covered a more narrow range of products, was issued in September, 1981, well before the *Ogilvy* consent order. The mere fact that the Commission issues different orders in cases against different companies at different times does not justify conforming earlier orders to those issued later. The Commission decides each matter on its own merits and structures the relief mandated to fit the circumstances.

The Commission determines the product coverage in a particular order based on a number of considerations related to the facts of each

[1] American Home Products Corp., 98 FTC 136 (1981); Bristol-Myers Co., 102 FTC 21 (1983); Sterling Drug, Inc., 102 FTC 395 (1983).

[2] Although the order against Sterling is limited to "internal analgesic drugs," the order against its advertising agency, Dancer-Fitzgerald-Sample ("Dancer"), contains the same "all OTC drug" coverage as the order in *Thompson*. 96 FTC 1 (1980). The Commission dismissed the Administrative Law Judge's order against a second advertising agency in *Sterling Drug*. 102 FTC at 791.

specific case such as the extent of the respondent's unlawful conduct, whether the respondent knew or should have known that its conduct was improper or unlawful and the perceived need for fencing-in relief. Here, Ogilvy consented to its order, including the present product coverage, at a time when it should have known that the product coverage in that order was broader than that contained in *American Home Products.* Some months after issuance of Ogilvy's consent order, the Commission issued its orders against Bristol-Myers, Sterling Drug and certain of their advertising agencies.

The scope of product coverage is always an important question in Commission orders that prohibit deceptive advertising. The fact that the Commission chose to impose broader orders on some and more narrow orders on others indicates that the Commission decided it was appropriate to treat the companies differently. Ogilvy has presented nothing to suggest that we should go behind that determination.

The mere fact that several of those orders, like the order against American Home Products and C.T. Clyne, included more limited product coverage than that in the *Ogilvy* and *Thompson* decrees is not a change of law or fact sufficient under Section 5 to require reopening of Ogilvy's consent and conforming it to the more favorable "analgesics" orders. This is particularly true in light of the different product coverage provisions in the "analgesics" cases themselves. As already noted, the product coverage in the order against Dancer in the *Sterling Drug* case is the same as that in *Thompson,* although the orders against Sterling Drug itself, and Ted Bates and Young & Rubicam in *Bristol-Myers,* for example, are not. *See* note 2, *supra.*

Ogilvy also has submitted the affidavit of its Chairman in support of this portion of the company's request for modification. That affidavit states that "[a]s a result of its much broader order, Ogilvy's ability to compete against those agencies has been threatened." Aff. at ¶7. It also states that "[a] number of Ogilvy's clients have expressed concern over the breadth of Ogilvy's order" (*Id.* at ¶8), and that its clients "are concerned that the breadth of Ogilvy's order will chill Ogilvy's creative efforts with respect to all drug products as Ogilvy seeks to avoid even the possibility of a civil penalty." *Id.* at ¶9. These statements are conclusory and self-serving. They do not demonstrate that the current order has imposed on Ogilvy significant harm that could not reasonably have been anticipated at the time the company agreed to its terms, and they offer no information relating to actual, as opposed to speculative, competitive injury. Such information would have had a bearing on the possible public interest in granting the modification.

Under the FTC Act and the Commission's rules, a Commission order need not be altered unless the respondent demonstrates a

change of law or fact requiring the modification or the Commission decides that the public interest warrants the changes sought. Ogilvy has failed to carry its burden in this respect, and the Commission, therefore, declines to grant this portion of Ogilvy's request. Similarly, we decline to grant Ogilvy's request that the product scope of Ogilvy's order be modified "at a minimum" to read "OTC drugs" as to Part I and "OTC topical analgesic drugs" as to Part II.

For the reasons above, the Commission has decided that some of the modifications proposed by Ogilvy are appropriate. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened and that the order therein against Ogilvy & Mather International, Inc., be modified to read as follows:

ORDER

PART I

It is ordered, That respondent Ogilvy & Mather International, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of any over-the-counter "drug", as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Employing the brand name "Aspercreme" for any such product or otherwise representing, directly or by implication, that an active ingredient of any such product is aspirin, unless such product contains aspirin in therapeutically significant quantities; *provided, however,* that the brand name "Aspercreme" may be used for such product if its advertising and labeling clearly and prominently disclose that the product does not contain aspirin.

(1) In television advertisements, an explicit and simple aspirin disclaimer statement (such as "ASPIRIN FREE") shall be superimposed on the television screen simultaneously with a vocal aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") at the end of each advertisement;

(2) In radio advertisements, an explicit aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") shall be made at the end of each advertisement;

(3) In print advertisements, an explicit aspirin disclaimer statement (such as "ASPERCREME DOES NOT CONTAIN ASPIRIN")

shall be displayed prominently and conspicuously in relation to each such advertisement as a whole;

(4) In labeling, an explicit aspirin disclaimer statement (such as "DOES NOT CONTAIN ASPIRIN") shall be prominently and conspicuously printed in the front package panel (or in the front of the container if no package is used).

B. Representing, directly or by implication, that any such drug involves a new scientific principle, when such drug or one involving such principle has been available for purchase as an over-the-counter drug in the United States for more than one year.

PART II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug," as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Employing any trade name for any such drug which represents, directly or by implication, that such drug contains an active ingredient which it in fact does not.

B. Representing, directly or by implication, that any such drug has an ingredient when in fact it does not have that ingredient.

C. Misrepresenting the contents, validity, results, conclusions or interpretations of any test or study.

D. Representing, directly or by implication, the mode of action by which any such drug treats, mitigates, or cures any symptom, disease, or condition unless respondent possesses and relies upon a reasonable basis substantiating the representation.

PART III

It is further ordered, That respondent Ogilvy & Mather International, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any topically applied drug, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Representing, directly or by implication, that any such topically applied drug is effective for the treatment or relief of the symptoms

of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders), or any other disease or condition;

B. Representing, directly or by implication, that any such topically applied drug is as fast or faster, or is as effective or more effective, than aspirin in the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorder), or any other disease or condition;

unless at the time of the dissemination of any such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific or medical evidence substantiating that representation. For the purposes of this order, competent and reliable scientific or medical evidence shall include at least two well-controlled, double blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. *Provided, however,* with respect to any representation covered by this Part, if the Food & Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective, then in lieu of the above, respondent may possess and rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation. *Provided, further,* however, where the evidence relied upon by respondent was not directly or indirectly conducted or controlled by respondent, it shall be an affirmative defense to an alleged violation of this Part for respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that a reasonable basis exists which meets the requirements of this Part. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. The written opinion shall describe the contents of the evidence upon which the opinion is based and shall set forth the qualifications of the person to render the opinion.

PART IV

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, for a period of three years after respondent last disseminates the advertisements for products covered by this order, shall retain all test results, data, and other documents or information on which it relied for its representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in its possession during either

their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

PART V

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

PART VI

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions, and to each of its officers who are engaged in the preparation and placement of advertisements for products covered by this order.

PART VII

It is further ordered, That the provisions of this order shall not apply to Scali, McCabe, Sloves, Inc.; Cole & Weber, Inc.; and Rogers, Weiss/Cole & Weber Advertising, three subsidiary corporations wholly owned by respondent, unless a product otherwise covered by this order is assigned or transferred from respondent to one of those corporations. However, respondent shall distribute a copy of this order to the officers of the aforementioned corporations.

PART VIII

It is further ordered, That the respondent shall, within sixty (60) days after this order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondent, setting forth in detail the manner and form in which it has complied with this order.

STATEMENT OF CHAIRMAN DANIEL OLIVER
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to modify the Ogilvy order in accordance with paragraph 8 of the consent agreement. I also concur in the decision to delete the portions of the order that were derived from complaint allegations later dismissed in the Thompson proceeding. I would go further, however, and grant some of Ogilvy's other requests.

Before turning to those portions of the Commission's order from which I dissent, I offer a few comments on Ogilvy's request to narrow

the product coverage of Part I of the order to "any OTC topically applied analgesic drug." I find this to be a closer question than the other Commissioners find it. Ogilvy contends that its conduct was no worse than that of the ad agencies involved in the *American Home Products* and *Bristol-Myers* cases, and that the product coverage of its order should therefore be no broader than the product coverage of the orders against those agencies (i.e., coverage should be limited to products of the same pharmacological class and mode of application).

I agree, and Ogilvy does not dispute, that a broader order is appropriate if Ogilvy was more culpable than the other ad agencies. I have reviewed the documents upon which the Commission relied in concluding that Thompson Medical Company, Ogilvy's client, intended to make a false "contains aspirin" claim for Aspercreme. *See* 104 FTC at 836. In my view, Ogilvy's contention that there is a less sinister interpretation of the documents has some merit—enough, at least, to raise a question whether Ogilvy really acted more egregiously than its competitors.

Nevertheless, I agree with the decision not to grant Ogilvy's request. Since the issue of Ogilvy's culpability was not litigated, I cannot be certain whether Ogilvy's interpretation of the documents would have been refuted or what other evidence the parties would have presented. In addition, my review of the documents leaves me uneasy about the Commission's ability to make such a difficult factual determination on the basis of the information normally before us in an order modification proceeding.[1] Under the circumstances, I conclude that Ogilvy should not be given the benefit of a litigation victory it chose not to pursue.

I dissent from the Commission's decision not to conform Ogilvy's order to the Thompson decree except to the extent expressly required by paragraph 8 of the consent agreement. I would allow the other changes requested by Ogilvy to conform its order to Thompson's. Ogilvy argues that denying its request for other modifications will discourage settlements since ad agencies will perceive that they can obtain a less restrictive order by litigating. I am not persuaded by this argument.[2] I am persuaded, however, that there is no basis in the record for treating Ogilvy more harshly than Thompson. The two respondents were named in a single complaint on the basis of a single set of facts. I fail to see how the public interest is served by maintain-

[1] The best course of action in this case might have been to reopen the proceeding for an evidentiary hearing to compare the conduct of Ogilvy with that of its competitors.

[2] Although in this instance the litigated order turned out to be less restrictive than the consent order, that fact became apparent only in hindsight. At the point Ogilvy was considering whether to sign the consent order, Ogilvy did not know whether the litigated order would be more restrictive or less restrictive than the consent order. Future respondents will be faced with the same uncertainty, and thus will have just as much incentive as ever to settle the Commission's charges.

ing tighter restrictions on one respondent than the other absent some factual distinction justifying disparate treatment.

I also dissent from the decision not to exempt the two additional advertising subsidiaries from the Ogilvy order. Ogilvy argues, I believe correctly, that it was understood that subsidiaries would be exempted if it were shown on a case-by-case basis that the subsidiary, by virtue of its management agreement with Ogilvy, would operate independently of Ogilvy. Given this understanding, it is unreasonable to expect Ogilvy to have felt the need to seek more explicit language in the order.[3] Clearly, memorializing the understanding would have been the better course, and I would expect such understandings to be committed to writing in future orders. But in this instance, I do not think it is appropriate for the Commission to ignore the intent that guided the negotiation of the order.

The factual determination of whether the new subsidiaries qualify for exemption is a simple one. In my view, Ogilvy has presented sufficient evidence to establish that Rolf Werner Rosenthal and Euramerica, Inc. operate independently of Ogilvy. If these corporations had been advertising subsidiaries of Ogilvy at the time the order was signed, Ogilvy likely would have sought, and the Commission likely would have agreed, to treat them the same as the three subsidiaries specifically exempted in Part VI of the order. The acquisition of RWR and the conversion of Euramerica to advertising after the order was signed are changes of fact that, in my view, justify modification of the order.[4] Although the emergence of additional subsidiaries was foreseeable at the time the order was signed, Ogilvy, as noted above, had reason to believe that future subsidiaries would be considered for exemption.

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[3] Moreover, here there was a conscious decision *not* to include a generalized exemption in order to avoid creating a loophole by which Ogilvy could circumvent the order.

[4] Granting this modification would not enable Ogilvy to circumvent the order by steering clients to RWR and Euramerica. Part VI of the order provides that the exemption does not apply if a product otherwise covered by the order is (1) transferred by Ogilvy to an exempted subsidiary, or (2) assigned by Ogilvy to an exempted subsidiary.

IN THE MATTER OF

MEDICAL STAFF OF MEMORIAL MEDICAL CENTER

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

Docket C-3231. Complaint, June 1, 1988—Decision, June 1, 1988

This consent order prohibits, among other things, the medical staff of a Savannah, Ga. medical center from denying, restricting, or recommending denial or restriction of hospital privileges for any nurse-midwife, unless the staff has a reasonable basis for believing that such restriction serves the interest of the hospital in providing health care services. Respondent will also be prohibited from refusing to deal with or coercing the hospital or any person, organization, or institution, if the purpose or effect is to restrict the practice of nurse-midwifery.

Appearances

For the Commission: *Harold Kirtz.*

For the respondent: *John Horty* and *Linda Haddad, Horty, Springer & Mattern,* Pittsburgh, PA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Medical Staff of Memorial Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, Savannah, Georgia.

It is composed of all physicians, dentists and podiatrists who have been granted privileges to attend patients at Memorial Medical Center.

PAR. 2. Memorial Medical Center is a 465-bed general, acute-care hospital and is the largest hospital in the Savannah metropolitan area. It is one of three hospitals in the Savannah metropolitan area that provide obstetrical services, and it accounts for nearly half of the births in that area.

PAR. 3. Most, if not all, members of the Medical Staff are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care practitioners in the Savannah metropolitan area. The Medical Staff's physician members constitute the majority of the practicing physicians in the Savannah metropolitan area.

PAR. 4. The Medical Staff engages in substantial activities for the economic benefit of its members. It is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 5. Members of the Medical Staff charge fees and collect payments for their services that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies and from other payers. The flow of such funds is affected by competition among health care practitioners in the Savannah metropolitan area, and by the acts and practices of the Medical Staff and its members as herein alleged. Health care practitioners in the Savannah metropolitan area treat out-of-state patients, and purchase goods and supplies from out-of-state vendors, and the ability of a practitioner, including a nurse-midwife, to obtain hospital privileges may influence his or her decision to move to and practice in the Savannah metropolitan area. The acts and practices described herein are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act.

PAR. 6. Pursuant to its bylaws, the Medical Staff has organized itself into various departments and committees, including a Credentials Committee. The Credentials Committee reviews the credentials of all applicants for privileges at Memorial Medical Center and receives recommendations from the clinical department in which an applicant requests privileges. The Credentials Committee is the final decisionmaker when it denies or limits privileges to "medical assistants," who are defined under the Medical Staff bylaws as "individuals who are licensed or certified and who provide services within the scope of their license and certification as employees of physicians or dentists who are presently appointed to the medical staff." Under the bylaws of the Medical Staff, nurse-midwives would be considered as a category of "medical assistants." Accordingly, a nurse-midwife seeking to practice at Memorial Medical Center as an employee of a member of the Medical Staff must have such privileges approved by the Medical Staff's Credentials Committee.

PAR. 7. A nurse-midwife is a registered nurse who has received additional training in the care and management of normal pregnancies and deliveries. Under the laws of the State of Georgia, a nurse-

midwife who satisfies the State's educational and credentials requirements is authorized to practice in accordance with the standards defined by the American College of Nurse-Midwives. Georgia law requires that a nurse-midwife must practice in collaboration with a physician, but does not require that a physician be physically present while a nurse-midwife provides services, including services in connection with delivery.

PAR. 8. Because nurse-midwifery services can substitute for certain kinds of obstetrical services provided by physicians, the availability of nurse-midwifery services, whether provided by self-employed nurse-midwives or by those working as employees of physicians or others, can offer a greater range of choices for consumers and increase competition in the provision of obstetrical care. For example, a nurse-midwife working as an employee of a physician may allow the physician to concentrate on patients whose conditions require the care of a physician, and thereby increase the efficiency with which obstetrical services are provided and increase the availability of such services.

PAR. 9. Some members of the Medical Staff provide obstetrical services, and are actual or potential competitors of nurse-midwives and of physicians who affiliate with nurse-midwives.

PAR. 10. Nurse-midwives and physicians who provide obstetrical services usually consider it necessary to have privileges at a hospital convenient to their patients. A practitioner who does not have such privileges may be at a significant competitive disadvantage vis-a-vis those who do.

PAR. 11. Rebecca Almand is a registered nurse who is authorized under Georgia state law to practice as a nurse-midwife, and was employed by obstetricians who are members of the Medical Staff. In January 1983, Almand requested privileges at Memorial Medical Center, among other things, to perform spontaneous vaginal deliveries with a physician in attendance. Almand was the first nurse-midwife ever to apply for privileges at Memorial Medical Center. The Medical Staff's Department of Obstetrics and Gynecology recommended against Almand's request on the grounds that no nurse-midwife should be permitted to deliver babies at Memorial Medical Center and that there was "no shortage of obstetricians in the Savannah area." The Department of Obstetrics and Gynecology did not, however, offer any evidence that Almand was not qualified to provide the services for which she sought privileges. The Credentials Committee found that Almand had acceptable credentials and met all applicable criteria set forth in the Medical Staff's bylaws, and that there was no basis for denying Almand's request for privileges. Accordingly, in August 1983, the Credentials Committee voted unanimously to approve Almand's request for privileges.

PAR. 12. Within weeks after the Credentials Committee's decision to approve Almand's request for privileges, eleven of the nineteen physicians with active privileges in the Medical Staff's Department of Obstetrics and Gynecology petitioned the Credentials Committee, "protesting and opposing" the Committee's decision to approve privileges despite the fact that the Department of Obstetrics and Gynecology had "turned down" Almand's application, and objecting that not all Committee members had been present when the Committee decided to approve Almand's request for privileges. Members of the Credentials Committee also were told that some obstetricians had threatened to shift patient admissions from Memorial Medical Center to another hospital because of the Committee's decision to approve Almand's request for privileges. The Committee members decided to reconsider their approval of privileges for Almand.

PAR. 13. In September 1983 the Credentials Committee met to reconsider their approval of Almand's request for privileges. Two representatives of the Department of Obstetrics and Gynecology attended the meeting and presented the Department's objection to the granting of any delivery privileges to a nurse-midwife. The Department's representatives said, among other things, that granting nurse-midwives delivery privileges would create an "economic problem" for obstetricians and that there was "no need in the community" for such nurse-midwifery services. The Department's representatives offered no evidence that Almand was not competent to provide the delivery services for which she had been approved. During this meeting, one of the physicians representing the Department of Obstetrics and Gynecology threatened to shift his patient admissions from Memorial Medical Center to another hospital if Almand were granted delivery privileges. At the conclusion of the meeting, the Credentials Committee voted to reverse its earlier decision and to deny Almand's request for delivery privileges, manifesting a policy against granting delivery privileges under any terms to any nurse-midwife. Under the Medical Staff's bylaws, Almand had no right to appeal the Credentials Committee's adverse decision.

PAR. 14. In January 1984 Almand reapplied for delivery privileges with a physician in attendance. In May 1984, after receiving a recommendation from the Department of Obstetrics and Gynecology opposing such privileges, the Credentials Committee denied Almand's application.

PAR. 15. There was no reasonable justification for the actions of the Credentials Committee described in paragraphs thirteen and fourteen.

PAR. 16. In engaging in the acts and practices described above, respondent Medical Staff, acting through its Credentials Committee,

has acted as a combination of its physician members or in conspiracy with some of them.

PAR. 17. The purpose, effects, tendency or capacity of the acts and practices described in paragraphs eleven through sixteen is and has been to restrain trade unreasonably and hinder competition in the provision of health care services in the Savannah metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Consumers have been limited in their ability to choose among alternative types of health care providers competing on the basis of price and service;

B. Physicians have been restricted from offering the services of nurse-midwives to their patients; and

C. Nurse-midwives have been restrained from offering their services to patients and may be deterred from entering into practice in the Savannah metropolitan area.

PAR. 18. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Medical Staff of Memorial Medical Center is an unincorporated association, organized and existing under and by virtue of the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, in the City of Savannah, State of Georgia.

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

ORDER

I.

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

A. "*The hospital*" means Memorial Medical Center, Inc., its trustees, officers, representatives, agents, employees, successors and assigns.

B. "*Respondent*" means the respondent Medical Staff of Memorial Medical Center, its officers, committees, representatives, agents, employees, successors and assigns.

C. A "*nurse-midwife*" means a registered nurse who is authorized under Georgia state law to practice nurse-midwifery.

II.

It is further ordered, That respondent, directly or indirectly or through any device, in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Deciding or recommending to deny, limit or otherwise restrict hospital privileges for any nurse-midwife, without a reasonable basis for believing that the denial, limitation or restriction serves the interest of the hospital in providing for the efficient and competent delivery of health care services.

B. Refusing or threatening to refuse to deal with, or otherwise

coercing or attempting to coerce, the hospital or any other person or entity for the purpose or with the effect or likely effect of restricting the practice of nurse-midwifery or of any nurse-midwife.

III.

It is further ordered, That, for a period of five years from the date of service of this order, whenever a nurse-midwife applies for privileges at the hospital, within thirty (30) days after respondent takes any action with respect to such application, respondent shall provide the hospital's governing body with a written statement of respondent's action and its reasons therefor.

IV.

It is further ordered, That respondent shall act upon any reapplication for privileges within four months after receiving a complete application from any nurse-midwife who, since January 1, 1982, has formally or informally sought privileges at the hospital.

V.

It is further ordered, That:

A. Within thirty (30) days after the date of service of this order, respondent shall provide a copy of this order and of the complaint in this proceeding to each officer of respondent and to each member of respondent who was an officer or a member on the date of service of this order and, for a period of five (5) years after that date, provide a copy of such order and complaint to each person who applies or requests an application to become a member of respondent, at the time that each such person applies or requests an application;

B. Within ninety (90) days after the date of service of this order, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order; and

C. In addition to the report required by Section V(B), respondent shall file, one (1) year after the date of service of this order and at such other times as the Commission may by written notice require, a written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

VI.

It is further ordered, That respondent shall notify the Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to the effective date of any such proposed change.

Commissioner Bailey not participating.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.