

IN THE MATTER OF
EMPIRE STATE PHARMACEUTICAL SOCIETY, INC.

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

Docket 9238. Complaint, Mar. 15, 1990—Decision, Feb. 5, 1991

This consent order prohibits, among other things, a trade association from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *Jerome I. Sager*, *Empire State Pharmaceutical Society*, New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Empire State Pharmaceutical Society, Inc. ("Empire") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 12 West 23rd Street, New York, New York. Respondent Empire is an association of pharmacy owners in the State of New York. In 1986, respondent Empire was affiliated with the Long Island Pharmaceutical Society.

PAR. 2. Members of respondent Empire hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 3. Respondent's general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 4. Respondent Empire is and has been, at all times relevant to this complaint, a corporation organized 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. 5. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 6. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 7. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 8. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimburse-

ment for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, while offering reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 9. In 1986, members of respondent Empire held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 10. In March 1986, New York State informed respondent Empire of the proposed terms of the Employees Prescription Program and respondent Empire then communicated this information to its members. Thereafter, respondent Empire held a meeting at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent Empire exhorted pharmacy owners to refuse to participate in the proposed Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent Empire, pharmacy-owning members of respondent and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 11. Respondent Empire has restrained competition among pharmacy firms by acting as a combination of at least some of its members and others, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 12. The combination or conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 13. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Empire State Pharmaceutical Society with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Empire State Pharmaceutical Society 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 12 West 23rd Street, New York, New York.

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

ORDER

I.

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

A. "*Empire*" means the Empire State Pharmaceutical Society, Inc. and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliate", and "joint venture"

refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Empire, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms after 1) any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and Empire fails to eject such person from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Empire from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

Provided, that nothing in this order shall be construed to prevent Empire from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state

government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That Empire:

A. Publish this order and the accompanying complaint in an issue of the Empire newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the Empire Newsletter or successor publication;

B. For a period of five (5) years after the date this order becomes final, provide each new Empire member, at the time the member is accepted into membership, with a copy of the Empire newsletter in which this order, and the accompanying complaint was published as required by paragraph III.A.;

C. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Empire, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

D. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by Empire or that come into Empire's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

E. Notify the Commission at least thirty (30) days prior to any proposed change in Empire such as assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF
CAPITAL AREA PHARMACEUTICAL SOCIETY

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

Docket 9239. Complaint, Mar. 15, 1990—Decision, Feb. 7, 1991

This consent order prohibits, among other things, the trade association from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

For the Commission: *Karen G. Bokat and Michael D. McNeely.*

For the respondent: *Thomas Fitzpatrick, New York, N.Y. and Jonathan Harvey, Harvey, Harvey, & Mulford, Albany, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Capital Area Pharmaceutical Society and Alan Kadish have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capital Area Pharmaceutical Society ("CAPS") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at Pine West Plaza IV, Washington Avenue Ext., Albany, New York. CAPS is an association of pharmacists who practice or reside in the Albany area. CAPS is composed of the individual members of the following pharmaceutical societies: Albany

County Pharmaceutical Society, Schenectady County Pharmaceutical Society, Troy Area Pharmaceutical Society, and the Adirondack Pharmaceutical Society. In 1986, CAPS was affiliated with the Pharmaceutical Society of the State of New York, Inc. ("PSSNY").

PAR. 2. Respondent Alan Kadish ("Kadish") is an individual residing at 24 Quincy Court, Goldens Bridge, New York and the owner of Kadish Pharmacy, an independent pharmacy located at 670 N. Broadway, White Plains, New York. In 1986, Kadish served as president of PSSNY.

PAR. 3. Respondent Kadish and members of respondent CAPS hold ownership interests in pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and now are in competition with each other and with other pharmacy firms and other health care providers in the State of New York.

PAR. 4. Respondents' general businesses or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent CAPS is and has been, at all times relevant to this complaint, a corporation organized 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. 6. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program ("Employees Prescription Program") is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, the Equitable Life Assurance Society of the United States has issued the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 7. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employee Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 8. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 9. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 10. In 1986, members of respondent CAPS held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Such pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Employees Prescription Program at a time when they were not participating.

PAR. 11. New York State informed PSSNY and respondent Kadish in his capacity as president of PSSNY of the proposed terms of the Employees Prescription Program and PSSNY communicated this information to its affiliated societies, including respondent CAPS. Respondent CAPS held meetings at which owners of pharmacy firms informed other owners of pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondents communicated to pharmacists and pharmacy owners information regarding the intentions of pharmacy firms concerning participation in the Employees Prescription Program. Respondent Kadish exhorted pharmacy owners to refuse to participate in the proposed Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent CAPS and respondent Kadish, pharmacy-owning members of respondent CAPS, respondent Kadish and other owners of pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 12. Respondents have restrained competition among pharmacy firms by conspiring among themselves and with others, and respondent CAPS has restrained competition by acting as a combination of its members, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 13. The combination or conspiracies and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 14. The combination or conspiracies and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracies, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Capital Area Pharmaceutical Society with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

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

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Capital Area Pharmaceutical Society is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at Pine West Plaza IV, Washington Avenue Extension, Albany, New York.

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

ORDER

I.

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

A. "*CAPS*" means the Capital Area Pharmaceutical Society and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and any of the above which contract with the State of New York or other governmental units to provide

health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls, or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliates," and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That CAPS, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, organizing, sponsoring, or facilitating a meeting that CAPS expects or reasonably should expect will facilitate communications concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement, or from continuing a meeting of representatives of pharmacy firms at which: 1) CAPS fails to eject from the meeting a person who makes any such communication; or 2) two persons make any such communications;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit CAPS from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers; and

Provided, that nothing in this order shall be construed to prevent CAPS from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That CAPS:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within thirty (30) days after the date this order becomes final;

B. Publish this order and the accompanying complaint in an issue of the CAPS newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the CAPS Newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new CAPS member with a copy of this order at the time the member is accepted into membership;

D. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by

written notice to CAPS, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by CAPS or that come into CAP's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in CAPS such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF

ALAN KADISH

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9239. Complaint**, Mar. 15, 1990—*Decision*, Feb. 7, 1991

This consent order prohibits, among other things, the owner of an independent pharmacy from organizing or encouraging any agreement among pharmacy firms to refuse to enter into or to withdraw from any third-party prescription plan. The consent agreement, among other things, also prohibits the respondent, for a period of ten years, from continuing any meeting at which representatives of pharmacy firms exchange information concerning the firms' intention to enter into, refuse to enter into, or withdraw from any third-party prescription plan, and from communicating to any firm any information concerning any other pharmacy firm's intention to enter into, refuse to enter into, or to withdraw from any existing or proposed third-party prescription plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *Thomas Fitzpatrick*, New York, N.Y. and *Jonathan Harvey, Harvey, Harvey, & Mulford*, Albany, N.Y.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Alan Kadish with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

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

* Complaint previously published at 114 FTC 159 (1991).

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Kadish resides at 24 Quincy Court, Goldens Bridge, New York. His office and principal place of business are at Kadish Pharmacy, 670 North Broadway, White Plains, New York.

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

ORDER

I.

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

A. "*Mr. Kadish*" means Alan Kadish, his representatives, agents, and employees;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. “*Pharmacy firm*” means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions, and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership’s, sole proprietorship’s or corporation’s subsidiaries, affiliates, divisions and joint ventures. The words “subsidiary”, “affiliate”, and “joint venture” refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Mr. Kadish, directly, indirectly, or through any device, in or in connection with his activities in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing to attend, in the capacity of an officer or a director of any society or association of pharmacists or pharmacy firms, a formal or informal meeting of representatives of pharmacy firms not owned or controlled by Mr. Kadish or Mr. Kadish’s employer after 1) any person makes any statement concerning one or more firms’ intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and such person is not ejected from the meeting, or 2) two persons make such statements;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist not employed by Mr. Kadish or Mr. Kadish’s employer or any pharmacy firm not owned or controlled by Mr. Kadish or Mr. Kadish’s employer any information concerning any pharmacy firm’s intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter

into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist not employed by Mr. Kadish or Mr. Kadish's employer or to any pharmacy firm not owned or controlled by Mr. Kadish or Mr. Kadish's employer on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Mr. Kadish from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

Provided, that nothing in this order shall be construed to prevent Mr. Kadish from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That Mr. Kadish:

A. Shall file a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five years on the anniversary of the date this order was served, and at such other times as the Commission may, by written notice to Mr. Kadish, require, setting forth in detail the manner and form in which he has complied and is complying with the order;

B. For a period of five (5) years after the date of service of this order, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II of the order, including but not limited to, all documents generated by Mr. Kadish or that come into his possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

C. Notify the Commission within thirty (30) days of any change that may affect compliance with the order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF
MELVILLE CORPORATION

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

Docket 9227. Complaint, Apr. 19, 1989—Decision, Feb. 8, 1991

This consent order prohibits, among other things, the pharmacy chain from entering into any agreement with other pharmacy firms to withdraw from or to refuse to enter into any third-party payer prescription drug participation agreement. For ten years, the chain is also prohibited from communicating to another pharmacy firm the decision or intention to enter or to refuse to enter into such a participation agreement, and for eight years, from advising any pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen G. Bokat and Michael D. McNeely.*

For the respondent: *Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glowsky & Popeo, 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 Chain Pharmacy Association of New York State, Inc.; Melville Corporation; Fay's Drug Company, Inc.; Kinney Drugs, Inc.; Peterson Drug Company of North Chili, New York, Inc.; Rite Aid Corporation; and James E. Krahulec have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Chain Pharmacy Association of New York State, Inc. ("Chain Association") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 17 Elk Street, Albany, New York.

PAR. 2. Respondent Chain Association is an association composed of

the following individual member firms: Brooks Drug, Inc., 75 Sabin St., Pawtucket, RI; Carl's Drug Co., Success Drive, Box 203, Rome, NY; CVS, One CVS Drive, Woonsocket, RI; Duane Reade, 4929 Thirtieth Place, Long Island City, NY; Fay's Drug Co., 7245 Henry Clay Blvd., Liverpool, NY; Genovese Drug Stores, 80 Marcus Dr., Melville, NY; Kinney Drugs, Inc., 29 Main St., Gouverneur, NY; The Kroger Co., 1014 Vine St., Cincinnati, OH; Peterson Drug Co., 68 Main St., P.O. Box 166, Oakfield, NY; Revco D.S., Inc., 1925 Enterprise Parkway, Twinsburg, OH; Rite Aid Corp., P.O. Box 3165, Harrisburg, PA; Supermarkets General Corp., 301 Blair Rd., Woodbridge, NJ; Super X Drugs Corp., 1933 Victory Blvd., Staten Island, NY; Walgreen Co., 200 Wilmont Rd., Deerfield, IL. Chain Association's members are engaged in the business of the retail sale of prescription drugs.

PAR. 3. Respondent Fay's Drug Company, Inc. ("Fay's") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 7245 Henry Clay Boulevard, Liverpool, New York. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the 110 to 120 pharmacies that respondent Fay's operated in New York State.

PAR. 4. Respondent Kinney Drugs, Inc. ("Kinney") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 29 Main Street, Gouverneur, New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 23 pharmacies that respondent Kinney operates in New York State.

PAR. 5. Respondent Melville Corporation ("Melville") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 3000 Westchester Ave., Harrison, New York. CVS (a/k/a CVS Pharmacies or Consumer Value Stores), with principal offices located at One CVS Drive, Woonsocket, Rhode Island, is a division of Melville. In 1986, the retail sale of prescription drugs accounted for a significant portion of sales of the approximately 115 pharmacies that respondent Melville operated under the CVS name in New York State.

PAR. 6. Respondent Peterson Drug Company of North Chili, New York, Inc. ("Peterson") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 68 North Main Street, Oakfield,

New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 18 pharmacies that respondent Peterson operates in New York State.

PAR. 7. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the approximately 260 pharmacies that respondent Rite Aid operated in New York State.

PAR. 8. Respondent James E. Krahulec is an individual and was employed by respondent Rite Aid as Vice-President, Government and Trade Relations in 1986 in respondent Rite Aid's principal offices at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania.

PAR. 9. Except to the extent that competition has been restrained as alleged herein, members of respondent Chain Association have been and now are in competition among themselves and with other pharmacy firms and other health care providers in the state of New York.

PAR. 10. Respondents' general businesses or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 11. Respondent Chain Association is, and has been at all times relevant to this complaint, a corporation organized 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. 12. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 13. Pharmacies are solicited to participate in the Employees

Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 14. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 15. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 16. In 1986, respondents Melville, Fay's, Kinney, Peterson, and Rite Aid ("respondent pharmacy firms") participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Each respondent pharmacy firm purchased prescription drugs at a cost which on average was below the Employees Prescription Program's proposed level of reimbursement for ingredient costs. Each respondent pharmacy firm would have suffered a significant loss of customers had its competitors participated in the Employees Prescription Program at a time when it was not participating.

PAR. 17. Even before PAID formally solicited pharmacy participation in the Employees Prescription Program, New York State began to inform pharmacists' associations of the proposed terms. In or before March 1986, respondent Chain Association became aware of the proposed terms of the Employees Prescription Program, and, in response, communicated to members that the extent to which pharmacies participated in the Employees Prescription Program could affect state officials' consideration of the reimbursement level. Respondent Chain Association held meetings at which some respon-

dent pharmacy firms informed other pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent pharmacy firms communicated information regarding their own intentions concerning participation in the Employees Prescription Program to other pharmacy firms. Respondent Chain Association and respondent Krahulec communicated, to Chain Association members and other pharmacy firms, information regarding the intentions of Chain Association members and other pharmacy firms concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent Chain Association and respondent Krahulec, respondent pharmacy firms and other pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 18. Respondents have restrained competition among pharmacy firms by conspiring among themselves and others, or by acting as a combination, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 19. The combination of conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumer in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 20. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are

continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Machol voted in the negative.

STATEMENT OF COMMISSIONER MARGOT E. MACHOL

The case as presented to the Commission was a very complex one, both factually and legally. It alleged a conspiracy among the Chain Pharmacy Association, a number of drugstore chains operating in New York State, and an executive of one of the chains, to coerce the State into raising proposed prescription drug payments to pharmacies under its employee benefit program by threats of refusal to participate in that program.

Each of the pharmacies and pharmacy chains eligible to participate in the program, of course, was free to make its own decision on whether to agree to do so or to threaten to withhold participation. Liability, under the law we administer, would attach only to conspiracy or collusion in reaching such decisions.

Further, the *Noerr/Pennington* line of cases in the Supreme Court teaches us that even commercial enterprises may not be held accountable under the antitrust laws for conspiring or colluding to exercise their right to petition governments, a right protected under the First Amendment. Through this area of the law is itself complex, it is clear that many of the activities in which the parties engaged in this case were thus protected.

As to the activities alleged in this case which would not be protected by *Noerr*, the information we received clearly contained no "smoking gun" evidence of conspiracy. We could find the necessary "reason to believe" that a violation had occurred only on the basis of circumstantial evidence. But, in the *Matsushita/Monsanto* line of Supreme Court cases, we are taught that an inference of conspiracy must be supported by at least some significant evidence of activity which was logically consistent only with conspiracy. That is, if the activity of each member of an alleged conspiracy was wholly consistent with its pursuit of its unilateral self-interest, that inference must fail.

In my view, the inference in this case—on the information available to support issuance of a complaint—fails for that reason. I believe—again on this information—that it was in the independent interest of each chain pharmacy to threaten to refuse to participate in the program unless prices were raised, because, if the threat had failed to

achieve a price increase, the pharmacy could then have reversed itself and participated. The costs of such a strategy were very limited; the potential gains were very large.

It seems clear that the parties to the alleged conspiracy exchanged a good deal of information. It seems very doubtful that it can be established that they conspired with respect to their decisions to threaten non-participation, however, because they did not need to. Their conversations appear to me to have taken place in the context of protected lobbying activity; their actions seem to have been entirely consistent with their individual economic self-interest; and there simply was not sufficient evidence from which I could find reason to believe in the existence of an unlawful conspiracy.¹

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Melville Corporation with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, and Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Melville Corporation is a corporation organized,

¹ Should I have occasion to review this matter following a proceeding before an administrative law judge, I will of course reconsider the factual issues presented solely on the basis of the adjudicative record.

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 One Theall Road, in the City of Rye, State of New York.

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

ORDER

I.

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

A. "*Melville*" means Melville Corporation, its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common

control with Melville. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Melville, directly, indirectly, or through any corporate or other device, in or in connection with its pharmacy operations and activities, including but not limited to those of its CVS division, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any Pharmacy Firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any Participation Agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the intention or decision of Melville with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Melville and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Melville and the other pharmacy firm have entered, could enter or are considering entering.

Provided, that nothing in this order shall prevent Melville from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or otherwise jointly

undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer; or

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Melville:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Melville's behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Melville:

A. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Melville, require, setting forth in detail the manner and form in which it has complied and is complying with this order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Melville or that come into Melville's possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Melville relies in deciding whether to enter into any participation agreement in which Melville participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Melville such as, assignment or sale resulting in

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the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF

RITE AID CORPORATION

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

*Docket 9227. Complaint**, Apr. 19, 1989—*Decision*, Feb. 8, 1991

This consent order prohibits, among other things, the pharmacy chain from entering into any agreement with other pharmacy firms to withdraw from or refuse to enter into any third-party payer prescription drug participation agreement. For ten years, the chain is also prohibited from communicating to another pharmacy firm the decision or intention to enter or to refuse to enter into such a participation agreement, and for eight years, from advising any pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely*.

For the respondent: *William C. Pelster, Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent Rite Aid Corporation with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(e) of its Rules; and

* Complaint previously published at 114 FTC 171 (1991).

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Rite Aid Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Railroad Avenue and Trindle Road, Shiremanstown, Pennsylvania.

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

ORDER

I.

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

A. "*Rite Aid*" means Rite Aid Corporation, its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or

corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common control with Rite Aid. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Rite Aid, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any Pharmacy Firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any Participation Agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the intention or decision of Rite Aid with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Rite Aid and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Rite Aid and the other pharmacy firm have entered, could enter or are considering entering.

Provided that nothing in this order shall prevent Rite Aid from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or otherwise jointly undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer;

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Rite Aid:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Rite Aid's behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Rite Aid:

A. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Rite Aid, require, setting forth in detail the manner and form in which it has complied and is complying with this order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Rite Aid or that come into Rite Aid's possession, custody, or control

regardless of source, that embody, discuss or refer to the decision or upon which Rite Aid relies in deciding whether to enter into any participation agreement in which Rite Aid participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Rite Aid such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting and Commissioner Starek not participating.

IN THE MATTER OF
LEWIS GALOOB TOYS, INC.

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

Docket C-3324. Complaint, Feb. 27, 1991—Decision, Feb. 27, 1991

This consent order prohibits, among other things, a San Francisco, Ca., based toy company ("Galoob") from making deceptive advertising claims for toys. In addition, Galoob is prohibited from making misrepresentations, as to whether its toys must be purchased separately or the toys' assembly requirements, in the labelling, packaging, sale or distribution, as well as the advertising, of its toys.

Appearances

For the Commission: *Janet M. Evans* and *Joel C. Winston*.

For the respondent: *Felix Kent, Hall, Dickler, Lawler, Kent & Friedman*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lewis Galoob Toys, Inc., ("Galoob"), hereinafter sometimes referred to as "respondent" has violated 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. Galoob is a Delaware corporation with its principal office or place of business at 500 Forbes Boulevard, San Francisco, California.

PAR. 2. Galoob has advertised, offered for sale, sold, and distributed toys, including Micro Machines (miniature vehicles), Micro Machines playsets (such as Aircraft Carrier, Air Cargo, and Transport Chopper), Xpanders (such as the Xpanders Chopper/Assault Base), and Bouncin' Kids (dolls that move).

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

PAR. 4. Typical, but not necessarily all inclusive, of respondent's advertisements for Micro Machines, Micro Machines playsets, Xpanders, and Bouncin' Kids are set forth in Exhibits A through E attached

hereto; typical, but not necessarily all inclusive, of respondent's packaging for Micro Machines playsets are set forth in Exhibits F, G, and H attached hereto.

PAR. 5. Through the use of the statements and depictions in Exhibit E and others in advertisements and promotional materials not specifically set forth herein, respondent represented, directly or by implication, that the Bouncin' Kids Ballerina Kid stands on one foot and twirls by herself without human assistance.

PAR. 6. In truth and in fact, the Bouncin' Kids Ballerina Kid does not stand on one foot and twirl by herself without human assistance. Therefore, the representations set forth in paragraph five were false and misleading.

PAR. 7. Through the use of the statements and depictions in Exhibit D and others in advertisements and promotional materials not specifically set forth herein, respondent represented, directly or by implication, that the Xpanders Chopper/Assault Base shoots a missile at a high rate of speed and that the missile travels a considerable distance.

PAR. 8. In truth and in fact, the Xpanders Chopper/Assault Base does not shoot a missile at a high rate of speed and the missile does not travel a considerable distance. Therefore, the representations set forth in paragraph seven were false and misleading.

PAR. 9. Through the use of the statements and depictions in Exhibits A, B, C, F, G, and H, and others in advertisements and promotional material not specifically set forth herein, respondent represented, directly or by implication, that the Micro Machines playsets Transport Chopper, Aircraft Carrier, and Air Cargo as packaged and sold include some or all of the Micro Machines pictured in the advertisements and on the packages.

PAR. 10. In truth and in fact, the Micro Machines playsets Transport Chopper, Aircraft Carrier, and Air Cargo are packaged and sold without any of the Micro Machines pictured in the advertisements or on the packages. Therefore, the representations set forth in paragraph nine were false and misleading.

PAR. 11. In its advertisements and promotional materials for the Xpanders Chopper/Assault Base, including but not limited to Exhibit D, respondent represented through depictions that the toy is fully assembled and ready for use, but failed to disclose that significant assembly is required prior to use. This fact would be material to consumers in their purchase decisions. Respondent's failure to disclose

this fact, in light of the depictions in the advertisements and promotional materials, was a deceptive practice.

PAR. 12. Through the use of the statements and depictions in Exhibits A and D and others in advertisements and promotional materials not specifically set forth herein, respondent represented, directly or by implication, that the rotors of the Micro Machines playset Transport Chopper and the Xpanders Chopper/Assault Base turn and move by themselves without human assistance.

PAR. 13. In truth and in fact, the rotors of the Micro Machines playset Transport Chopper and the Xpanders Chopper/Assault Base do not turn and move by themselves without human assistance. Therefore, the representations set forth in paragraph twelve were false and misleading.

PAR. 14. The dissemination by respondent of the aforesaid false and misleading representations as alleged in this complaint constituted unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek not participating.

Complaint

114 F.T.C.

EXHIBIT A

**RADIO
TV REPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT	GALOOB MICRO MACHINES TRANSPORT CHOPPER	90-03494
PROGRAM	CHIP 'N DALES RESCUE RANGERS	3/23/90 15 SEC.
	WP1X-TV (NEW YORK)	4:55PM



1. (SFX-HELICOPTER) MAN:
Micro Machine Man here.
I'm so excited about the
Micro Machines' Transport
Chopper



2. that I'm going to land
that chopper in the palm
of my hand. Wow!



3. Like the simply amazing
Micro Machines' Transport
Chopper, with two totally
terrific decks,



4. opening and closing doors,
a fantastic pull down
ramp, and real rotating
motors.



5. Lands in your hand,
chopper man! The Micro
Machine Transport Chopper
from Galoob.



6. Remember if it doesn't
say Micro Machine, (SFX-
HELICOPTER) it's not
the real thing! (SFX OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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187

Complaint

EXHIBIT B

TSR

EXHIBIT B -

Towne, Silverstein, Rotter Inc., 101 Park Avenue, New York, N.Y. 10178, Tel. (212) 557-5570

Copy	client	GALOOB	product	MICRO MACHINES AIRCRAFT CARRIER
	media	TV	size	:15
	date	3/16/88	job no.	GAL-2039 XGLT-8405

AS PRODUCEDVIDEO

Long shot of J. Moschitta standing
in front of Aircraft Carrier.
SUPER: © 1988 Lewis Galoob Toys, Inc.

Aircraft Carrier becomes smaller and
is reduced to fit in his hand.

Shot of Aircraft Carrier w/airplanes
on it.
SUPER: Vehicles Sold Separately.

CU of Aircraft Carrier elevators
moving w/airplanes.

Shot of working hoist.

CU of Cargo arms.

Med. Shot of product showing moving
parts.
SUPER: Micro Machines
Galoob

CU of J. Moschitta.

AUDIO

The Micro Machine Man here...Aircraft
Carrier there! You can't have that...

but you can have this:
THE NEW MICRO MACHINE AIRCRAFT CARRIER
PLAYSET.
The dramatically detailed, terrifically
trimmed replica of the real thing,

that holds 25 Micro Machines.

With fabulous fantastic features:
Two totally terrific elevators...

real working hoist, runway

and two cargo arms.

THE NEW MICRO MACHINE AIRCRAFT CARRIER
PLAYSET. From Galoob.
Remember, if it doesn't say Micro
Machines,

it's not the real thing.

001083

Complaint

114 F.T.C.

EXHIBIT C



Exhibit C

Towne, Silverstein, Rotter Inc., 101 Park Avenue, New York, N.Y. 10178, Tel. (212) 557-5570

Copy	client	GALCOB	product	MICRO MACHINES
	media	TV	size	Cargo Plane Playset :15
	date	3/16/88	job no.	GAL-2039 XGLT-8425

AS PRODUCEDVIDEOAUDIO

Moschitta:

J. Moschitta standing in front of
Cargo Plane.
SUPER: © 1988 Lewis Galoob Toys, Inc.

I'm just the Micro Machine Man, but
this isn't just a plane!

Cargo Plane becomes smaller and is
reduced to fit in his hand.

It's the new, perfectly precise,
stupendously styled

CU of J.M. holding product.

Micro Machine Cargo Plane Playset...
that holds 15 Micro Machines, with
amazingly mini military features:

CU of product opening w/car coming
out.
SUPER: Vehicles Sold Separately.

open and close nose...
Real working ramps, elevator and
cargo door.

CU of J.M. flying product in front
of camera.

Better get it before it takes off!

Med. Shot of product opening.
SUPER: Micro Machines
Galoob

The New Micro Machine Mini Cargo
Plane Playset. From Galoob.

CU of J. Moschitta

it's not the real thing!

001062

187

Complaint

EXHIBIT D

Radio TV Reports41 East 42nd Street, New York, N.Y. 10017
(212) 309-1400PRODUCT: XPANDERS/GALOOB
PROGRAM: TEENAGE MUTANT NINJA
TURTLES
WPIX-TV89-12520
10/20/89 30 SEC.
(NEW YORK) 3:46PM1. (MUSIC/SFX) MEN SING:
Xpanders.

2. Expand at your command.



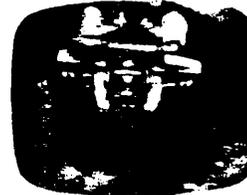
3. (SFX)

4. MAN: Company command? Time
to expand.5. ANNCR: The PT Assault Boat.
(SFX) Expands to an air team
tactic force with torpedos.

6. sky fighters,



7. troops and guns.

8. (SFX-HELICOPTER) The
Chopper. Expands9. into an assault base with
manpower, missile power,
land and air defense.

10. MAN: Ready to expand?



11. MEN SING: Xpanders.

12. ANNCR: Xpanders. Open
automatically to reveal you
hidden strike force. Sold
separately from Galoob.
(MUSIC & SFX OUT)**ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE**

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EXHIBIT E

Exhibit E

**RADIO
TV REPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT	GALOOB BOUNCIN' KIDS	90-03951
PROGRAM:	GHOSTBUSTERS	4/4/90
	WNYW-TV	(NEW YORK) 3:56PM



1. (MUSIC) GIRL SINGS: Can you pirouette so sweet



2. or swing up high right off your feet.



3. Bouncin' Kids can, Bouncin' Kids can.



4. So much fun to take a ride



5. and can you skate like this outside.



6. Bouncin' Kids can, Bouncin' Kids can.



7. ANNCR: Bouncin' Kids love taking their Bouncin' Ponies out for a ride.



8. They groom their hair, hook up their wagons, and hop on inside.



9. GIRLS: Giddy up, now!



10. GIRLS SING: Riding Ponies in the sun, can you imagine so much fun?



11. Bouncin' Kids can!



12. From Galoob. (MUSIC OUT)

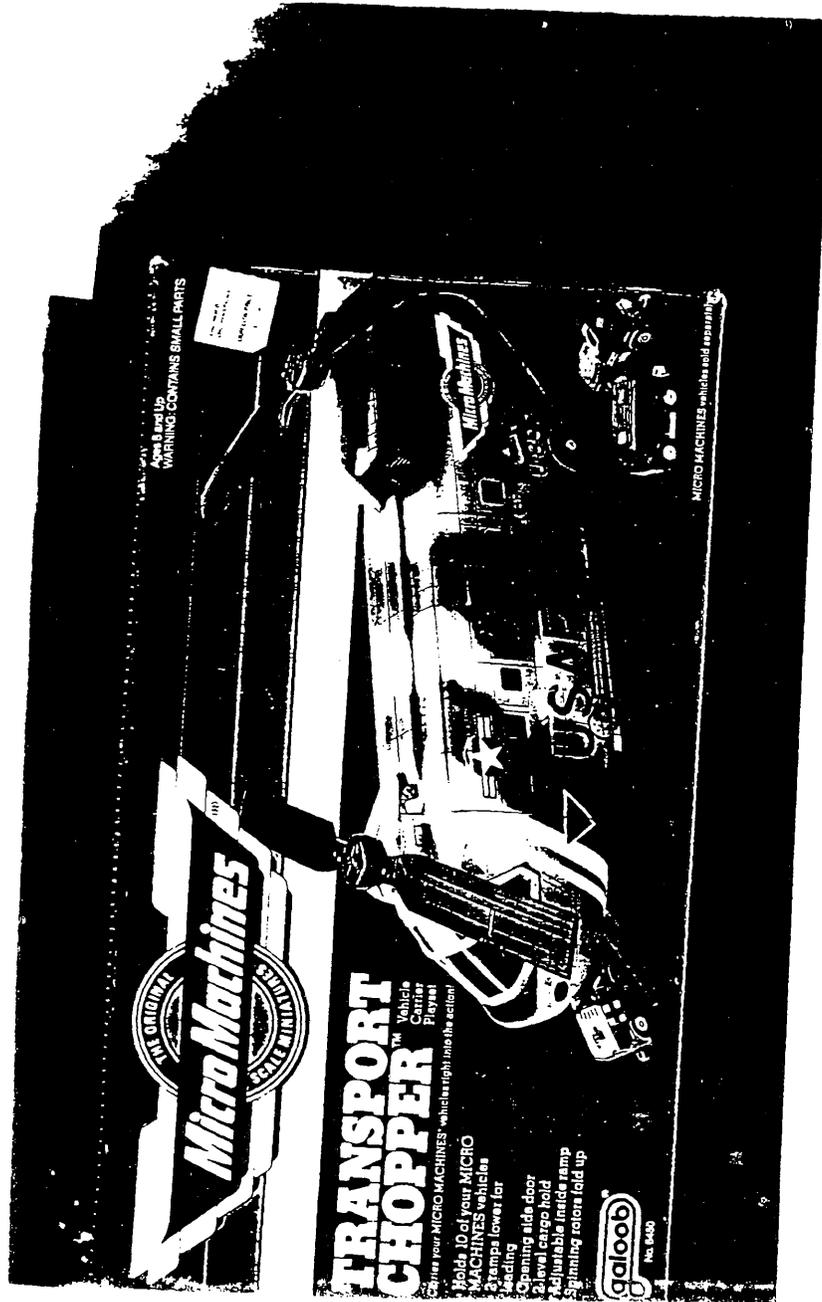
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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Complaint

EXHIBIT F

Exhibit F





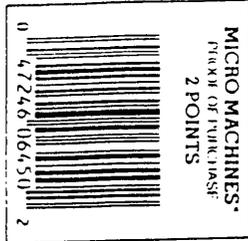
TRANSPORT CHOPPER

Micro Machines
White
Center
Flyer

Carve your MICRO MACHINES® vehicle right into the action!



1989 Lewis Galooob Toys, Inc. All Rights Reserved. Made in Malacca for Lewis Galooob Toys, Inc., South San Francisco, CA 94080. Product specifications subject to change. MICRO MACHINES® is a registered trademark of Lewis Galooob Toys, Inc.



- Deluxe Editions
 - 1) Action I
 - 2) Action II
 - 3) Action III
 - 4) Action IV
 - 5) Action V
 - 6) Action VI
 - 7) Action VII
 - 8) Action VIII
 - 9) Action IX
 - 10) Action X
 - 11) Action XI
 - 12) Action XII
- New Seam Trucks
 - 1) New Seam Truck
 - 2) New Seam Truck
 - 3) New Seam Truck
 - 4) New Seam Truck
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 - 12) New Seam Truck
- Collectors #4
 - 1) Collectors #4
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 - 3) Collectors #4
 - 4) Collectors #4
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 - 6) Collectors #4
 - 7) Collectors #4
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 - 9) Collectors #4
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 - 11) Collectors #4
 - 12) Collectors #4
- Ultimate™ - The Fastest
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 - 8) Ultimate™ - The Fastest
 - 9) Ultimate™ - The Fastest
 - 10) Ultimate™ - The Fastest
 - 11) Ultimate™ - The Fastest
 - 12) Ultimate™ - The Fastest
- 2) Hand, Heavy Edition
 - 1) Hand, Heavy Edition
 - 2) Hand, Heavy Edition
 - 3) Hand, Heavy Edition
 - 4) Hand, Heavy Edition
 - 5) Hand, Heavy Edition
 - 6) Hand, Heavy Edition
 - 7) Hand, Heavy Edition
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 - 10) Hand, Heavy Edition
 - 11) Hand, Heavy Edition
 - 12) Hand, Heavy Edition
- 2) D. Knight Edition
 - 1) D. Knight Edition
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 - 12) D. Knight Edition

- 2) M. Super 414 W. Edition
 - 1) M. Super 414 W. Edition
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 - 8) M. Super 414 W. Edition
 - 9) M. Super 414 W. Edition
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 - 11) M. Super 414 W. Edition
 - 12) M. Super 414 W. Edition



TRANSPORT CHOPPER™

Carries your MICRO MACHINES® vehicles right into the action!

AUTHENTICALLY DETAILED—COLLECT 'EM ALL!



Not for use with some MICRO MACHINES vehicles



No. 6450

Vehicles, collections and playsets each sold separately. Some vehicles not for use with some sets.

Vehicle Carriers Playset



CAR WASH CITY™



CITY AIR CARGO™ Action Playset



SERVICE CITY™



BIG RIG HALLS™ Action Playset



SUPER CAR ACTION™ Playset



MIGHTY CARRIER™ Action Playset

MicroMachines

TRANSPORT CHOPPERTM Vehicle Carrier Playset

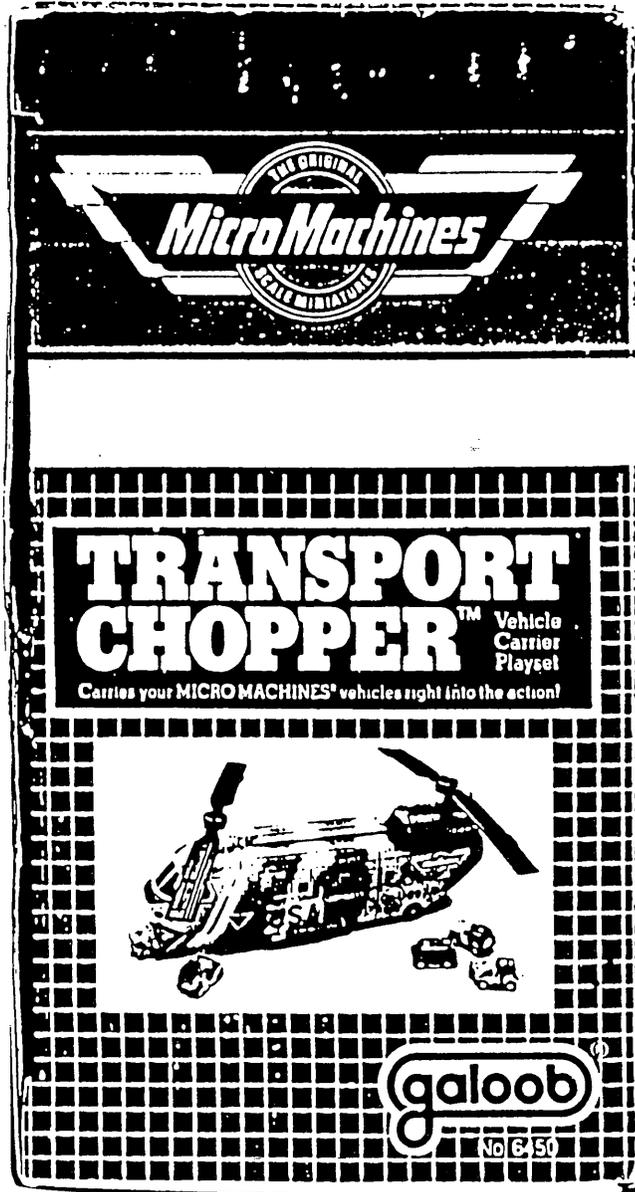
Carries your MICRO MACHINES[®] vehicles right into the action!

Front loading ramp lowers.

Side opens! 2 cargo levels inside.

Rear loading ramp lowers.

galoob[®]
NO. 157



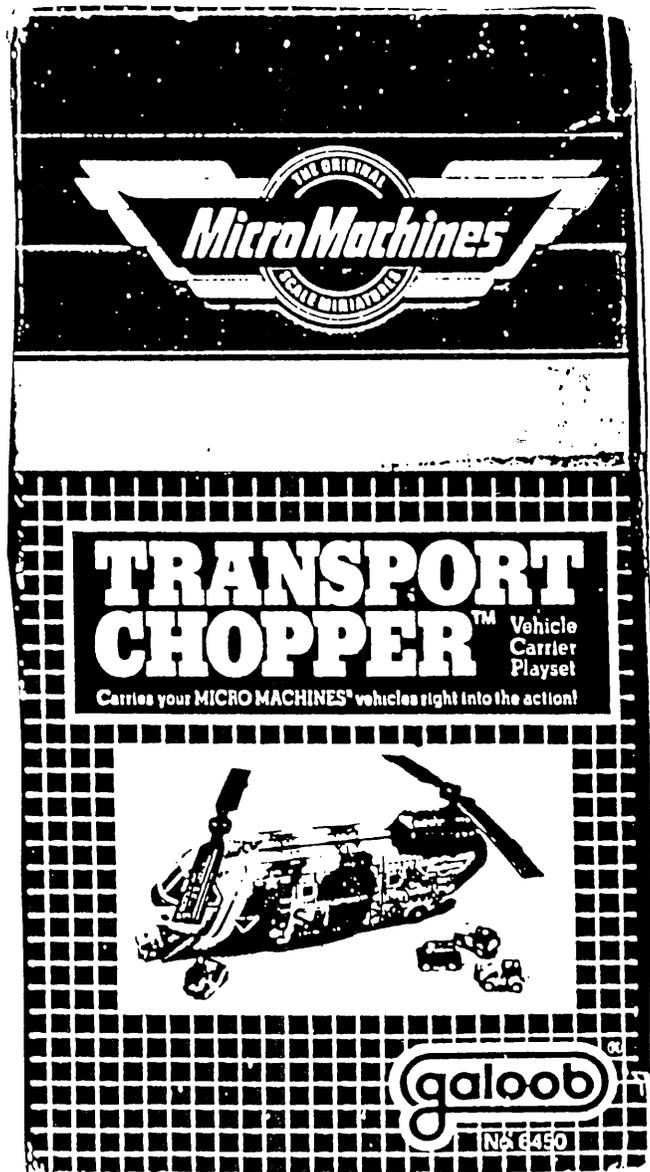


EXHIBIT G



Complaint

#1 MOBI COLLECTION
 51 CORDON
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#17 CITY SERVICE COLLECTION
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#18 MARSHALL COLLECTION
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#19 BALLY RACERS COLLECTION
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#20 CONVERTIBLE COLLECTION
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#21 HOT BARRIS COLLECTION
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#22 CLASSIC CONVERTIBLES COLLECTION
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galloob
PLAYSETS

Micro Machines
THE ORIGINAL
SCALE MODEL
ACTION FIGURES

C-7 AIR CARGOTM Action Playset
Cargo-loading air transport for your MICRO MACHINES[®] vehicles!

Lift-up door with loading ramp

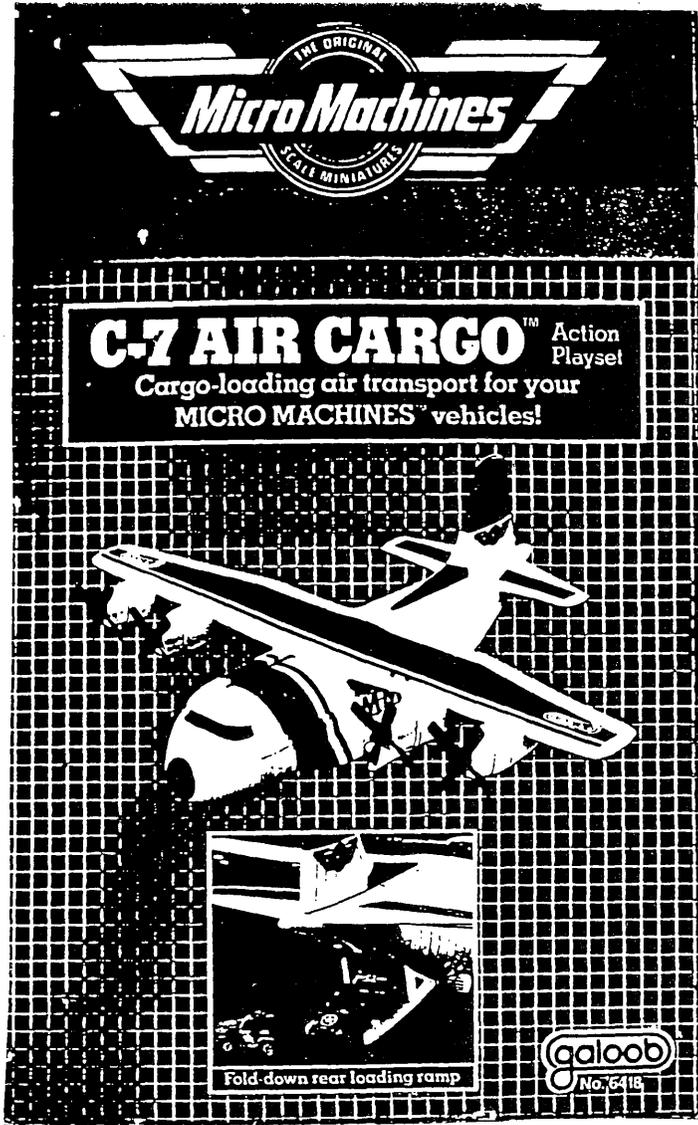
Spinning propellers

Lift-up rear cargo hatches

Retractable landing gear







THE ORIGINAL
Micro Machines
SCALE MINIATURES

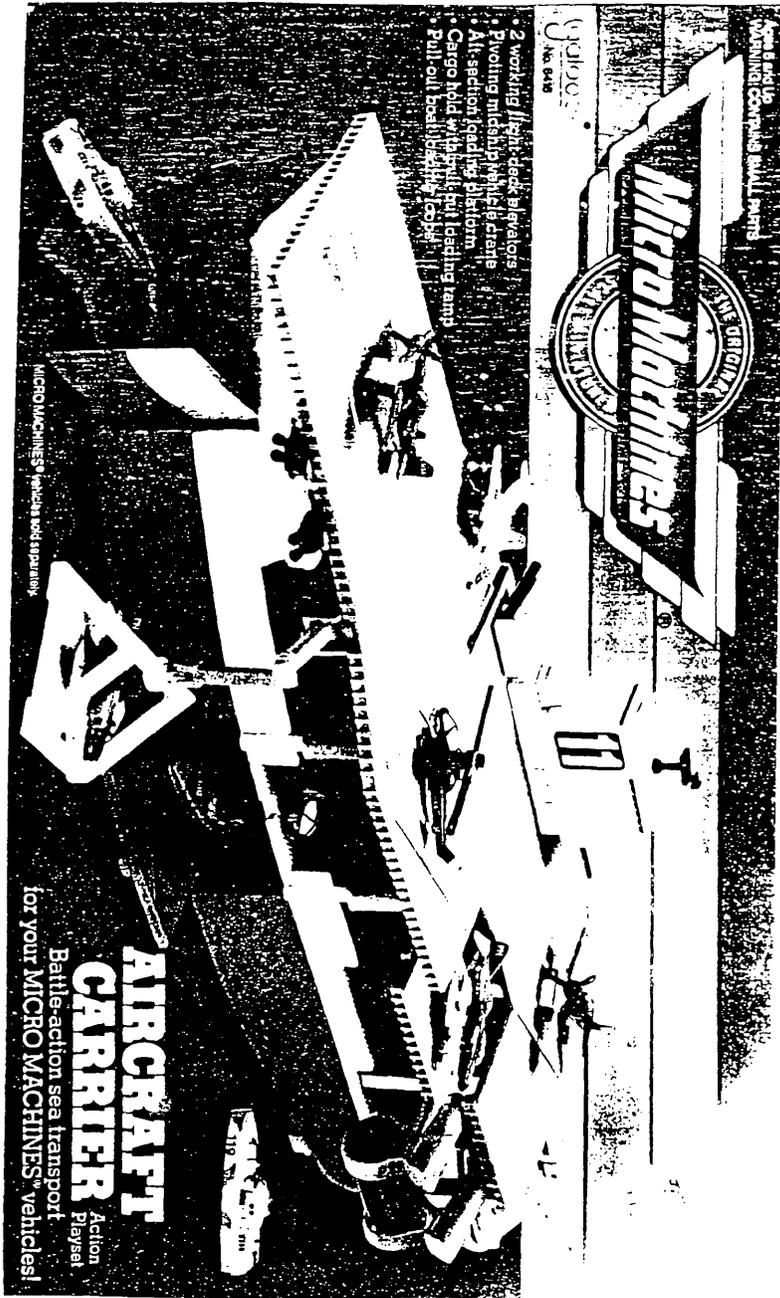
C-7 AIR CARGO™ Action Playset
Cargo-loading air transport for your
MICRO MACHINES® vehicles!

galoob
No. 6418

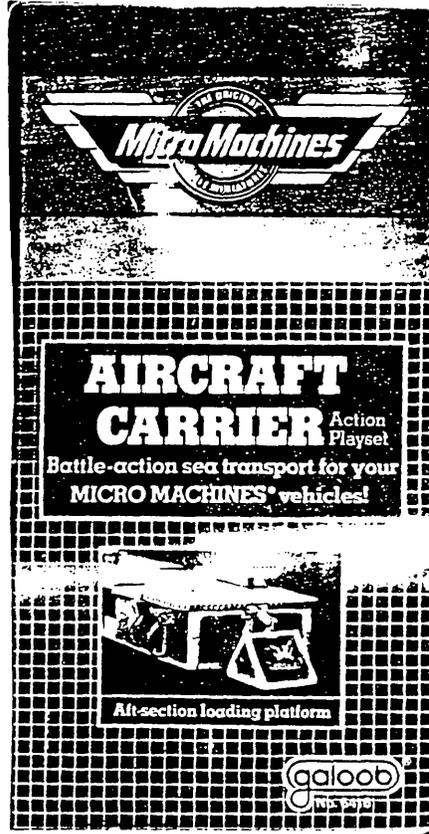
Fold-down rear loading ramp

The advertisement features a central illustration of a C-7 military transport aircraft with its rear cargo door open and a ramp extended. A small inset image shows a Micro Machines vehicle on the ramp. The background is a grid pattern. The top of the ad has a stylized logo for 'Micro Machines' with 'THE ORIGINAL' and 'SCALE MINIATURES' written around it. The bottom right corner contains the 'galoob' logo and the product number 'No. 6418'. A small text box at the bottom center of the illustration reads 'Fold-down rear loading ramp'.

EXHIBIT H







DECISION AND ORDER

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

The respondent, its 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 Lewis Galoob Toys, 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 500 Forbes Boulevard, San Francisco, California.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order the required disclosure shall conform to the following requirements: (a) in television advertisements, a legible superscript in a manner to ensure clarity and prominence with a simultaneous voice-over recitation; except that any advertisement

which, in view of its content and placement, is directed to adults need not contain a simultaneous voice-over recitation; (b) in printed advertisements and promotional materials, a disclosure printed in a typeface and color that are clear and prominent; (c) in radio advertisements, a statement included in a manner to ensure clarity and prominence. Any disclosure required by this order shall be in language understandable to children unless, in view of its content and placement, the advertisement is directed to adults. For purposes of this order adults are defined as individuals age thirteen (13) and older.

I.

It is ordered, That respondent Lewis Galoob Toys, 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, labelling, packaging, offering for sale, or distribution of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from depicting or describing in any advertisement or other promotional material two or more non-identical toys that are not available for purchase together as a set, unless respondent clearly and prominently discloses that the toys must be purchased separately.

II.

It is further ordered, That respondent Lewis Galoob Toys, 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, labelling, packaging, offering for sale, or distribution of any toy that requires significant assembly prior to use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from depicting or otherwise representing such toy as fully assembled unless respondent clearly and prominently discloses on the packaging that the toy must be assembled before it is ready for use.

III.

It is further ordered, That respondent Lewis Galoob Toys, 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, labelling, packaging, offering for sale, sale or distribution of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or indirectly, that any such product can move by itself without human assistance, or any other movement capability, or the need for assembly; *provided, however*, that nothing in this order shall be deemed to preclude the use of stop-action photography in television commercials so long as the advertisement as a whole represents the toy in a non-deceptive manner, such as but not limited to, by means of a clear and prominent depiction of hands-on play showing the method of operation of the toy.

IV.

It is further ordered, That respondent Lewis Galoob Toys, Inc., and its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating any representation covered by this order;

B. All film footage used in connection with any advertisement that contains any representation covered by this order; and

C. Any toy as well as the packaging for any toy involved in any representation covered by this order.

V.

It is further ordered, That respondent Lewis Galoob Toys, Inc., shall distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VI.

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

VII.

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

Commissioner Starek not participating.

IN THE MATTER OF
TOWNE, SILVERSTEIN, ROTTER, INC.

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

Docket C-3325. Complaint, Feb. 27, 1991—Decision, Feb. 27, 1991

This consent order prohibits, among other things, a New York City based advertiser from making deceptive advertising claims for toys.

Appearances

For the Commission: *Janet M. Evans* and *Joel C. Winston*.

For the respondent: *Felix Kent, Hall, Dickler, Lawler, Kent & Friedman*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Towne, Silverstein, Rotter, Inc., ("TSR") hereinafter sometimes referred to as "respondent" has violated 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. TSR is a New York corporation with its principal office or place of business at 411 Lafayette Street, New York, New York.

PAR. 2. TSR is now, and for some time past has been the advertising agency of Lewis Galoob Toys, Inc. ("Galoob"). TSR has prepared and placed for publication, advertising material to promote the sale of Galoob toys, including Micro Machines (miniature vehicles), Micro Machines playsets (such as Transport Chopper, Aircraft Carrier and Air Cargo), Xpanders (such as the Xpanders Chopper/Assault Base), and Bouncin' Kids (dolls that move).

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

PAR. 4. Typical, but not necessarily all inclusive, of respondent's advertisements for Micro Machines, Micro Machines playsets, Xpan-

ders, and Bouncin' Kids are set forth in Exhibits A through E attached hereto.

PAR. 5. Through the use of the statements and depictions in Exhibit E and others in advertisements not specifically set forth herein, respondent represented, directly or by implication, that the Bouncin' Kids Ballerina Kid stands on one foot and twirls by herself without human assistance.

PAR. 6. In truth and in fact, the Bouncin' Kids Ballerina Kid does not stand on one foot and twirl by herself without human assistance. Therefore, the representations set forth in paragraph five were false and misleading.

PAR. 7. Through the use of the statements and depictions in Exhibit D and others in advertisements not specifically set forth herein, respondent represented, directly or by implication, that the Xpanders Chopper/Assault Base shoots a missile at a high rate of speed and that the missile travels a considerable distance.

PAR. 8. In truth and in fact, the Xpanders Chopper/Assault Base does not shoot a missile at a high rate of speed and the missile does not travel a considerable distance. Therefore, the representations set forth in paragraph seven were false and misleading.

PAR. 9. Through the use of the statements and depictions in Exhibits A, B, and C, and others in advertisements not specifically set forth herein, respondent represented, directly or by implication, that the Micro Machines playsets Transport Chopper, Aircraft Carrier, and Air Cargo as packaged and sold include some or all of the Micro Machines pictured in the advertisements.

PAR. 10. In truth and in fact, the Micro Machines playsets Transport Chopper, Aircraft Carrier, and Air Cargo are packaged and sold without any of the Micro Machines pictured in the advertisements or on the packages. Therefore, the representations set forth in paragraph nine were false and misleading.

PAR. 11. In its advertisements for the Xpanders Chopper/Assault Base, including but not limited to Exhibit D, respondent represented through depictions that the toy is fully assembled and ready for use, but failed to disclose that significant assembly is required prior to use. This fact would be material to consumers in their purchase decisions. Respondent's failure to disclose this fact, in light of the depictions in the advertisements and promotional materials, was a deceptive practice.

PAR. 12. Through the use of the statements and depictions in

Exhibits A and D and others in advertisements not specifically set forth herein, respondent represented, directly or by implication, that the rotors of the Micro Machines playset Transport Chopper and the Xpanders Chopper/Assault Base turn and move by themselves without human assistance.

PAR. 13. In truth and in fact, the rotors of the Micro Machines playset Transport Chopper and the Xpanders Chopper/Assault Base do not turn and move by themselves without human assistance. Therefore, the representations set forth in paragraph twelve were false and misleading.

PAR. 14. The dissemination by respondent of the aforesaid false and misleading representations as alleged in this complaint constituted unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek not participating.

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Complaint

EXHIBIT A

Exhibit A

**RADIO
TV REPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT:	GALOOB MICRO MACHINES TRANSPORT CHOPPER	90-03494
PROGRAM:	CHIP 'N DALES RESCUE RANGERS	3/23/90 15 SEC.
	WPXI-TV	(NEW YORK) 4:55PM



1. (SFX-HELICOPTER) MAN: Micro Machine Man here. I'm so excited about the Micro Machines' Transport Chopper



2. that I'm going to land that chopper in the palm of my hand. Wow!



3. Like the simply amazing Micro Machines' Transport Chopper, with two totally terrific decks,



4. opening and closing doors, a fantastic pull down ramp, and real rotating motors.



5. Lands in your hand, chopper man! The Micro Machine Transport Chopper from Galoob.



6. Remember if it doesn't say Micro Machine, (SFX-HELICOPTER) it's not the real thing! (SFX OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

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Complaint

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EXHIBIT B



EXHIBIT B -

Towne, Silverstein, Rotter Inc., 101 Park Avenue, New York, N.Y. 10178, Tel. (212) 557-5570

Copy	client	GALCOB	product	MICRO MACHINES AIRCRAFT CARRIER
	media	TV	size	:15
	date	3/16/88	job no.	GAL-2039 XGLT-8405

AS PRODUCEDVIDEO

Long shot of J. Moschitta standing
in front of Aircraft Carrier.
SUPER: © 1988 Lewis Galoob Toys, Inc.

Aircraft Carrier becomes smaller and
is reduced to fit in his hand.

Shot of Aircraft Carrier w/airplanes
on it.
SUPER: Vehicles Sold Separately.

CU of Aircraft Carrier elevators
moving w/airplanes.

Shot of working hoist.

CU of Cargo arms.

Med. Shot of product showing moving
parts.
SUPER: Micro Machines
Galoob

CU of J. Moschitta.

AUDIO

The Micro Machine Man here...Aircraft
Carrier there! You can't have that..

but you can have this:
THE NEW MICRO MACHINE AIRCRAFT CARRIER
PLAYSET.
The dramatically detailed, terrifical
trimmed replica of the real thing,

that holds 25 Micro Machines.

With fabulous fantastic features:
Two totally terrific elevators...

real working hoist, runway

and two cargo arms.

THE NEW MICRO MACHINE AIRCRAFT CARRIER
PLAYSET. From Galoob.
Remember, if it doesn't say Micro
Machines,

it's not the real thing.

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Complaint

EXHIBIT C

TSR

Exhibit C

Towne, Silverstein, Rotter Inc., 101 Park Avenue, New York, N.Y. 10178, Tel. (212) 557-5570

Copy

client GALCOB

product MICRO MACHINES

media TV

size Cargo Plane Playset
:15

date 3/16/88

job no. GAL-2039

XGLT-8425

AS PRODUCEDVIDEOAUDIO

Moschitta:

J. Moschitta standing in front of
Cargo Plane.
SUPER: © 1988 Lewis Galoob Toys, Inc.

I'm just the Micro Machine Man, but
this isn't just a plane!

Cargo Plane becomes smaller and is
reduced to fit in his hand.

It's the new, perfectly precise,
stupendously styled

CU of J.M. holding product.

Micro Machine Cargo Plane Playset...
that holds 15 Micro Machines, with
amazingly mini military features:

CU of product opening w/car coming
out.
SUPER: Vehicles Sold Separately.

open and close nose...
Real working ramps, elevator and
cargo door.

CU of J.M. flying product in front
of camera.

Better get it before it takes off!

Med. Shot of product opening.
SUPER: Micro Machines
Galoob

The New Micro Machine Mini Cargo
Plane Playset. From Galoob.

CU of J. Moschitta

it's not the real thing!

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Complaint

114 F.T.C.

EXHIBIT D

Radio TV Reports41 East 42nd Street, New York, N.Y. 10017
(212) 309-1400PRODUCT: XPANDERS/GALOOB
PROGRAM: TEENAGE MUTANT NINJA
TURTLES
WPIX-TVEXHIBIT D
89-12520
10/20/89 30 SEC.
(NEW YORK) 3:46PM
Exhibit D1. (MUSIC/SFX) MEN SING:
Xpanders.

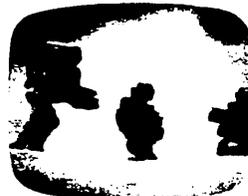
2. Expand at your command.



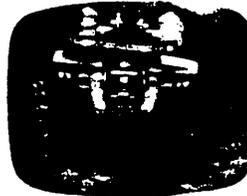
3. (SFX)

4. MAN: Company command? Time
to expand.5. ANNCR: The PT Assault Boat.
(SFX) Expands to an air team
tactic force with torpedos,

6. sky fighters,



7. troops and guns.

8. (SFX-HELICOPTER) The
Chopper. Expands9. into an assault base with
manpower, missile power,
land and air defense.

10. MAN: Ready to expand?



11. MEN SING: Xpanders.

12. ANNCR: Xpanders. Open
automatically to reveal your
hidden strike force. Sold
separately from Galoob.
(MUSIC & SFX OUT)**ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE**

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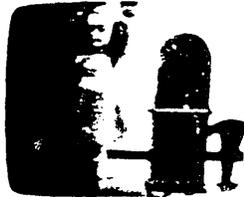
EXHIBIT E

Exhibit E

**RADIO
TV REPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT:	GALOOB BOUNCIN' KIDS	90-03951
PROGRAM:	GHOSTBUSTERS	4/4/90
	WNYW-TV	(NEW YORK) 3:56PM



1. (MUSIC) GIRL SINGS: Can you pirouette so sweet



2. or swing up high right off your feet.



3. Bouncin' Kids can, Bouncin' Kids can.



4. So much fun to take a ride



5. and can you skate like this outside.



6. Bouncin' Kids can, Bouncin' Kids can.



7. ANNCR: Bouncin' Kids love taking their Bouncin' Ponies out for a ride.



8. They groom their hair, hook up their wagons, and hop on inside.



9. GIRLS: Giddy up, now!



10. GIRLS SING: Riding Ponies in the sun, can you imagine so much fun?



11. Bouncin' Kids can!



12. From Galoob. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio-TV Reports endeavors to assure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions. Material supplied by Radio-TV Reports may be used for file and reference purposes only. It may not be reproduced, sold or publicly demonstrated or exhibited.

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 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 Commissions' 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 Towne, Silverstein, Rotter, 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 411 Lafayette Street, New York, New York.

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

ORDER

For purposes of this order the required disclosures shall conform to the following requirements: (a) in television advertisements, a legible superscript in a manner to ensure clarity and prominence with a simultaneous voice-over recitation; except that any advertisement

which, in view of its content and placement, is directed to adults need not contain a simultaneous voice-over recitation; (b) in printed advertisements and promotional materials, a disclosure printed in a typeface and color that are clear and prominent; (c) in radio advertisements, a statement included in a manner to ensure clarity and prominence. Any disclosure required by this order shall be in language understandable to children unless, in view of its content and placement, the advertisement is directed to adults. For purposes of this order adults are defined as individuals age thirteen (13) and older.

I.

It is ordered, That respondent Towne, Silverstein, Rotter, 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 of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from depicting or describing two or more non-identical toys that are not available for purchase together as a set, unless respondent clearly and prominently discloses that the toys must be purchased separately.

II.

It is further ordered, That respondent Towne, Silverstein, Rotter, 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 of any toy manufactured or sold in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act by Lewis Galoob Toys, Inc., or its successors or assigns, that requires significant assembly prior to use, do forthwith cease and desist from depicting or otherwise representing such toy as fully assembled unless respondent has a reasonable basis to believe that there is a clear and prominent disclosure on the packaging that the toy must be assembled before it is ready for use.

III.

It is further ordered, That respondent Towne, Silverstein, Rotter, Inc., a corporation, its successors and assigns, and their officers,

agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or indirectly, that any such product moves by itself without human assistance or any other movement capability; *provided, however*, that nothing in this order shall be deemed to preclude the use of stop-action photography in television advertisements so long as the advertisement as a whole represents the toy in a non-deceptive manner, such as, but not limited to, by means of a clear and prominent depiction of hands-on play showing the method of operation of the toy.

IV.

It is further ordered, That respondent Towne, Silverstein, Rotter, Inc., and its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating any representation covered by this order;

B. All film footage used in connection with any advertisement that contains any representation covered by this order; and

C. Any toy as well as the packaging for any toy involved in any representation covered by this order.

V.

It is further ordered, That respondent Towne, Silverstein, Rotter, Inc., shall distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VI.

It is further ordered, That respondent Towne, Silverstein, Rotter,

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

VII.

It is further ordered, That respondent Towne, Silverstein, Rotter, Inc., shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the requirements of this order. Commissioner Starek not participating.

Complaint

114 F.T.C.

IN THE MATTER OF

RICHARD CREW

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

Docket C-3326. Complaint, Mar. 4, 1991—Decision, Mar. 4, 1991

This consent order prohibits, among other things, the advertiser and distributor of the Diet Patch from making unsubstantiated efficacy claims for any product or service and from misrepresenting that a paid advertisement is an independent program. In addition, the order prohibits the respondent from disseminating or broadcasting "The Michael Reagan Show."

Appearances

For the Commission: *Tracy S. Thorleifson.*

For the respondent: *Pro se.*

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 Richard Crew, an individual, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Richard Crew is an individual residing at 7968 Via Costa, Scottsdale, Arizona. Individually or in concert with others, he advertised, marketed and sold a weight-loss product, the "EuroTrym Diet Patch," primarily by means of a 30-minute television advertisement made to simulate a regular television talk show.

PAR. 2. Respondent engaged in the advertising, offering for sale, sale and distribution of a food, drug, device, or cosmetic, the EuroTrym Diet Patch, a product found in commerce. The EuroTrym Diet Patch comes within the classification of "drug," as that term is defined in Section 15(c) of the FTC Act, 15 U.S.C. 55(c).

PAR. 3. The acts and practices of respondent alleged in this

complaint have been or are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

PAR. 4. Since at least 1988, individually or in concert with others, respondent promoted the sale of and sold numerous packages of the EuroTrym Diet Patch to consumers in various areas of the United States. A one-month supply of the EuroTrym Diet Patch sold for \$49.95, plus shipping and handling costs of \$4.00. Sales of the EuroTrym Diet Patch totalled approximately \$4,833,000. To promote the sale of the EuroTrym Diet Patch, respondent appeared in a 30-minute television commercial identified as "The Michael Reagan Show," which was broadcast on network, independent and cable television stations throughout the United States.

PAR. 5. By and through the "Michael Reagan Show" and other statements and depictions, respondent represented, directly or by implication, that:

- (a) Use of the EuroTrym Diet Patch prevents feelings of hunger.
- (b) Use of the EuroTrym Diet Patch enables users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch enables users to lose weight in a large majority of cases.
- (d) Competent and reliable tests or studies establish that the EuroTrym Diet Patch promotes weight loss.

PAR. 6. In truth and in fact:

- (a) Use of the EuroTrym Diet Patch does not prevent feelings of hunger.
- (b) Use of the EuroTrym Diet Patch does not enable users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch does not enable users to lose weight in a large majority of cases.
- (d) No competent and reliable test or study establishes that the EuroTrym Diet Patch promotes weight loss.

Therefore, each of the representations set forth in paragraph 5 was and is false, misleading or deceptive.

PAR. 7. Through the use of the statements and representations set forth in paragraph 5 and others not specifically set forth herein, respondent represented, directly or by implication, that he possessed and relied upon a reasonable basis for each of the representations set forth in paragraph 5 at the time such representations were made.

PAR. 8. In truth and in fact, respondent did not possess and rely

upon a reasonable basis for making each of the representations set forth in paragraph 5 at the time such representations were made. Therefore, the representation set forth in paragraph 7 was and is false, misleading or deceptive.

PAR. 9. By and through "The Michael Reagan Show," respondent represented, directly or by implication, that "The Michael Reagan Show" was an independent consumer program that discusses a variety of topics, including products like the EuroTrym Diet Patch.

PAR. 10. In truth and in fact, "The Michael Reagan Show" was not an independent consumer program or anything other than paid commercial advertising. Therefore, the representation set forth in paragraph 9 was and is false, misleading or deceptive.

PAR. 11. By and through "The Michael Reagan Show" and other statements and depictions, respondent, in numerous instances, represented, directly or by implication, that endorsements appearing in advertisements for the EuroTrym Diet Patch:

- (a) Reflect the honest opinions, findings, beliefs, or experience of the endorser;
- (b) Reflect the typical or ordinary experiences of members of the public who have used these products; and
- (c) Were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities marketing the product.

PAR. 12. In truth and in fact, in numerous instances, the endorsements appearing in advertisements for the EuroTrym Diet Patch:

- (a) Do not reflect the honest opinions, findings, beliefs, or experience of the endorser;
- (b) Do not reflect the typical or ordinary experience of members of the public who have used these products; and
- (c) Were obtained from individuals or other entities who, at the time of providing their endorsements, were not independent from all of the individuals and entities marketing the product.

Therefore, each of the representations set forth in paragraph 11 was and is false, misleading and deceptive.

PAR. 13. Respondent's dissemination of the false and misleading representations as alleged in this complaint constitutes unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act.

PAR. 14. Respondent's unfair or deceptive acts or practices as alleged in this complaint have caused substantial injury to consumers. Commissioner Starek not participating.

DECISION AND ORDER

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

The respondent 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. Richard Crew resides at 7968 Via Costa, Scottsdale, Arizona.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, an individual, and respondent's

agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

II.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product or service prevents feelings of hunger;
- (2) Use of such product or service enables users to lose substantial amounts of weight;
- (3) Use of such product or service enables users to lose weight in a large majority of cases; or
- (4) Any competent and reliable test or study establishes that such product or service promotes weight loss.

For purposes of this Part II a "substantially similar weight control or weight reduction product" shall be defined as any product that is advertised to cause or aid weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient *calcarea carbonica*.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or

distribution of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of the product or service prevents or reduces feelings of hunger;
- (2) Use of the product or service enables users to lose substantial amounts of weight;
- (3) Use of the product or service enables users to lose weight in a substantial number of cases; or
- (4) Any competent and reliable test or study establishes that use of the product or service promotes weight loss,

unless the representation is true and, at the time of making the representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. Competent and reliable scientific evidence shall mean for purposes of this order any test, analysis, research, study, survey or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; *provided, however*, that this disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product or service in question is effective without dieting and/or exercise.

III.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or

device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Subpart III.A), unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

IV.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in 16 CFR 255(b)), unless respondent has good reason to believe that at the time of such use, publication or reference, the endorsement reflects the honest opinions, findings, beliefs or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent.

B. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and respondent. For purposes of this Part IV, a "*material connection*" shall mean any relationship between an endorser or any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

C. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless the representation is true.

V.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service-in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating;

A. Any commercial or other advertisement for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement;

B. Any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

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

VI.

It is further ordered, That, within fifteen (15) days after the date this order becomes final, respondent shall submit a truthful sworn statement, in the form shown in Exhibit A to this order that shall reaffirm and attest to the truth, accuracy, and completeness of respondent's financial statements and the related documents ("Financial Statement") that were dated July 17, 1990, and previously submitted to the Commission.

VII.

It is further ordered, That this order is expressly premised upon respondent's financial condition as represented in the sworn Financial Statement referenced above, which contains material information upon which the Commission relied in negotiating and agreeing to the

lack of a redress payment in this order. If the Commission determines that respondent failed to file the truthful sworn statement required by Part VI of this order, or failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in his Financial Statement, the Commission may reopen the proceeding and take such action as the Commission deems appropriate. Proceedings instituted under this paragraph are in addition to and not in lieu of any other remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this order.

VIII.

It is further ordered, That respondent shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this Part VIII shall not affect any other obligation arising under this order.

IX.

It is further ordered, That for three (3) years from the date that the practices to which they pertain are last employed, respondent shall maintain and upon reasonable request make available to the Federal Trade Commission, at a place designated by Commission staff for inspection and copying:

A. All advertisements and promotional materials subject to this order;

B. All materials relied on as substantiation for any representation covered by this order;

C. All test reports, studies or other materials in respondent's possession or control at any time that contradict, qualify or call into question any representation of respondent covered by this order or the basis on which respondent relied for such claim or representation; and

D. All other materials and records that relate to respondent's compliance with this order.

This part IX shall expire five (5) years after the date of entry of this order.

X.

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

Commissioner Starek not participating.

EXHIBIT A

Declaration of Richard Crew

I, Richard Crew, do hereby affirm and attest that the financial statements and related documents dated July 17, 1990, that I submitted to the Federal Trade Commission, copies of which are attached hereto, were truthful, accurate and complete. I understand that should the Commission determine that I failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentations, the Commission may reopen this proceeding, initiate an enforcement proceeding against me, or take other appropriate action.

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

Richard Crew

Complaint

114 F.T.C.

IN THE MATTER OF
ROBERT FRANCIS

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

Docket C-3327. Complaint, Mar. 4, 1991—Decision Mar. 4, 1991

This consent order prohibits, among other things, the advertiser and distributor of the Diet Patch from making unsubstantiated efficacy claims for any product or service and from misrepresenting that a paid advertisement is an independent program. In addition, the order prohibits the respondent from disseminating or broadcasting "The Michael Reagan Show".

Appearances

For the Commission: *Tracy S. Thorleifson.*

For the respondent: *Pro se.*

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 Robert Francis, an individual, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Robert Francis is an individual residing at 4975 Viceroy Street, Apartment #204, Cape Coral, Florida. Individually or in concert with others, he advertised, marketed and sold a weight-loss product, the "EuroTrym Diet Patch," primarily by means of a 30-minute television advertisement made to simulate a regular television talk show.

PAR. 2. Respondent, individually or in concert with others, engaged in the advertising, offering for sale, sale and distribution of a food, drug, device, or cosmetic, the EuroTrym Diet Patch, a product found in commerce. The EuroTrym Diet Patch comes within the classifica-

tion of "drug," as that term is defined in Section 15(c) of the FTC Act, 15 U.S.C. 55(c).

PAR. 3. The acts and practices of respondent alleged in this complaint have been or are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

PAR. 4. Since at least 1988, individually or in concert with others, respondent promoted the sale of and sold numerous packages of the EuroTrym Diet Patch to consumers in various areas of the United States. A one-month supply of the EuroTrym Diet Patch sold for \$49.95, plus shipping and handling costs of \$4.00. Sales of the EuroTrym Diet Patch totalled approximately \$4,833,000. The EuroTrym Diet Patch was advertised on a 30-minute television commercial identified as "The Michael Reagan Show," which was broadcast on network, independent and cable television stations throughout the United States.

PAR. 5. By and through the "Michael Reagan Show" and other statements and depictions, respondent, individually or in concert with others, represented, directly or by implication, that:

- (a) Use of the EuroTrym Diet Patch prevents feelings of hunger.
- (b) Use of the EuroTrym Diet Patch enables users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch enables users to lose weight in a large majority of cases.
- (d) Competent and reliable tests or studies establish that the EuroTrym Diet Patch promotes weight loss.

PAR. 6. In truth and in fact:

- (a) Use of the EuroTrym Diet Patch does not prevent feelings of hunger.
- (b) Use of the EuroTrym Diet Patch does not enable users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch does not enable users to lose weight in a large majority of cases.
- (d) No competent and reliable test or study establishes that the EuroTrym Diet Patch promotes weight loss.

Therefore, each of the representations set forth in paragraph 5 was and is false, misleading or deceptive.

PAR. 7. Through the use of the statements and representations set forth in paragraph 5 and others not specifically set forth herein, respondent, individually or in concert with others, represented,

directly or by implication, that he possessed and relied upon a reasonable basis for each of the representations set forth in paragraph 5 at the time such representations were made.

PAR. 8. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making each of the representations set forth in paragraph 5 at the time such representations were made. Therefore, the representation set forth in paragraph 7 was and is false, misleading or deceptive.

PAR. 9. By and through "The Michael Reagan Show," respondent, individually or in concert with others, represented, directly or by implication, that "The Michael Reagan Show" was an independent consumer program that discusses a variety of topics, including products like the EuroTrym Diet Patch.

PAR. 10. In truth and in fact, "The Michael Reagan Show" was not an independent consumer program or anything other than paid commercial advertising. Therefore, the representation set forth in paragraph 9 was and is false, misleading or deceptive.

PAR. 11. By and through "The Michael Reagan Show" and other statements and depictions, respondent, individually or in concert with others, in numerous instances represented, directly or by implication, that endorsements appearing in advertisements for the EuroTrym Diet Patch:

- (a) Reflect the honest opinions, findings, beliefs, or experience of the endorser;
- (b) Reflect the typical or ordinary experience of members of the public who have used these products; and
- (c) Were obtained from individuals or other entities who at the time of providing their endorsements, were independent from all of the individuals and entities marketing the product.

PAR. 12. In truth and in fact, in numerous instances, the endorsements appearing in advertisements for the EuroTrym Diet Patch:

- (a) Do not reflect the honest opinions, findings, beliefs, or experience of the endorser;
- (b) Do not reflect the typical or ordinary experience of members of the public who have used these products; and
- (c) Were obtained from individuals or other entities who, at the time of providing their endorsements, were not independent from all of the individuals and entities marketing the product.

Therefore, each of the representations set forth in paragraph 11 was and is false, misleading and deceptive.

PAR. 13. Respondent's dissemination of the false and misleading representations as alleged in this complaint constitutes unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act.

PAR. 14. Respondent's unfair or deceptive acts or practices as alleged in this complaint have caused substantial injury to consumers. Commissioner Starek not participating.

DECISION AND ORDER

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

The respondent 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. Robert Francis resides at 4975 Viceroy Street, Apartment #204, Cape Coral, Florida.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

II.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product or service prevents feelings of hunger;
- (2) Use of such product or service enables users to lose substantial amounts of weight;
- (3) Use of such product or service enables users to lose weight in a large majority of cases; or
- (4) Any competent and reliable test or study establishes that such product or service promotes weight loss.

For purposes of this Part II a "substantially similar weight control

or weight reduction product” shall be defined as any product that is advertised to cause or aid weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient *calcareo carbonica*.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

(1) Use of the product or service prevents or reduces feelings of hunger;

(2) Use of the product or service enables users to lose substantial amounts of weight;

(3) Use of the product or service enables users to lose weight in a substantial number of cases; or

(4) Any competent and reliable test or study establishes that use of the product or service promotes weight loss,

unless the representation is true and, at the time of making the representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. Competent and reliable scientific evidence shall mean for purposes of this order any test, analysis, research, study, survey or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; *provided, however*, that this disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product or service in question is effective without dieting and/or exercise.

III.

It is further ordered, That respondent, an individual, and respondent’s agents, representatives and employees, directly or through any

partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Subpart III.A), unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

IV.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in 16 CFR 255(b)), unless respondent has good reason to believe that at the time of such use, publication or reference, the endorsement reflects the honest opinions, findings, beliefs or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent.

B. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and respondent. For purposes of this Part IV, a "*material connection*" shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the

endorsement and which relationship would not reasonably be expected by consumers.

C. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless the representation is true.

V.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any commercial or other advertisement for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement;

B. Any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

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

VI.

It is further ordered, That, within fifteen (15) days after the date this order becomes final, respondent shall submit a truthful sworn statement, in the form shown in Exhibit A to this order that shall reaffirm and attest to the truth, accuracy, and completeness of respondent's financial statements and the related documents ("Financial Statement") that were dated June 26, 1990, and previously submitted to the Commission.

VII.

It is further ordered, That this order is expressly premised upon respondent's financial condition as represented in the sworn Financial Statement referenced above, which contains material information upon which the Commission relied in negotiating and agreeing to the lack of a redress payment in this order. If the Commission determines that respondent failed to file the truthful sworn statement required by Part VI of this order, or failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in his Financial Statement, the Commission may reopen the proceeding and take such action as the Commission deems appropriate. Proceedings instituted under this paragraph are in addition to and not in lieu of any other remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this order.

VIII.

It is further ordered, That respondent shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this Part VIII shall not affect any other obligation arising under this order.

IX.

It is further ordered, That for three (3) years from the date that the practices to which they pertain are last employed, respondent shall maintain and upon reasonable request make available to the Federal Trade Commission, at a place designated by Commission staff for inspection and copying:

A. All advertisements and promotional materials subject to this order;

B. All materials relied on as substantiation for any representation covered by this order;

C. All test reports, studies or other materials in respondent's possession or control at any time that contradict, qualify or call into question any representation of respondent covered by this order or the basis on which respondent relied for such claim or representation; and

D. All other materials and records that relate to respondent's compliance with this order.

This Part IX shall expire five (5) years after the date of entry of this order.

X.

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

Commissioner Starek not participating.

EXHIBIT A

Declaration of Robert Francis

I, Robert Francis, do hereby affirm and attest that the financial statements and related documents dated June 26, 1990, that I submitted to the Federal Trade Commission, copies of which are attached hereto, were truthful, accurate and complete. I understand that should the Commission determine that I failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentations, the Commission may reopen this proceeding, initiate an enforcement proceeding against me, or take other appropriate action.

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

Robert Francis