IN THE MATTER OF

COCA-COLA BOTTLING CO. OF THE SOUTHWEST

Docket 9215. Interlocutory Order, September 9, 1996

ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

In 1984, Coca-Cola Bottling Company of the Southwest ("CCSW") acquired the Dr Pepper and Canada Dry carbonated soft drink franchises for the San Antonio, Texas area from the San Antonio Dr Pepper Bottling Company, a wholly-owned subsidiary of the parent Dr Pepper concentrate company. On July 29, 1988, the Commission issued an administrative complaint alleging, *inter alia*, that this acquisition was likely substantially to lessen competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The Notice of Contemplated Relief in the administrative complaint included a provision that would have required divestiture of the Dr Pepper and Canada Dry licenses.

Hearings on the complaint were held before an administrative law judge ("ALJ") from July to October 1990. On June 14, 1991, the ALJ issued an initial decision dismissing the complaint. Applying Clayton Act standards, the ALJ concluded that the relevant product market included all carbonated soft drinks and other similar non-carbonated beverages; that the relevant geographic market was broader than the 10-county San Antonio area pleaded in the complaint; that entry was not difficult; that competition had been significant; that no customer had complained; and that there was accordingly no likelihood of anticompetitive effects from the transaction.

FTC counsel for the complaint appealed that decision to the full Commission. On August 31, 1994, the Commission issued a Final Order and Opinion in which the Commission concluded, *inter alia*, that CCSW's acquisition of the Dr Pepper franchise violated the FTC Act and the Clayton Act, and reversed the ALJ's initial decision. The Commission concluded that the relevant product market was branded carbonated soft drinks; that the relevant geographic market was the 10-county San Antonio area; that entry into the market was difficult; that the acquisition had raised CCSW's market share from 44.7% to 54.5%; that the market was highly concentrated; and that the acquisition substantially increased the likelihood of collusion among

soft drink bottlers. For reasons differing from those of the ALJ, the Commission also concluded that CCSW's acquisition of the Canada Dry franchise did not violate the FTC Act or the Clayton Act.

In its decision, the Commission expressly rejected CCSW's contention that the legality of the transaction should be judged under the Soft Drink Interbrand Competition Act of 1980 ("SDICA"), 15 U.S.C. 3501-3503. That Act provides that "[n]othing contained in any antitrust law shall render unlawful the inclusion and enforcement in any [soft drink] trademark licensing contract" of "provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area," so long as "such product is in substantial and effective competition with other products of the same general class in the relevant market or markets." 15 U.S.C. 3501. The Commission concluded, however, that the SDICA was designed to establish the standard for judging the legality of a concentrate manufacturer's grant of exclusivity to a licensee, rather than to establish the legality of a bottler's acquisition of licenses to bottle competing soft drink brands. The Commission issued a Final Order requiring CCSW to divest the Dr Pepper license and related assets, and requiring CCSW to obtain prior Commission approval for future soft drink license acquisitions.

Following issuance of the Commission's opinion, CCSW filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On June 10, 1996, the Fifth Circuit entered a decision vacating and remanding the Commission's decision. The Court of Appeals held that the standards of the SDICA governed the transaction, and hence that the Commission had used the wrong legal standard in concluding that Section 5 of the FTC Act prohibited this change in distribution. The court vacated the Commission's divestiture order and remanded the case to the Commission for further proceedings to determine the transaction's validity under the SDICA's "substantial and effective competition" standard.

The Commission disagrees with the Fifth Circuit's application of the SDICA in this case. The SDICA -- an amendment to the antitrust laws passed in 1980 -- was designed to terminate the Commission's 1970's challenge to the use of exclusive territories in soft drink bottling licenses, and to govern any future challenges to the use of exclusivity provisions in soft drink franchises. The statute has accomplished that purpose. *See, Coca-Cola Co. v. FTC*, 642 F.2d 1387 (D.C. Cir. 1981). Nothing in the language or legislative history

of the statute suggests that it was intended to govern Clayton Act challenges to the acquisition by a soft drink bottler of the license to bottle a competing brand, where the challenge is not premised on the exclusivity of the license whose acquisition is being challenged. Notwithstanding our view that the Court of Appeals has misapplied the SDICA in this case, the Commission has determined not to seek further review of the court's decision. The court's decision, by its express terms, "hold[s] only that the Soft Drink Act applies in a case such as this one in which the manufacturer sells its wholly-owned bottling subsidiary and then enters the downstream market by licensing an independent distributor for the first time" (emphasis added). Given market conditions in the soft drink bottling industry, the circumstances described in the court's holding are not likely to present themselves in any future case. For this reason, the Court of Appeals's decision is highly unlikely to affect the Commission's future enforcement of the Clayton Act against combinations of competing soft drink brands, even in markets within the Fifth Circuit. Accordingly, the Commission has concluded that seeking further review of the decision would be unwarranted.

With respect to the present case, the Commission has concluded that, in light of the age of the challenged transaction, the limited size of the market, and the age of the record evidence regarding the competitive impact of the challenged acquisition, further expenditure of resources on this case would not be in the public interest.

For these reasons, the Commission has determined not to seek further judicial review, to return the matter to adjudication, and to dismiss the complaint. Therefore,

It is ordered, That this matter be, and it hereby is, returned to adjudication, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

HARPER & ROW PUBLISHERS, INC.

Docket 9217. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

MACMILLAN, INC.

Docket 9218. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

THE HEARST CORPORATION, ET AL.

Docket 9219. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

THE PUTNAM BERKLEY GROUP, INC.

Docket 9220. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

SIMON & SCHUSTER, INC.

Docket 9221. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

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Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

RANDOM HOUSE, INC.

Docket 9222. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These

developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

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It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

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DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from

adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

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Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have sought appropriate revisions in the proposed consent orders, or it

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The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOE, INC.

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

Docket C-3683. Complaint, Sept. 10, 1996--Decision, Sept. 10, 1996

This consent order prohibits, among other things, the Massachussetts-based corporation from fixing, controlling, or maintaining the prices at which retailers advertise, promote or offer for sale any New Balance athletic or casual footwear. The order also prohibits the respondent from coercing or pressuring any retailer to maintain or adopt any resale price and from attempting to secure a retailer's commitment to any resale price. In addition, the order prohibits the respondent, for ten years, from notifying a retailer in advance that the retailer is subject to partial or temporary suspension or termination as a New Balance dealer if it advertises products below New Balance's designated resale price.

Appearances

For the Commission: *Michael J. Bloom* and *Pamela A. Gill.*

For the respondent: *Paul R. Gauron, Goodwin, Procter & Hoar,* Boston, MA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, Inc. (hereinafter "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 61 North Beacon Street, Boston, Massachusetts.

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

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

PAR. 4. In connection with the sale and distribution of New Balance branded products, respondent, in combination, agreement and understanding with certain of its dealers, has engaged in a course of conduct to fix, establish and maintain the resale prices at which dealers sell its products. Respondent has entered into express or tacit agreements with certain dealers, pursuant to which such dealers have agreed to raise retail prices on respondent's products, or to maintain certain prices or price levels set by respondent, or to refrain from discounting respondent's products for a certain period of time. Respondent has engaged in certain actions with the intent and effect of inducing dealers to enter into such price agreements, including, among other things, the following:

(a) Respondent has made threats to terminate or suspend shipments to discounting retailers and has engaged in other coercive acts, such as surveillance of dealers' prices, demands that dealers raise their prices, and threats that respondent would in the future respond to complaints by other dealers about a dealer's prices, with the intent and effect of inducing dealers to enter into express or tacit price agreements;

(b) Respondent, in order to induce certain dealers to enter into price agreements, has told such dealers that it would act to secure similar price agreements with other dealers or to prevent other dealers from discounting more than a certain fixed percentage below suggested retail prices; and

(c) Respondent has secured price agreements from dealers after warning discounting dealers that continued or subsequent selling of its products at prices below those set by respondent would result in discontinuation of sales to the dealer pursuant to respondent's written policy stating that respondent will give a "one-time warning" to a dealer who sells its products below designated prices, and that in the

event of continued or subsequent violation of its policy respondent will discontinue selling to that dealer.

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

(a) Price competition among retail dealers with respect to the sale of New Balance products has been restricted, and

(b) Prices to consumers of New Balance products have been increased, or have been prevented from falling.

PAR. 6. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent

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

1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. The mailing address and principal place of business of respondent New Balance Athletic Shoe, Inc. is 61 North Beacon Street, Boston, Massachusetts.

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

ORDER

I.

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

(A) The term *"New Balance"* means New Balance Athletic Shoe, Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by New Balance Athletic Shoe, Inc., and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

(B) The term *"respondent"* means New Balance.

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

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

(E) The term *"resale price"* means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any

product. "Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

It is further ordered, That New Balance, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

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

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

Provided that nothing in this order shall prohibit New Balance from establishing and maintaining cooperative advertising programs

that include conditions as to the prices at which dealers offer products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

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

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

IV.

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

V.

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

VI.

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

VII.

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

VIII.

It is further ordered, That this order shall terminate on September 10, 2016.

Commissioner Starek dissenting.

EXHIBIT A

[NEW BALANCE LETTERHEAD]

Dear Retailer:

The Federal Trade Commission has conducted an investigation into New Balance's sales policies, and in particular New Balance's "Statement of Policy," which was announced in July 1991 and, with modifications, has remained in effect since then. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, New Balance has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell and advertise our products at any

price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell and advertise those products at any price you choose.

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

Sincerely yours,

_____

President
New Balance Athletic Shoe, Inc.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

There is some evidence that New Balance went beyond permissible communications with its dealers and entered the realm of unlawful resale price maintenance. An order is, therefore, appropriate. I write separately to make clear my understanding that the complaint does not challenge the announcement or implementation by a supplier of a structured termination policy. Although I view paragraph 4(c) of the complaint as ambiguous, the essence of the charge is that New Balance secured price agreements from dealers that discounted in return for assurances that New Balance would not impose sanctions on them. New Balance did not implement its structured termination policy, and the complaint and order do not address the lawfulness of that policy.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

As I did in Reebok International, Ltd., Docket No. C-3592, I find reason to believe that the target of the present investigation -- New Balance Athletic Shoe, Inc. ("New Balance") -- has entered into agreements with retailers to restrain retail prices and has thereby violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. However, I dissent from the Commission's decision to issue the final order in this matter because certain provisions of the order are not required to prevent unlawful conduct and may instead unnecessarily restrain procompetitive conduct by New Balance.

As in Reebok International, the fencing-in restrictions in the order relating to resale price advertising (specifically, the minimum advertised price provisions[1]) and to New Balance's "structured

[1] The unnecessary provisions relating to price advertising appear in paragraphs II(A), II(B), and III and in Exhibit A to the proposed order.

termination policy"[2] are unjustifiably broad and likely to deter efficient conduct. Indeed, the order even goes beyond the provisions I found overinclusive, and therefore unacceptable, in the Reebok order: the current order omits language that appeared in paragraph II of the Reebok order that expressly recognized the respondent's Colgate rights.[3]

In the interests of fairness and efficiency, injunctive relief ordered to address resale price maintenance should be strictly tailored to the *per se* unlawful conduct alleged. Because the order in this case mandates excessive restrictions upon the conduct of New Balance, I respectfully dissent.

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[2] *See* paragraph IV(C) of the proposed complaint and paragraph II(D) of the proposed order.

[3] *See United States v. Colgate & Co.*, 250 U.S. 300 (1919).

IN THE MATTER OF

RED APPLE COMPANIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9266. Consent Order, Feb. 28, 1995--Modifying Order, Sept. 13, 1996

This order reopens a 1995 consent order -- that required the New York-based companies and their officer to divest six supermarkets to a Commission-approved acquirer or acquirers -- and this order modifies the consent order by terminating their obligation to divest a supermarket in the Chelsea area of Manhattan, New York.

ORDER REOPENING AND MODIFYING ORDER

On April 29, 1996, Red Apple Companies, Inc., John A. Catsimatidis, Supermarket Acquisition Corp., and Sloan's Supermarkets, Inc. (formerly Designcraft Industries, Inc.) (collectively, "respondents"), the respondents named in the consent order issued by the Commission on February 28, 1995, in Docket No. 9266, filed their "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Petition"), seeking to reopen and set aside the order in Docket No. 9266 ("order") that directs respondents to divest six supermarkets in certain areas of New York County, New York by March 6, 1996. On August 23, 1996, respondents withdrew their request for a reopening and modification of the order as to the divestiture requirements in the Upper East Side and Greenwich Village. On September 6, 1996, respondents withdrew their request as to the Upper West Side. Accordingly, the only provision that the respondents continue to seek to modify is paragraph II.A.3, requiring a divestiture in Chelsea. For the reasons stated below, the Commission has determined to grant the Petition.

The order requires respondents to divest six supermarkets, one in each of the four relevant markets consisting of the Upper West Side, the Upper East Side, Greenwich Village and Chelsea, plus two more in two of three of the relevant markets, by March 6, 1996.[1] Paragraph II.A.3 of the order requires respondents to divest a supermarket

[1] Only one divestiture is required in Chelsea. Respondents may choose in which two of the other three markets they will divest the additional two supermarkets.

located at 188 Ninth Avenue (store no. 441) "or the nearest alternate supermarket owned or operated by any respondent."

On March 5, 1996, the day before the divestiture deadline contained in the order, respondents filed a "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Original Petition"). Subsequently, in response to a letter from staff detailing specific concerns with the Original Petition and indicating that staff was prepared to recommend denial of the Original Petition unless material that would constitute a sufficient showing was submitted, on April 29, 1996, respondents withdrew the Original Petition and filed the Petition with additional arguments and supporting materials.

I. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[2]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[3] In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.[4] For example, it may be in the public interest to modify an order "to relieve any impediment

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[2] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[3] Hart Letter at 5; 16 CFR 2.51.

[4] Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

to effective competition that may result from the order."[5] Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[6] The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.[7]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. THE PETITION

Respondents request that the Commission modify the order to eliminate the divestiture requirement in Chelsea. Respondents base their Petition on changed conditions of fact and public interest considerations.[8] The changes of fact alleged by respondents include the entry into the market of Rite Aid under a new format (Rite Aid Food Mart); that other new entry has occurred and will occur in the future; that respondents' market share has declined due to sales of

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[5] *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

[6] Damon Letter at 2.

[7] Damon Letter at 4.

[8] Respondents do not assert that any change of law requires reopening the order.

supermarkets; that divestiture in Chelsea will eliminate respondents as a competitor in that market; and that operating losses and declining sales are such that divestiture will further weaken respondents as competitors.[9] Respondents assert that the losses imposed by the requirement to maintain the stores will harm respondents and prevent them from being vigorous competitors, and that this constitutes the affirmative need for the modification under the public interest standard.[10]

Respondents claim that they have "made diligent efforts (Catsimatidis Declaration ¶¶ 3-8) to divest,"[11] to no avail. John Catsimatidis asserts that he has been in contact with numerous persons concerning the divestiture, but no viable purchasers have come forward.[12] The only purchasers who have come forward have not been able to arrange adequate financing to finalize a transaction.[13]

Respondents assert that the competitive environment has substantially changed in ways that were not foreseeable at the time the order was entered.[14] In addition, they assert that a number of strong competing supermarket chains have entered the market or expanded and that this is scheduled to continue;[15] that they could not have known that Rite Aid would enter the market with its Food Mart format; that respondents' market share has declined due to sales of stores; and that store operating losses and declining sales are such that divestiture will further weaken respondents as competitors.[16]

Respondents state that Price/Costco has entered the market with a 116,000 square foot supermarket in Staten Island. Also, Price/Costco plans to open a 120,000 square foot supermarket on 34th Street between Eighth and Ninth Avenues during the summer of 1997.[17] Respondents assert that "[b]ased on size alone, the inference is overwhelming that this store, like a Macy's, will compete on a citywide basis, *i.e.*, in each of the four areas in issue here."[18] In

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9 Petition at 19.

10 Petition at 26-27.

11 Petition at 3.

12 Declaration of John A. Catsimatidis, Petition Exhibit A ("Catsimatidis Decl."), at ¶ 6.

13 Catsimatidis Decl. at ¶ 7.

14 Petition at 19.

15 Petition at 4-5.

16 Petition at 23-24.

17 Petition at 20-21; Declaration of Matt Wanning (June 23, 1996), ("Wanning Decl.").

18 Petition at 21.

addition, according to the Petition, the imminent opening of the Chelsea Market will further eliminate the need for relief in that area.[19]

Respondents state in addition that there has been enormous entry of drug stores, some of which allocate 50% of their space to food and supermarket items, and which are lower cost and have a competitive advantage over respondents' operations.[20]

The Petition asserts that "the geographic markets set forth in the order did not foresee or contemplate the developments of the last year."[21]

Respondents also assert that their market share has diminished since the order became final.[22] At the time respondents entered into the consent agreement, they owned three supermarkets in Chelsea. Currently, they own one, having sold two to Rite Aid.[23]

Finally, respondents assert that divestiture would cause further losses and weaken their competitive position.[24] Respondents argue that the divestiture of their only remaining supermarket in Chelsea will cause them to exit the market and will weaken respondents competitively with no corresponding benefit to competition. These losses constitute the affirmative need to modify the order. In addition, the large amount of entry reduces the need for the order as written, and the sale of supermarkets to Rite Aid (which has opened Rite Aid Food Marts at the locations) has in substance accomplished the purposes of the divestiture, thus favoring modification.[25]

As part of the Petition, respondents submitted consumer surveys regarding the Rite Aid Food Marts.[26] Respondents also submitted several declarations, audited and unaudited financial statements, and news articles, among other things.

III. IT IS IN THE PUBLIC INTEREST TO GRANT THE PETITION

Respondents assert that the modification of the order is necessary for them to remain effective competitors. Respondents currently only have one supermarket in Chelsea, and divestiture of that supermarket would cause them to exit the market. Respondents assert that it is in

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19 Petition at 15.

20 Petition at 22-23.

21 Petition at 23.

22 Petition at 23.

23 Petition at 6-7.

24 Petition at 24.

25 Petition at 26.

26 Exhibit 1 to Wanning Decl.

the public interest to reopen and modify the order to prevent them from exiting the market. For the reasons discussed below, it is in the public interest to reopen and modify the order as requested by respondents.[27]

Respondents have an affirmative need for the modification because compliance with the order would require them to exit the Chelsea market. Divestiture of respondents' only supermarket in Chelsea will harm respondents in a way not contemplated by the order, by requiring them to exit.

In addition, the reasons in favor of the modification outweigh the reasons to retain the order as written. The purpose of the divestiture requirement, as stated in the order, is to ensure the continuation of the assets to be divested as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisitions as alleged in the Commission's complaint. Divestiture of respondents' sole remaining supermarket will not restore competition in the market. Instead, it will simply replace one competitor with another. In addition, there is no reason to believe that the supermarket will be more viable when operated by another firm than it will be in the hands of respondents. Although respondents themselves, by selling supermarkets for non-supermarket use, have created the situation where divestiture will not improve competition in Chelsea, there is no longer any reason to continue to require divestiture in this market other than to punish respondents.[28] However, to the extent that respondents merit punishment for their conduct, that is a matter best addressed through an action for violation of the order. The Commission expressly reserves the right to pursue such an action with regard to the failure to divest a supermarket in Chelsea, as well as any other violations of the order.[29]

Commissioner Starek concurring in the result only.

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[27] Because the Petition is granted on public interest grounds, the Commission has not reached the question of whether it also meets the standards under change of fact. The Commission notes, however, that the entry discussed by respondents is not within the product and/or geographic markets alleged in the complaint and order. Accordingly, respondents have a heavy burden to demonstrate that conditions have changed so significantly that those markets are no longer appropriate.

[28] There may, of course, be circumstances under which a divestiture would improve competition and accomplish an order's remedial purposes even though that divestiture would result in a respondent's exit from a market.

[29] Respondents have agreed to pay a civil penalty of $600,000 to settle the Commission's claims for failure to divest a supermarket in Chelsea, as well as failure to divest the other supermarkets as required by the order.

IN THE MATTER OF

JORDAN, McGRATH, CASE & TAYLOR, INC.

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

Docket C-3684. Complaint, Sept. 18, 1996--Decision, Sept. 18, 1996

This consent order requires, among other things, the New York advertising agency for Doan's pills to have competent and reliable scientific evidence, consisting of at least two clinical studies, to support any claim that any over-the-counter analgesic is more effective than any other such drug in relieving any particular kind of pain. In addition, the consent order requires the advertising agency to have scientific evidence to support claims regarding the efficacy, safety, benefits or performance of any over-the-counter internal analgesic.

Appearances

For the Commission: *Loren G. Thompson* and *Shira Modell.*

For the respondent: *Stuart Friedel, David & Gilbert,* New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Jordan, McGrath, Case & Taylor, Inc., is a New York corporation with its principal office or place of business at 445 Park Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Ciba-Geigy Corporation or CIBA Self-Medication, Inc., and prepared and disseminated advertisements to promote the sale of Doan's analgesic products. Doan's analgesic products are "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Doan's analgesic products, including,

but not necessarily limited to, the attached Exhibits A and B. These advertisements contain the following statements and depictions:

1. If nothing seems to help, try Doan's. It relieves back pain no matter where it hurts. Doan's has an ingredient these pain relievers don't have. [Depiction of large package of Doan's in front of smaller packages of Bayer, Aleve, Advil, and Tylenol]. [Superscript: Magnesium Salicylate]. Doan's. The Back Specialist. [Superscript: The Back Specialist] [Exhibit A: "Activity - Pets" 15-Second Television]

2. There are hundreds of muscles in the back. Any one can put you in agony. That's when you need Doan's. [Depiction of box of Doan's superimposed over boxes of Bayer, Tylenol, Aleve and Advil]. Doan's has an ingredient the leading brands don't. It relieves back pain no matter where it hurts. There are hundreds of muscles in the back. Doan's relieves them all. [Superscript: The Back Specialist] [Exhibit B: "Muscles - Male" 15-Second Television]

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that Doan's analgesic products are more effective than other analgesics, including Bayer, Advil, Tylenol, and Aleve, for relieving back pain.

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

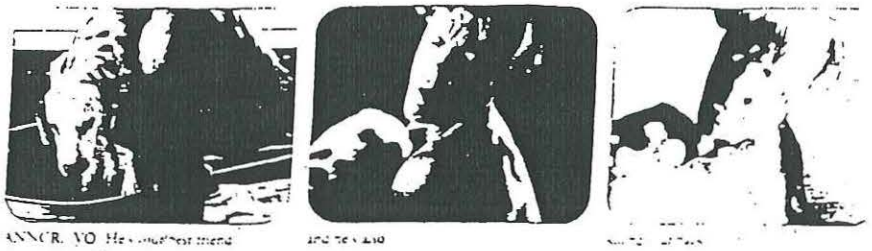
PAR. 8. Respondent knew or should have known that the representation set forth in paragraph six was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

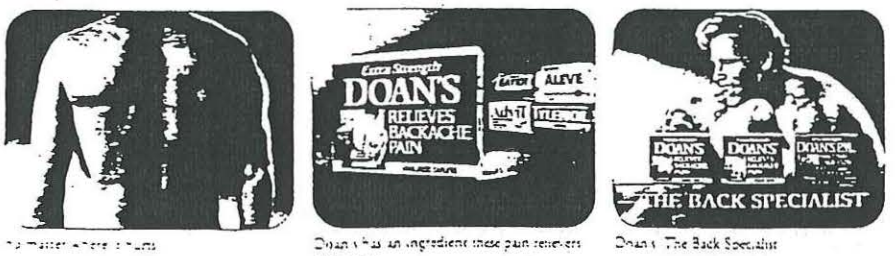
EXHIBIT A

DOAN'S

"ACTIVITY-PETS" :15 TV



ANNCR. VO He's [illegible]



Doan's has an ingredient these pain relievers don't have

Doan's The Back Specialist

Exhibit A

020002

EXHIBIT B

DOAN

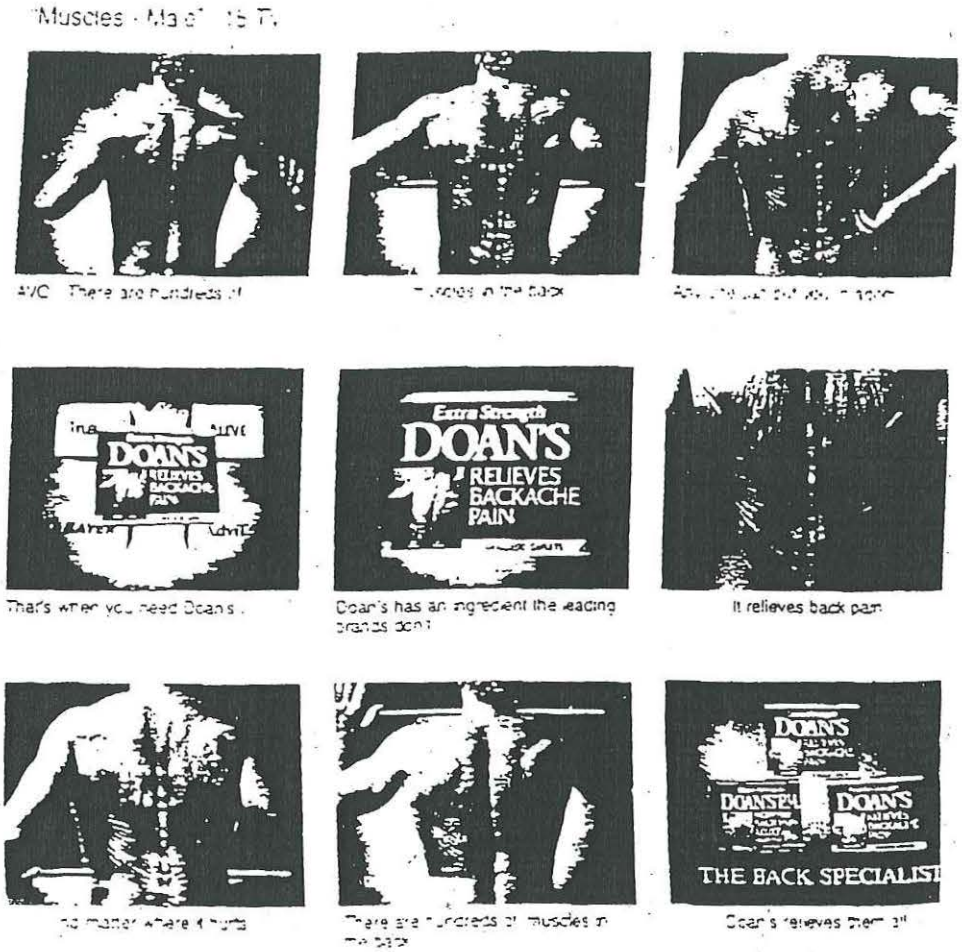


Exhibit B

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 the complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Jordan, McGrath, Case & Taylor, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 445 Park Avenue, New York, New York.

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

ORDER

For purposes of this order:

1. *"Doan's"* shall mean any over-the-counter internal analgesic drug, as "drug" is defined in the Federal Trade Commission Act, bearing the Doan's brand name, including, but not limited to, Regular Strength Doan's analgesic, Extra Strength Doan's analgesic, and Extra Strength Doan's P.M. analgesic.

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

I.

It is ordered, That respondent Jordan, McGrath, Case & Taylor, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that such product is more effective than other over-the-counter analgesic drugs for relieving back pain or any other particular kind of pain, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of Part I of this order, "competent and reliable scientific evidence" shall include at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, each of whom is qualified by training and experience to conduct such studies, independently of each other.

II.

It is further ordered, That respondent Jordan, McGrath, Case & Taylor, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter internal analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding such product's efficacy, safety, benefits, or performance, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know of an inadequacy of substantiation for the representation.

III.

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

IV.

It is further ordered, That for a period of five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

It is further ordered, That respondent shall:

A. Within thirty (30) days from the date of entry of this order, provide a copy of this order to each of its current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with them or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VI.

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

VII.

It is further ordered, That this order will terminate on September 18, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VIII.

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

IN THE MATTER OF

LOCKHEED MARTIN CORPORATION

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

Docket C-3685. Complaint, Sept. 19, 1996--Decision, Sept. 19, 1996

This consent order requires Lockheed Martin, a Maryland-based corporation, among other things, to divest an air traffic control system-related contract; limits Lockheed Martin's ownership of Loral Space; prohibits Lockheed Martin from providing certain technical services or information regarding satellites to Loral Space; restricts participation and compensation of persons who serve as directors or officers of both Lockheed Martin and Loral Space; and requires firewalls to limit information flows about competitors' tactical fighter aircraft and unmanned aerial vehicles.

Appearances

For the Commission: *Naomi Licker.*

For the respondent: *Ray Jacobsen, Howrey & Simon,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Lockheed Martin Corporation ("Lockheed Martin"), a corporation subject to the jurisdiction of the Commission, has agreed to, among other things, acquire all of the outstanding voting stock of Loral Corporation ("Loral"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such an acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"SETA services"* means systems engineering, technical assistance services and support services relating to air traffic control systems provided by Lockheed Martin to the Federal Aviation Administration, pursuant to paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12. and C.2.2.4. of Task Area 2 and paragraphs C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of Task Area 9 of the National Implementation and Support Contract, DTFA01-93-C-00031, that involve the development of technical and other specifications for procurements and programs; the assessment of bid and other proposals; the evaluation, testing or monitoring of any service, equipment or product provided by any company; the modification or change of any performance requirements of any contractor; or the development of financial, cost or budgetary plans, procedures or policies.

2. *"Air traffic control systems"* means any current or future air traffic control equipment, system or service designed, developed, proposed or provided for the Federal Aviation Administration.

3. *"Commercial low earth orbit satellite"* means an unmanned machine that is launched from the earth's surface and designed to orbit approximately 100 miles to 300 miles above the earth's surface in low earth orbit for the purpose of transmitting data back to earth, which is sold to any customer other than the U.S. government.

4. *"Commercial geosynchronous earth orbit satellite"* means an unmanned machine that is launched from the earth's surface and designed to orbit approximately 22,300 miles above the earth's surface in geosynchronous earth orbit for the purpose of transmitting data back to earth, which is sold to any customer other than the U.S. government.

5. *"Military aircraft"* means fixed-wing aircraft manufactured for sale to the United States or foreign governments.

6. *"NITE Hawk systems"* means any airborne forward-looking infrared targeting system researched, developed, designed, manufactured or sold by Loral for use on the F/A-18 series of military aircraft.

7. *"Simulation and training systems"* means the operational and weapons systems trainers designed, developed, manufactured or sold by Loral that simulate military aircraft.

8. *"Electronic countermeasures"* means systems designed, developed, manufactured or sold by Loral, including, but not limited

to, the ALR-56A and ALR-56C, that detect, jam and deceive hostile radars and radar and infrared guided weapons for use on military aircraft.

9. *"Mission computers"* means any computer designed, developed, manufactured or sold by Loral, including, but not limited to, the AP1, AAAP1R and CP1075A/B/C, that control, monitor or manage the operations and electronics of any military aircraft.

10. *"Unmanned aerial vehicle"* means any unmanned aircraft used for tactical or strategic reconnaissance missions manufactured for sale to the United States or foreign governments.

11. *"Integrated communications systems"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the 367-6000-59-R-012 and the 367-6000-59-R-013, that are capable of both wideband satellite and line-of-sight data link communications and command and control data links for use on unmanned aerial vehicles.

12. *"Merger Agreement"* means the Agreement and Plan of Merger, dated as of January 7, 1996, by and among Loral Corporation, Lockheed Martin Corporation and LAC Acquisition Corporation.

13. *"Restructuring Agreement"* means the Restructuring, Financing and Distribution Agreement, dated as of January 7, 1996, by and among Loral Corporation, Loral Aerospace Holdings, Inc., Loral Aerospace Corp., Loral General Partner, Inc., Loral Globalstar, L.P., Loral Globalstar Limited, Loral Telecommunications Acquisition, Inc. (to be renamed Loral Space & Communications Ltd.) and Lockheed Martin Corporation.

14. *"Lockheed Martin/Loral Space Technical Services Agreement"* means the technical services agreement between Lockheed Martin and Loral Space, as described by Article VI, Section 6.7, paragraph (d), of the Restructuring Agreement.

15. *"Loral Space"* means Loral Space & Communications Ltd., a company organized under the laws of the Islands of Bermuda, with its principal office and place of business located at 600 Third Avenue, New York, New York. Loral Space, through its 33% ownership interest in Space Systems/Loral, is engaged in, among other things, the research, development, manufacture and sale of Commercial Low Earth Orbit Satellites and Commercial Geosynchronous Earth Orbit Satellites.

16. *"Space Systems/Loral"* means Space Systems/Loral, Inc., a Delaware corporation, with its principal office and place of business located at 3825 Fabian Way, Palo Alto, California. Space Systems/Loral is engaged in, among other things, the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

II. RESPONDENT

17. Respondent Lockheed Martin is a corporation organized and existing under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland. Respondent Lockheed Martin is engaged in, among other things, the provision of SETA services and the research, development, manufacture and sale of commercial low earth orbit satellites, commercial geosynchronous earth orbit satellites, military aircraft and unmanned aerial vehicles.

18. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

19. Loral is a corporation organized and existing under and by virtue of the laws of the state of New York, with its principal office and place of business located at 600 Third Avenue, New York, New York. Loral is engaged in, among other things, the research, development, manufacture and sale of air traffic control systems, NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers and integrated communications systems. Loral, through its 33% ownership interest in Space Systems/Loral, is also engaged in the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

20. Loral is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in

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

IV. THE ACQUISITION

21. On or about January 7, 1996, Lockheed Martin entered into a Merger Agreement and Restructuring Agreement, whereby Lockheed Martin would engage in a series of related transactions and acts, including, but not limited to: (1) the acquisition of all of the outstanding voting common stock of Loral; (2) the transfer of the space and telecommunications businesses of Loral and its subsidiaries to Loral Space; (3) the acquisition of a 20% convertible preferred stock interest in Loral Space, which in turn owns a 33% interest in Space Systems/Loral; (4) the Lockheed Martin/Loral Space Technical Services Agreement; and (5) the appointment of Mr. Bernard Schwartz, Chairman of the Board of Directors and Chief Executive Officer of Loral Space, to the position of Vice Chairman of the Board of Directors of Lockheed Martin.

V. THE RELEVANT MARKETS

22. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. The research, development, manufacture and sale of air traffic control systems;
b. The provision of SETA services;
c. The research, development, manufacture and sale of commercial low earth orbit satellites;
d. The research, development, manufacture and sale of commercial geosynchronous earth orbit satellites;
e. The research, development, manufacture and sale of military aircraft;
f. The research, development, manufacture and sale of NITE Hawk systems;
g. The research, development, manufacture and sale of simulation and training systems;
h. The research, development, manufacture and sale of electronic countermeasures;
i. The research, development, manufacture and sale of mission computers;

j. The research, development, manufacture and sale of unmanned aerial vehicles; and

k. The research, development, manufacture and sale of integrated communications systems.

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

VI. STRUCTURE OF THE MARKETS

24. The market for the provision of SETA Services in the United States is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent has been the only provider of SETA services since 1993.

25. Respondent, through the Acquisition, would be engaged in both the research, development, manufacture and sale of air traffic control systems and the provision of SETA services.

26. The markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites in the United States are highly concentrated as measured by the HHI or concentration ratios.

27. Respondent and Loral, through its 33% ownership interest in Space Systems/Loral, are actual significant competitors in the relevant markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

28. Respondent and Loral Space, through its 33% ownership interest in Space Systems/Loral, will be actual significant competitors in the relevant markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

29. The markets for the research, development, manufacture and sale of NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers and integrated communications systems in the United States are highly concentrated as measured by the HHI or concentration ratios.

30. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of military aircraft, as well as the research, development, manufacture and sale of NITE

Hawk systems, electronic countermeasures and mission computers, all of which are used in military aircraft.

31. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of both military aircraft and simulation and training systems, which are used to simulate military aircraft.

32. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of both unmanned aerial vehicles and integrated communications systems, which are used in unmanned aerial vehicles.

VII. BARRIERS TO ENTRY

33. Entry into the market for the provision of SETA services would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of, among other things, the time required to develop the experience and expertise necessary to effectively provide these services.

34. Entry into the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of, among other things, the time and expense required to establish manufacturing facilities, develop the technology needed to produce these products and establish a reputation for high quality products among customers in these markets.

35. Entry into the markets for the research, development, manufacture and sale of NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers and integrated communications systems is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of, among other things, the time and expense required to develop the technology needed to produce these products.

VIII. EFFECTS OF THE ACQUISITION

36. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C.

18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

A. Respondent may gain access to competitively sensitive non-public information concerning other air traffic control systems contractors, whereby:

(1) Actual competition between respondent and air traffic control systems contractors would be reduced; and

(2) Advancements in air traffic control systems research, development, innovation and quality would be reduced;

B. Respondent may be in a position to disadvantage or raise the costs of competing air traffic control systems contractors, whereby actual competition between respondent and air traffic control systems contractors would be reduced;

C. By eliminating direct actual competition between respondent and Loral Space in the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

D. By enhancing the likelihood of collusion or coordinated interaction between or among the firms in the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

E. By increasing the likelihood that quality and technological innovation in the commercial low earth orbit satellite and commercial geosynchronous earth orbit satellite markets would be reduced;

F. By increasing the likelihood that consumers in the United States would be forced to pay higher prices for commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

G. Respondent may gain access to competitively sensitive non-public information concerning other military aircraft manufacturers, whereby:

(1) Actual competition between respondent and military aircraft manufacturers would be reduced; and

(2) Advancements in military aircraft research, development, innovation and quality would be reduced; and

H. Respondent may gain access to competitively sensitive non-public information concerning other unmanned aerial vehicle manufacturers, whereby:

(1) Actual competition between respondent and unmanned aerial vehicle manufacturers would be reduced; and

(2) Advancements in unmanned aerial vehicle research, development, innovation and quality would be reduced.

IX. VIOLATIONS CHARGED

37. The Acquisition described in paragraph twenty-one constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent

has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Lockheed Martin Corporation ("Lockheed Martin") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, with its principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"Lockheed Martin"* means Lockheed Martin Corporation, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Lockheed Martin includes Loral Corporation, which prior to the Acquisition had its principal office and place of business located at 600 Third Avenue, New York, New York; except that Lockheed Martin does not include any of the foregoing that will be part of Loral Space after the Acquisition.

B. *"Loral"* means Loral Corporation, a New York corporation, with its principal office and place of business located at 600 Third Avenue, New York, New York, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Loral Corporation, and the respective

directors, officers, employees, agents, representatives, successors and assigns of each; except that Loral does not include any of the foregoing that will be part of Loral Space after the Acquisition.

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

D. *"SETA services"* means systems engineering, technical assistance services and support services relating to air traffic control systems provided by Lockheed Martin to the Federal Aviation Administration, pursuant to paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12. and C.2.2.4. of Task Area 2 and paragraphs C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of Task Area 9 of the National Implementation and Support Contract, DTFA01-93-C-00031, that involve the development of technical and other specifications for procurements and programs; the assessment of bid and other proposals; the evaluation, testing or monitoring of any service, equipment or product provided by any company; the modification or change of any performance requirements of any contractor; or the development of financial, cost or budgetary plans, procedures or policies.

E. *"SETA services operations"* means all assets, properties, business and goodwill, tangible and intangible, held by respondent and used in the provision of SETA services including, without limitation, the following:

1. All rights, obligations and interests in paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12., C.2.2.4., C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of contract DTFA01-93-C-00031 relating to the provision of SETA services;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and systems, software, software licenses, inventions, copyrights, trademarks, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to the contracts entered into in the ordinary course of business, including, but not limited to, contracts with customers (together with associated bid and performance bonds), suppliers, subcontractors, sales representatives,

distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

5. All rights under warranties and guarantees, express or implied;

6. All books, records and files;

7. All data developed, prepared, received, stored or maintained; and

8. All items of prepaid expense.

F. *"Non-public air traffic control information"* means any information not in the public domain disclosed by the Federal Aviation Administration or any company to respondent in its capacity as a provider of SETA services.

G. *"Standard terminal automation replacement system"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to upgrade the traffic control equipment and systems in the Federal Aviation Administration's U.S. air traffic control terminals.

H. *"Traffic flow management system"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to predict arrival and departure traffic flows at U.S. airports for the Federal Aviation Administration.

I. *"Operational and supportability implementation service"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to upgrade Federal Aviation Administration flight server stations.

J. *"Air traffic control systems"* means any current or future air traffic control equipment, system or service designed, developed, proposed or provided by Loral air traffic control, including, but not limited to, the standard terminal automation replacement system, the traffic flow management system and the operational and supportability implementation service, for the Federal Aviation Administration.

K. *"Military aircraft"* means fixed-wing aircraft manufactured for sale to the United States or foreign governments.

L. *"NITE Hawk systems"* means any airborne forward-looking infrared targeting system researched, developed, designed, manufactured or sold by Loral for use on the F/A-18 series of military aircraft.

M. *"Simulation and training systems"* means the operational and weapons systems trainers designed, developed, manufactured or sold by Loral that simulate military aircraft.

N. *"Electronic countermeasures"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the ALR-56A and ALR-56C, that detect, jam and deceive hostile radars and radar and infrared guided weapons for use on military aircraft.

O. *"Mission computers"* means any computer designed, developed, manufactured or sold by Loral, including, but not limited to, the AP1, AAAP1R and CP1075A/B/C, that control, monitor or manage the operations and electronics of any military aircraft.

P. *"Unmanned aerial vehicle"* means any unmanned aircraft used for tactical or strategic reconnaissance missions manufactured for sale to the United States or foreign governments.

Q. *"Integrated communications systems"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the 367-6000-59-R-012 and the 367-6000-59-R-013, that are capable of both wideband satellite and line-of-sight data link communications and command and control data links for use on unmanned aerial vehicles.

R. *"Loral air traffic control"* means Loral air traffic control, an entity with its principal place of business at 9211 Corporate Blvd., Rockville, Maryland, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of air traffic control systems, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Loral air traffic control (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Loral air traffic control does not include any of the foregoing that will be part of Loral space after the Acquisition.

S. *"Lockheed Martin Military Aircraft Business"* means any entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of military aircraft or unmanned aerial vehicles, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by a Lockheed Martin Military Aircraft

Business and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

T. *"Management and data systems"* means Lockheed Martin Management and Data Systems Division, an entity with its principal place of business at 7000 Geerdes Blvd., King of Prussia, Pennsylvania, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the provision of SETA services, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Management and Data Systems Division (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

U. *"Non-public military aircraft information (NITE Hawk)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of NITE Hawk systems and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of NITE Hawk systems. Non-public military aircraft information (NITE Hawk) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (NITE Hawk) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

V. *"Non-public military aircraft information (simulation and training)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of simulation and training systems and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of simulation and training systems. Non-public military aircraft information (simulation and training) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (simulation and training) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

W. *"Non-public military aircraft information (electronic countermeasures)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of electronic countermeasures and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer

prior to the Acquisition to Loral in its capacity as a provider of electronic countermeasures. Non-public military aircraft information (electronic countermeasures) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (electronic countermeasures) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

X. *"Non-public military aircraft information (mission computers)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of mission computers, and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of mission computers. Non-public military aircraft information (mission computers) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such

non-public military aircraft information (mission computers) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Y. *"Non-public unmanned aerial vehicle information"* means (1) any information not in the public domain disclosed by any unmanned aerial vehicle manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of integrated communications systems, and (a) if written information, designated in writing by the unmanned aerial vehicle manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the unmanned aerial vehicle manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any unmanned aerial vehicle manufacturer prior to the Acquisition to Loral in its capacity as a provider of integrated communications systems. Non-public unmanned aerial vehicle information shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public unmanned aerial vehicle information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Z. *"Satellite"* means an unmanned machine that is launched from the earth's surface for the purpose of transmitting data back to earth and which is designed either to orbit the earth or travel away from the earth.

AA. *"Restructuring Agreement"* means the Restructuring, Financing and Distribution Agreement, dated as of January 7, 1996, by and among Loral Corporation, Loral Aerospace Holdings, Inc., Loral Aerospace Corp., Loral General Partner, Inc., Loral Globalstar, L.P., Loral Globalstar Limited, Loral Telecommunications

Acquisition, Inc. (to be renamed Loral Space & Communications Ltd.) and Lockheed Martin Corporation.

BB. *"Loral Space"* means Loral Space & Communications Ltd., a company organized under the laws of the Islands of Bermuda, with its principal office and place of business located at 600 Third Avenue, New York, New York, as described by the Restructuring Agreement; its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled or managed by Loral Space & Communications Ltd., including, but not limited to, Globalstar, L.P., Space Systems/Loral, Inc. and K&F Industries, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Loral Space does not include any of the foregoing that will be part of Loral or Lockheed Martin after the Acquisition.

CC. *"Space Systems/Loral"* means Space Systems/Loral, Inc., an entity with its principal place of business at 3825 Fabian Way, Palo Alto, California, or any other entity within or controlled by Loral Space that is engaged in, among other things, the research, development, manufacture or sale of Satellites, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Space Systems/Loral, Inc. (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Space Systems/Loral does not include any of the foregoing that will be part of Loral or Lockheed Martin after the Acquisition and does not include any entity or line of business, outside of Space Systems/Loral, Inc., within or controlled by Loral Space that is not engaged in the research, development, manufacture or sale of Satellites.

DD. *"Defensive missiles systems"* are the research, development, manufacture or sale of defensive missiles systems and components, including, among other things, the Theater High Altitude Area Defense System, Corps SAM/MEADS, the Advanced Intercept Technology, National Missile Defense, Naval Upper Tier, the Airborne Laser, target programs and other related activities.

EE. *"Fleet Ballistic Missiles"* are the research, development, manufacture, sale or life cycle support including disposal of strategic

offensive missiles and associated support equipment, including, among other things, the Trident missile.

FF. *"Missile System Products Center"* is the research, development, manufacture or sale of missile systems, missile components, missile technology, propulsion systems, seekers, electronics, avionics, composites, bombs, rockets and mortars, including, among other things, the Composites Initiative, the Propulsion Initiative, BLU-109 and Precision Guided Mortar Munition.

GG. *"Space & Strategic Missiles"* means Lockheed Martin Space & Strategic Missiles Sector, an entity with its principal place of business at 6801 Rockledge Drive, Bethesda, Maryland, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of Satellites; and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Space & Strategic Missiles Sector (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Space & Strategic Missiles does not include Defensive Missile Systems, Fleet Ballistic Missiles, and Missile System Products Center, and any other entity or line of business, outside of Lockheed Martin Space & Strategic Missiles Sector, within or controlled by Lockheed Martin that is not engaged in the research, development, manufacture or sale of Satellites.

HH. *"Common LM/Loral Space Director"* means any person who is simultaneously a member of the Board of Directors of Lockheed Martin or an officer of Lockheed Martin and a member of the Board of Directors of Loral Space or an officer of Loral Space.

II. *"Non-public space information of Lockheed Martin"* means any information not in the public domain relating to Space & Strategic Missiles.

JJ. *"Non-public space information of Loral Space"* means any information not in the public domain relating to Space Systems/Loral.

KK. *"Lockheed Martin/Loral Space Technical Services Agreement"* means the technical services agreement between Lockheed Martin and Loral Space, as described by Article VI, Section 6.7, paragraph (d), of the Restructuring Agreement.

LL. *"Merger Agreement"* means the Agreement and Plan of Merger, dated as of January 7, 1996, by and among Loral Corporation, Lockheed Martin Corporation and LAC Acquisition Corporation.

MM. *"Stockholders Agreement"* means the Stockholders Agreement referred to in the Restructuring Agreement.

NN. *"Non-Voting Equity Securities"* means any share of stock that does not entitle the shareholder to vote for any member of the Board of Directors.

OO. *"Voting Equity Securities"* means any share of stock that entitles the shareholder to vote for any member of the Board of Directors.

PP. *"Acquisition"* means the transaction described by the Merger Agreement and the Restructuring Agreement, including, but not limited to: (1) the acquisition by respondent of all of the outstanding voting common stock of Loral; (2) the transfer of the space and telecommunications businesses of Loral and its subsidiaries to Loral Space; (3) the acquisition by respondent of a 20% convertible preferred stock interest in Loral Space, which in turn owns a 33% interest in Space Systems/Loral; (4) the Lockheed Martin/Loral Space Technical Services Agreement; and (5) the appointment of Mr. Bernard Schwartz, Chairman of the Board of Directors and Chief Executive Officer of Loral Space, to the position of Vice Chairman of the Board of Directors of Lockheed Martin.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within six (6) months of the date respondent signed the Agreement Containing Consent Order in this matter, the SETA services operations, and shall not charge any costs associated with the divestiture to the Federal Aviation Administration.

B. Respondent shall divest the SETA services operations only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA services in the same manner as provided by respondent at the time of the proposed divestiture and to

remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the SETA services operations, respondent shall take such actions as are necessary to ensure the continued provision of SETA services, to maintain the viability and marketability of the assets used to provide SETA services, to prevent the destruction, removal, wasting, deterioration or impairment of the assets used to provide SETA services, and to prevent the disclosure of non-public air traffic control information to Loral Air Traffic Control.

D. Upon reasonable notice from any acquirer or the Federal Aviation Administration to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA services in substantially the same manner and quality as provided by respondent prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA services operations. Respondent shall convey all know-how necessary to perform the SETA services operations in substantially the same manner and quality provided by respondent prior to divestiture, provided, however, that the respondent may retain the right to use the know-how. However, respondent shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of the purchase agreement between respondent and a proposed acquirer of the SETA services operations ("Purchase Agreement"), respondent shall provide the acquirer(s) with a complete list of all full-time, non-clerical, salaried employees of respondent who were engaged in the provision of SETA services on the date of the Acquisition, as well as all current full-time, non-clerical, salaried employees of respondent engaged in the provision of SETA services on the date of the purchase agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and

work performed by the individual in connection with the SETA services operations.

F. Following the execution of the Purchase Agreement(s) and subject to the consent of the employees, respondent shall provide the proposed acquirer(s) with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, respondent shall further provide the acquirer(s) with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Respondent shall provide all employees identified in paragraph II.E of this order with reasonable financial incentives, if necessary, to continue in their employment positions pending divestiture of the SETA services operations, and to accept employment with the acquirer(s) at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality restrictions relating to the SETA services or SETA services operations that apply to any employee identified in paragraph II.E who accepts employment with any proposed acquirer. Respondent also shall not enforce any noncompete restrictions that apply to any employee identified in paragraph II.E who accepts employment with any proposed acquirer.

H. For a period of one (1) year commencing on the date of the individual's employment by any acquirer, respondent shall not re-hire any of the individuals identified in paragraph II.E of this order who accept employment with any acquirer, unless such individual has been separated from employment by the acquirer against that individual's wishes.

I. Prior to divestiture, respondent shall not transfer, without the consent of the Federal Aviation Administration, any of the individuals identified in paragraph II.E of this order whose employment responsibilities involve access to non-public air traffic control information from management and data systems to any other position involving business with the Federal Aviation Administration.

III.

It is further ordered, That:

A. Respondent shall not provide, disclose or otherwise make available to Loral Air Traffic Control any non-public air traffic control information.

B. Respondent shall use any non-public air traffic control information obtained by Management and Data Systems only in respondent's capacity as provider of technical assistance to an acquirer, pursuant to paragraph II.D of this order.

IV.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the SETA services operations within six (6) months of the date respondent signed the Agreement Containing Consent Order in this matter, the Commission may appoint a trustee to divest the SETA services operations. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in

acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the SETA services operations.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the SETA services operations, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer or

acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the SETA services operations.

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

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

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

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to

assure the marketability, viability and competitiveness of the SETA services operations.

12. The trustee shall have no obligation or authority to operate or maintain the SETA services operations.

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

V.

It is further ordered, That within forty-five (45) days after the date this order becomes final and every forty-five (45) days thereafter until respondent has fully complied with paragraphs II through IV of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II through IV of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II through IV including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda and all reports and recommendations concerning the divestiture.

VI.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (NITE Hawk), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (NITE Hawk).

B. Respondent shall use any non-public military aircraft information (NITE Hawk) only in respondent's capacity as a provider of NITE Hawk systems, absent the prior written consent of the proprietor of non-public military aircraft information (NITE Hawk).

VII.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (simulation and training), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (simulation and training).

B. Respondent shall use any non-public military aircraft information (simulation and training) only in respondent's capacity as a provider of simulation and training systems, absent the prior written consent of the proprietor of non-public military aircraft information (simulation and training).

VIII.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (electronic countermeasures), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (electronic countermeasures).

B. Respondent shall use any non-public military aircraft information (electronic countermeasures) only in respondent's capacity as a provider of electronic countermeasures, absent the prior written consent of the proprietor of non-public military aircraft information (electronic countermeasures).

IX.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (mission computers), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (mission computers).

B. Respondent shall use any non-public military aircraft information (mission computers) only in respondent's capacity as a provider of mission computers, absent the prior written consent of the proprietor of non-public military aircraft information (mission computers).

X.

It is further ordered, That respondent shall deliver a copy of this order to any United States military aircraft manufacturer prior to obtaining any information outside the public domain relating to that manufacturer's military aircraft, either from the military aircraft manufacturer or through the Acquisition.

XI.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public unmanned aerial vehicle information, provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public unmanned aerial vehicle information.

B. Respondent shall use any non-public unmanned aerial vehicle information only in respondent's capacity as a provider of integrated communications systems, absent the prior written consent of the proprietor of non-public unmanned aerial vehicle information.

XII.

It is further ordered, That respondent shall deliver a copy of this order to any United States unmanned aerial vehicle manufacturer prior to obtaining any information outside the public domain relating to that manufacturer's unmanned aerial vehicle, either from the unmanned aerial vehicle manufacturer or through the Acquisition.

XIII.

It is further ordered, That:

A. Respondent shall not discuss, provide, disclose or otherwise make available, directly or indirectly, to any Common LM/Loral Space Director any non-public space information of Lockheed Martin.

B. Respondent shall require any Common LM/Loral Space Director to refrain from discussing, providing, disclosing or otherwise making available, directly or indirectly, any non-public space information of Loral Space to any member of the Board of Directors of Lockheed Martin, any officer of Lockheed Martin or any employee of Lockheed Martin.

C. Respondent shall conduct all matters relating to Space & Strategic Missiles without the vote, concurrence or other participation of any kind whatsoever of any Common LM/Loral Space Director.

D. Any Common LM/Loral Space Director shall not be counted for purposes of establishing a quorum in connection with any matter relating to Space & Strategic Missiles.

E. Respondent shall not provide any Common LM/Loral Space Director with any type of compensation that is based in whole or in part on the profitability or performance of Space & Strategic Missiles; provided, however, that any Common LM/Loral Space Director may receive as compensation for his or her serving on the Lockheed Martin Board of Directors such stock options or other stock-based compensation as is provided generally to other members of the Lockheed Martin Board of Directors in accordance with respondent's ordinary practice.

XIV.

It is further ordered, That:

A. Respondent shall not provide or otherwise make available, directly or indirectly, any personnel, information, facilities, technical services or support from Space & Strategic Missiles to Space Systems/Loral pursuant to any provision contained in the Lockheed Martin/Loral Space Technical Services Agreement.

B. Respondent shall not disclose or otherwise make available to Space & Strategic Missiles any information received in connection with the Lockheed Martin/Loral Space Technical Services Agreement.

C. Respondent shall not disclose to any Space & Strategic Missile employee any information or technical services provided to Space Systems/Loral by Lockheed Martin pursuant to the Lockheed Martin/Loral Space Technical Services Agreement.

XV.

It is further ordered, That if respondent's ownership of the equity securities of Loral Space increases to more than twenty percent (20%) of the total equity securities (including both Voting Equity Securities and Non-Voting Equity Securities) of Loral Space as the result of repurchases of equity securities by Loral Space or for any other reason, respondent shall, following its obtaining actual knowledge of an event leading to such increase ("Event"), reduce its equity security ownership interest to a level of not more than twenty percent (20%). Those equity securities which must be sold are hereinafter referred to as the "Excess Securities." Respondent shall have a period of 185 days following its obtaining actual knowledge of the Event to sell the Excess Securities (the "Sale Period"); provided, however, that, if within ten (10) business days of respondent's receipt of such knowledge, respondent requests that Loral Space file a registration statement providing for such sale, the Sale Period shall be deemed to begin on the effective date of such registration statement, and shall extend for 150 days thereafter, and provided further that, if respondent elects to sell the Excess Securities in a manner that does not require Loral Space to file a registration statement, and such sales cannot be accomplished within the Sale Period without violating Rule 144 (or any successor provision) under the Securities Act of 1933, then the Sale Period shall be extended by the minimum amount necessary to allow such securities to be sold pursuant to Rule 144 (or any successor provision). Pending the sale of Excess Securities, respondent shall not exercise any voting rights relating to the Excess Securities. Respondent shall amend the Stockholders Agreement to provide respondent the means of complying with the foregoing provisions and shall thereafter not amend the applicable provisions of the Stockholders Agreement in a fashion so as to impair respondent's

ability to comply with this paragraph. The provisions of this paragraph shall terminate ten (10) years from the date this order becomes final.

XVI.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II through XVI of this order are complied with or until such other time as is stated in said Interim Agreement.

XVII.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually for the next ten (10) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs VI through XVI of this order. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States military aircraft and unmanned aerial vehicle manufacturers with whom respondent has entered into an agreement for the research, development, manufacture or sale of NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers or integrated communications systems.

XVIII.

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

XIX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representatives of the Commission:

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

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

XX.

It is further ordered, That this order shall terminate on September 19, 2016, except as otherwise provided in this order.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Lockheed Martin Corporation ("Lockheed Martin"), a corporation organized and existing under the laws of the State of Maryland, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, Lockheed Martin has proposed to acquire all of the outstanding voting common stock of Loral Corporation and engage in a series of related transactions and acts; and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving competition during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Lockheed Martin entering into this Interim Agreement shall in no way be construed as an admission by Lockheed Martin that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Lockheed Martin understands that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

Now, therefore, Lockheed Martin agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Lockheed Martin agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Lockheed Martin signs the Consent Agreement.

2. Lockheed Martin agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, the Federal Aviation Administration, McDonnell Douglas Corporation,

Northrop Grumman Corporation, The Boeing Company and Teledyne Inc.

3. Lockheed Martin agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Lockheed Martin, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Lockheed Martin setting forth in detail the manner in which Lockheed Martin will comply with paragraphs II through XVI of the Consent Agreement.

4. Lockheed Martin agrees that, from the date Lockheed Martin signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the Commission finally issues its Complaint and its Decision and Order.

5. Lockheed Martin waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, and upon written request, and on reasonable notice, to Lockheed Martin made to its principal office, Lockheed Martin shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Lockheed Martin and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Lockheed Martin relating to compliance with this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

ZYGON INTERNATIONAL, INC., ET AL.

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

Docket C-3686. Complaint, Sept. 24, 1996--Decision, Sept. 24, 1996

This consent order prohibits, among other things, a Washington-based company and its owner, that manufacture and advertise learning accelerating, memory enhancing, weight loss, and vision improving products and devices, from making any claims concerning the performance, benefits, efficacy, or safety of any product or service they market, unless they possess competent and reliable evidence to substantiate such claims, and requires the respondents to pay $195,000 into escrow accounts for consumer redress programs.

Appearances

For the Commission: *Dean C. Forbes* and *Lesley Anne Fair.*

For the respondents: *Margaret Feinstein* and *Peter Kadzik, Dickstein, Shapirro & Morin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Zygon International, Inc., a corporation, and Dane Spotts, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Zygon International, Inc. is a Washington corporation, with its principal office or place of business at 18368 Redmond Way, Redmond, WA.

Respondent Dane Spotts is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed consumer products through radio and print advertisements, the Zygon International "SuperLife"

mail-order catalog, and the Internet's World Wide Web. These products include, but are not limited to the "Learning Machine" and the "SuperMind," devices that purportedly accelerate learning; the "SuperBrain Nutrient Program," pills that purportedly enhance memory, intelligence, attention, and concentration levels; "Fat Burner" pills, which purportedly induce weight loss; and "Day and Night Eyes," purported vision improvement pills.

The Learning Machine, SuperMind, SuperBrain Nutrient Program, Fat Burner pills, and Day and Night Eyes pills are "foods," "drugs," or "devices" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

LEARNING MACHINE

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for the Learning Machine, including, but not necessarily limited to, the attached Exhibits A through E. These advertisements contain the following statements:

A. "Amazing Digital Headset Teaches You Foreign Languages Overnight" [Exhibit A: Zygon's SuperLife catalog]

B. "Knowledge really is power. But learning using traditional study methods is slow and boring. Imagine putting on a digital headset hooked up to an ordinary CD player. When you push play it fires a programmed sequence of light and sound, opening a window into your mind. Then like magic it downloads new information directly onto your brain cells. No, it's not science fiction. High-tech learning is now science fact. It's called the Learning Machine™. A profound breakthrough that will revolutionize how you learn and acquire new skills." [Exhibit A: Zygon's SuperLife catalog]

C. "Plus you can try the Learning Machine risk free for 30 days. During your risk free trial, you'll be able to learn 4 languages, triple your reading speed, boost your vocabulary, improve your memory, and reprogram one or two bad habits." [Exhibit A: Zygon's SuperLife catalog]

D. "Let's say . . . you'd like to quit smoking or lose weight. Pop in an Inner-Mind™ Programming Disc. The sensory stimulation matrix opens a window into your unconscious mind. Then by infusing your 'inner mind' with positive programming, you can rescript negative, self-defeating attitudes." [Exhibit B: USA Today, January 23, 1995]

E. "Let's say you want to learn a foreign language, quadruple your reading speed, or increase your math skills. Or give your children a powerful edge in school, learning 300%-500% faster than their peers. You select a specially programmed Learning Disc™ in the area you want to study. Plug it into any

ordinary CD player. Then attach your Learning Machine digital headset into the headphone jack. Push play and a few moments later your mind is launched into a pre-programmed learning session. In a fun, almost effortless way, the Learning Disc lesson plan unfolds its program and transfers the knowledge into your mind." [Exhibit A: Zygon's SuperLife catalog; Exhibit C: US AIR magazine, July 1994; and Exhibit D: Longevity magazine, August 1994]

F. "The Learning Machine goes beyond virtual reality. It's the most advanced accelerated learning tool in the world! Absolutely mind blowing! What if you could flip a switch inside your mind to instantly activate your imagination? Speak foreign languages. Expand your mental skills . . . And pour into your mind the genius of an Einstein or a Socrates. Find out how the Learning Machine boosts mental powers . . . Get a Photographic Mind, Instant Motivation, Speak Foreign Languages, and More!" [Exhibit E: The Learning Machine Home Page, World Wide Web, January 18, 1996]

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondents have represented, directly or by implication, that the Learning Machine:

A. Enables users to learn foreign languages overnight.
B. Enables users to quadruple their reading speed.
C. Enables users to improve their math skills.
D. Enables children to learn at a rate of 300% to 500% faster than their peers.
E. Enables users to lose weight.
F. Enables users to quit smoking.
G. Substantially improves users' ability to learn and retain information.
H. Enables users to learn four languages, triple their reading speed, improve their vocabulary, and improve their memory in thirty days.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not

possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

SUPERMIND

PAR. 8. Respondents have disseminated or have caused to be disseminated advertisements for the SuperMind, including, but not necessarily limited to, the attached Exhibits F and G. These advertisements contains the following statements:

A. "Based on hard scientific evidence which associates states of consciousness with dominant brainwave activity, this machine coaxes your brain into an Alpha/Theta pattern (brainwaves in the 4-10 Hz range), which is associated with deep meditation and mental imagery. . . . Developed by the Mind Research Laboratory, now anyone can enter profound mental states at the push of a button. . . . I take it with me on business trips to beat stress and jet lag. A 20-minute session gives me the equivalent of 8-hours sleep and helps reset my biological clock.

Boost Brainpower

Listen: Training your brain to generate Theta activity for even a few minutes each day has enormous benefits, including boosting the immune system, enhancing creativity, I.Q., and psychic abilities, along with increasing feelings of psychological well-being.
For a little black box to do all that to your brain in 20 minutes is amazing enough, but it's only part of the story. Because this machine can also be used to accelerate learning and modify negative self-defeating behavior.

Automatic Hypnosis

Let's say you wanted to quit smoking, enhance your self-esteem, lose weight, or play a better game of golf. . . . [B]y plugging into the SuperMind™, you could induce a hypnotic trance in a matter of seconds. Then, while your subconscious is primed for psychological programming, you play prerecorded behavioral mindscripts, and these new success patterns become transferred onto your brain." [Exhibit F: Longevity magazine, July 1993]

B. "Instant Speed Learning
Plus, you can use this machine for speed learning. Tests at the University of California have revealed the effects of Theta frequencies on learning. During their study a group of 20 students learned 1,800 words of Bulgarian in 120 hours while using Theta stimulation programs. In about 1/3 the normal time they spoke and wrote the new language." [Exhibit F: Longevity magazine, July 1993]

C. "Speak French, Spanish, German, & Italian Overnight
Using the amazing accelerated language learning system, these four Instant Language courses are also bundled with your SuperMind™ computer. Each course

works with software built into your SuperMind™ to imprint a super-fast working knowledge of these languages into your memory. Edited to accelerate learning time, words and phrases for speaking in each country are imprinted directly onto your brain cells. No verbs to conjugate or grammar to learn." [Exhibit F: Longevity magazine, July 1993]

E. "Speak four languages almost overnight. Instant French. Instant Spanish. Instant German & Instant Italian use the SuperMind computer to stimulate the optimum brain-state for learning. Each language soundtrack imprints new words and phrases directly onto your brain cells. A second tape included with each course uses a special reinforcement system to lock the language session into permanent memory. There are no verbs to conjugate or grammar to learn." [Exhibit G: Omni magazine, January 1994]

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisements attached as Exhibits F and G, respondents have represented, directly or by implication, that the SuperMind:

A. Effectively treats users' stress.
B. Effectively treats users' jet lag.
C. Gives users the equivalent of eight hours of sleep after twenty minutes of use.
D. Enables users to lose weight.
E. Enables users to quit smoking.
F. Enabled 20 students to learn 1800 words of Bulgarian in 120 hours in tests at the University of California.
G. Improves the functioning of users' immune system.
H. Increases users' I.Q.
I. When used in conjunction with the Instant Language courses, enables users to learn foreign languages overnight.
J. Substantially improves users' ability to learn and retain information.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisements attached as Exhibits F and G, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraph nine, respondents did not

possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that the SuperMind has been proven in tests conducted at the University of California to teach users to speak and write foreign languages in about one-third the time of traditional methods of study.

PAR. 13. In truth and in fact, tests conducted at the University of California have not proven that the SuperMind teaches users to speak and write foreign languages in about one-third the time of traditional methods of study. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

SUPERBRAIN NUTRIENT PROGRAM

PAR. 14. Respondents have disseminated or have caused to be disseminated advertisements for the SuperBrain Nutrient Program, including, but not necessarily limited to, the attached Exhibit H. This advertisement contains the following statements:

A. "Recently I received a news clipping about a Florida medical doctor who takes a daily dose of 'smart pills' to increase memory, improve intelligence, and energize his brain. The article went on to tell of his incredible claim that these super pills not only made him smarter, but his 4-year-old son was turned into a genius because his wife took the pills when she was pregnant." [Exhibit H: Zygon's SuperLife catalog]

B. "I...started taking them myself. Instantly I was zooming....In other words, my brain was thinking at warp speed.

Smart Pill Breakthrough

So how can a 'pill' enhance cognition? Several ways. By increasing blood supply and oxygen to the brain. Enhancing brain cell metabolism. Inhibiting free radical damage to brain cells. And stimulating neuro-transmitter hormones.
My goal was to design a powerful brain formula made entirely of natural substances.

Waking Up Your Brain

We hired the hottest pharmaceutical research lab in the country. The result is the Brain Cognition Formula. Twenty-six ingredients each tested for maximum purity and potency are loaded into a gelatin capsule.

Look: Popping a few pills won't make you an Einstein, but if your experiences are like mine, you'll notice an improvement in attention, focus, concentration, and mental energy. Because subtle or even major improvements in cognitive functioning often go unnoticed, it's important to have some way of measuring your progress.

So included in your package will be a special report called The Mental Boost that shows you how to measure your mental progress. You'll be instructed how to look for changes in alertness, mental energy, concentration, memorization, productivity, organization and planning, verbal skills, problem solving ability, mood, sexual desire, and overall health." [Exhibit H: Zygon's SuperLife catalog]

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit H, respondents have represented, directly or by implication, that the SuperBrain Nutrient Program:

A. Enables users to improve their memory.

B. Enables users to improve their intelligence.

C. When taken by pregnant women, will cause their children to have enhanced intelligence.

D. Enhances cognition, increases blood supply and oxygen to the brain, enhances brain cell metabolism, inhibits free radical damage to brain cells, and stimulates neuro-transmitter hormones of users.

E. Enables users to improve their cognitive and mental functions, including attention and concentration levels, problem solving abilities, and verbal skills.

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph fifteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time they made the representations set forth in paragraph fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

FAT BURNER PILLS

PAR. 18. Respondents have disseminated or have caused to be disseminated advertisements for Fat Burner pills, including, but not necessarily limited to, the attached Exhibit I. This advertisement contains the following statements:

A. "Fat Burner Pills
Not only is *Fat Burner* the fastest selling product in its class, but it contains an incredible 500 mg of pure L-Carnitine (a special amino acid used in metabolism) per serving. . . . [Y]ou'll be on your way to a trimmer, firmer, leaner body.
Try this supplement with any of the other weight control products in this catalog for a super combined effect that will enhance your weight control program.
A special blend of Lipotropics plus 500 mg of L-Carnitine enhances the body's ability to burn fat." [Exhibit I: Zygon's SuperLife catalog]

PAR. 19. Through the use of the statements contained in the advertisements referred to in paragraph eighteen, including but not necessarily limited to the advertisement attached as Exhibit I, respondents have represented, directly or by implication, that Fat Burner pills:

A. Enhance the body's ability to burn fat.
B. Enable users to have a trimmer, firmer, and leaner body.
C. Enable users to lose weight.

PAR. 20. Through the use of the statements contained in the advertisements referred to in paragraph eighteen, including but not necessarily limited to the advertisement attached as Exhibit I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nineteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 21. In truth and in fact, at the time they made the representations set forth in paragraph nineteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty was, and is, false and misleading.

DAY AND NIGHT EYES PILLS

PAR. 22. Respondents have disseminated or have caused to be disseminated advertisements for Day and Night Eyes pills, including,

but not necessarily limited to, the attached Exhibit J. This advertisement contains the following statements:

A. "Focus on Healthy Eyes
Eye Improvement Supplement
If you suffer from night blindness (or want clearer vision during the day), *Day and Night Eyes* may be the remedy for you. This all-natural supplement gives your eyes the essential nutrients that must be present in your diet for proper eyesight function. Ingredients include Beta Carotene, Calcium, Vitamin D, Riboflavin (B-2), Zinc, Eyebright, and Anthocyanocide-rich Blueberry Leaf. Recommended dosage is one tablet every morning and evening." [Exhibit J: Zygon's SuperLife catalog]

PAR. 23. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that Day and Night Eyes pills:

A. Improve the night blindness of users.
B. Give users clearer vision during the day.

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twenty-three, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 25. In truth and in fact, at the time they made the representations set forth in paragraph twenty-three, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

THIRTY-DAY MONEY-BACK GUARANTEE

PAR. 26. Respondents have disseminated or have caused to be disseminated advertisements for products, including, but not necessarily limited to, the attached Exhibits B, E, and K. These advertisements contains the following statements:

A. "Try the Learning Machine for 30 days risk free. Take your mind on an incredible journey. If for any reason you're not totally blown away by the experience, send your kit back to me for a full refund." [Exhibit B: USA Today, January 23, 1995]

B. "Try the Learning Machine for 30 days RISK FREE." [Exhibit E: The Learning Machine Home Page, World Wide Web, January 16, 1996]

C. "Our Return Policy We are committed to providing you with products that will improve your life. But if within 30 days you are not completely satisfied with your order, simply call a Customer Service Representative at 1-800-526-2177 to receive return instructions." [Exhibit K: Zygon's SuperLife catalog]

PAR. 27. Through the use of the statements contained in the advertisements referred to in paragraph twenty-six, including but not limited to the advertisements attached as Exhibit B, E, and K, respondents have represented, directly or by implication, that products ordered from respondents carry a thirty-day money-back guarantee, and that consumers who returned the product to respondents within thirty days after receipt would receive a full refund within a reasonable period of time.

PAR. 28. In truth and in fact, in numerous instances, consumers returned products to respondents within thirty days after receipt and did not receive a full refund within a reasonable period of time, or at all. Therefore, the representation set forth in paragraph twenty-seven was, and is, false and misleading.

PAR. 29. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

MIND DEVELOPMENT

Learning Machine Breakthrough!

Amazing Digital Headset Teaches You Foreign Languages Overnight, Reprograms Your Mind For Success & Launches You Into Virtual Dream-State Experiences.

Knowledge really is power. But learning using traditional study methods is slow and boring. Imagine putting on a digital headset hooked up to an ordinary CD player. When you push play it fires a programmed sequence of light and sound, opening a window into your mind. Then like magic it downloads new information directly onto your brain cells. No, it's not science fiction. High-tech learning is now a science fact.

It's called the *Learning Machine*™. A profound breakthrough that will revolutionize how you learn and acquire new skills.

Learning Discs work through any CD player, where they send a light-sound matrix into your Learning Machine, which decodes and translates the information into your mind.

Plug Your Mind Into Super-Sonic Learning Power

Let's say you want to learn a foreign language, quadruple your reading speed, or increase your math skills. Or give your children a powerful edge in school, learning 300%-500% faster than their peers.

You select a specially programmed Learning Disc™ in the area you want to study. Plug it into any ordinary CD player. Then attach your *Learning Machine* digital headset into the headphone jack. Push play and a few moments later your mind is launched into a pre-programmed learning session. In a fun, almost effortless way, the Learning Disc lesson plan unfolds its program and transfers the knowledge into your mind. It's incredible.

Amazing Light-Sound Matrix Stimulates Your Mind

How does it work? A digital program embedded in the CD, called a Learning Matrix™, sends a combination of light and sound instructions through the *Learning Machine* digital headset to stimulate the optimum mind-state for learning.

During your learning session you'll be asked to listen to audio instructions while you review written materials. Then while this information is still fresh in your mind, the narrator instructs you to lower your Eye Shield, and your Learning Disc fires an amazing light-sound matrix that instantly relaxes your mind. This highly relaxed mind-state helps lock the new information into your memory.

Learning Discs™ Teach Foreign Languages, Speed Reading, And More

Learning foreign languages, or anything for that matter, at rocket speed can be very empowering. And I'm going to include a ton of valuable Learning Disc Software with your *Learning Machine* so you can get immediate results from this new technology. You'll receive 4 language courses – French, German, Spanish, and Italian. A Super Vocabulary course, a Super Memory course, and a Speed Reading course. And for your kids, a SuperPhonics™ reading program. Over $400 worth of Learning Discs make this the deal of the century. But I want to show off its other amazing powers. And give you 10 more reasons for ordering it now.

3-D Mind-Sync Library Launches Virtual Dream-States

So I'll include an amazing 3-D Mind-Sync Library™, with 10 amazing whole-brain synchronization programs on 3 CDs, to turn your *Learning Machine* into a powerful meditation, self-hypnosis, and dream-induction computer.

The 3-D Mind-Sync Library I'm bundling includes the following titles: *Creativity Booster, Goal Energizer, Stress Zapper, Brain Tune-up, Alpha Visualization, Imagination Stimulator, Learning Accelerator, Super Intuition, Lucid Dreaming, and Ultra Zen States.*

A $150 value, this extensive collection of mind expansion experiences is a super bonus. But what's even more exciting is how this same machine can be used for habit control, success conditioning, and eliminating self-defeating attitudes.

Reprogram Bad Habits & Zap Your Mind With Success

Let's say you want to transform a loser mind-set into a winning one. Or you'd like to quit smoking or lose weight. Pop in an Inner Mind Programming Disc™. The light-sound matrix opens a window into your unconscious mind – the source of your inner programming.

Then by infusing your "inner mind" with new positive programs, you can rescript negative self-defeating behavior. I'm including with your *Learning Machine* kit 18 exquisitely produced Inner Mind programs. From success conditioning to weight control, this is another $150 value.

And here's something else too.

$200 Instant Rebate

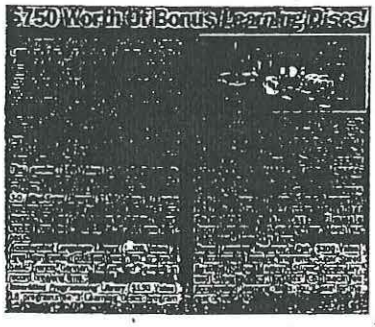
In addition to the Accelerated Language Learning Library, the SuperPhonics Program, Super Speed Reading, Super Memory, & Super Vocabulary, the Mind-Sync Library, and the Inner Mind Programming Library (a $750 combined value), I'm going to offer you a one-time $200 instant rebate off the list price of the *Learning Machine*. I figure you'll be so impressed with this incredible technology you'll use that extra $200 to buy additional Learning Discs. That's good for business.

The list price for the *Learning Machine* is $499.95. But as I said I'm letting you have it (limited to the first 3,000 units) for $299.95 plus shipping. And remember, in addition to the $200 rebate, I'm including hundreds of dollars worth of free Learning Discs, making this an incredible opportunity.

30-Day Risk Free Trial

Plus you can try the *Learning Machine* risk free for 30 days. During your risk free trial you'll be able to learn 4 languages, triple your reading speed, boost your vocabulary, improve your memory, and reprogram one or two bad habits. Now imagine what you can do during the second month. But please hurry. This is a limited introductory offer, so please reserve your order now.

Note: The Learning Machine will be available after January 1. Please reserve your order now. You will not be billed until your order is ready to ship. The unit you receive may vary slightly in appearance as pictured above.



Learning Machine Special Offer
Item # 201 ..... $299.95[illegible] 201

Portable CD Player
Item # 31021 ..... $[illegible] 1519 201

3

EXHIBIT A

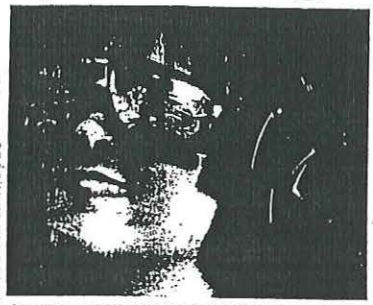
Zygon's Learning Machine

EXHIBIT B

EXHIBIT B

Mind Power Breakthrough!

Plug Your Mind into the Learning Machine - To Boost Mental Powers, Program Your Mind for Success & Launch Virtual Reality-Like Fantasies!



Beyond virtual reality, the light-sound matrix stimulates your mind and opens your learning centers. Like magic it pours in new information, skills, mental programming, and launches your imagination.

BY DANE SPOTTS

ABSOLUTELY MIND blowing! I popped a French Learning CD into the Learning Machine™ Immediately I was sucked into a deep, dream-like trance. Weird colors and patterns were created on the insides of my closed eyelids. While in this super-relaxed but hyper-aware state, the special Learning CD began unfolding its magic programming.

Ideas and mental images float in and out of your consciousness. It feels like the best dream you've ever had. Then while in this highly euphoric mental space, the Learning CD opens your learning centers to peak receptivity and pours in new knowledge and skills. It's the ultimate mind trip. But it's not just for fun.

Let's say you want to learn a foreign language, improve your reading and comprehension or increase your math skills. Or just give your kids a powerful edge in school, learning many times faster than their peers. It's simple.

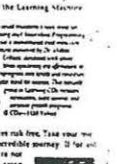
You select a special-ly programmed Learning CD on the subject you want to study. Pop it into any ordinary CD player. Then attach your Learning Machine digital headset into the headphone jack. Push play and a few moments later your mind is launched into a pre-programmed learning session. In a fun, elegant effortless way, the Learning CD unfolds its program and literally turns you on to learn. It's the most amazing thing you've ever experienced.

A Vacation in 22 Minutes

Learning at Light Speed

Speak French, Spanish, German & Italian

Learning foreign languages, or anything for that matter, at rocket speed can be very empowering. And I'm going to include a real valuable Learning CD numerous with your Learning Machine so you can get immediate results from this new technology.



10 Fantastic Mind Journeys

Super Motivation Library

30-Day Risk Free Trial

Learning Machine Special Offer

Need a CD Player? We have an assortment portable models at great prices

Portable Kenwood CD Player

FOR FASTEST SERVICE CALL TOLL FREE
1-800-925-3263
ZYGON

EXHIBIT C

US Air Magazine

BEYOND VIRTUAL REALITY

Learning Machine Breakthrough!

Amazing new technology teaches you foreign languages, reprograms your mind for success & launches you into virtual fantasy experiences

BY DANE SPOTTS

THE FIRST TIME I plugged my mind into the Learning Machine™ I was reminded of the 50s sci-fi classic *Forbidden Planet*. If you've never seen the movie, an astronaut on the planet Krell discovers an incredible learning technology — a brainwave computer that downloads knowledge directly into your brain cells. Impossible? Maybe not.

A revolutionary breakthrough, the Learning Machine stimulates your mind and opens your learning centers. Like magic it pours in new information and skills. And it's super entertaining.

Plug Your Mind into Supersonic Learning Power

Let's say you want to learn a foreign language, quadruple your reading speed, or increase your math skills. Or give your children a powerful edge in school, learning 300%-500% faster than their peers.

You select a specially programmed Learning Disc in the area you want to excel. Play it on any ordinary CD player. Then attach your Learning Machine digital headset into the headphone jack. Push play and a few moments later your mind is launched into a pre-programmed learning session. In a fun, almost effortless way, the Learning Disc lesson plan installs its program and transfers the information into your mind.

Amazing Light-Sound Matrix Stimulates Your Mind

How does it work? A digital program embedded in the CD, called a Learning Matrix™, sends a combination of light and sound instructions through the Learning Machine digital headset to stimulate the optimum mind-state for learning.

During your learning session you'll be asked to listen to audio instructions while you review written materials. While this information is still fresh in your mind, the narrator instructs you to lower your Light Pulse Shield, and the Learning Disc fires in amazing light-sound matrix that instantly relaxes you. This highly relaxed mind-state helps lock the new information into your memory.

Learn Foreign Languages, Speed Reading, and More

Learning foreign languages, or anything for that matter, at rocket speed can be very empowering. And I'm going to include a ton of valuable Learning Disc software with your Learning Machine so you can get immediate results from this new technology. You'll receive 4 basic language courses — French, German, Spanish, Italian. A Super Vocabulary course, a Super Memory course and a Speed Reading course. And for your kids, a SuperPhonics™ reading program. Over $600 worth of Learning Discs make this the deal of the century. But I also want to show off its other amazing powers.

Amazing digital headset stimulates your mind and opens your learning centers. Like magic it pours in new information and skills in a fun, effortless way.

3-D Mind Sync Induces Virtual Fantasy Experiences

So I'll include the 3-D Mind Sync™ Library, with 10 whole brain synchronization programs on 3 CDs, to turn your Learning Machine into a meditation, self-hypnosis, and virtual fantasy computer. You'll receive the following titles: *Creativity Booster, Quick Energy, Stress Zapper, Brain Tune-Up, Virtual Visualization, Inspiration Stimulator, Learning Accelerator, Super Intuition, Lucid Dreaming,* and *Super Zen States.*

A $150 value, this extensive collection is a super added bonus. But what's even more exciting is how this same technology can be used for total success conditioning and eliminating self-defeating stresses.

Zap Your Mind with Success

Let's say you want to transform a negative mind-set into a winning one. Or would like to get unstuck in your weight. Pop in an InnerMind™ Programming Disc. The light-sound matrix opens a window into your unconscious mind.

Then by imprinting your "inner mind" with positive programming, you can reprogram negative, self-defeating behavior. I'm including 15 "awesome" InnerMind programs. From success conditioning to weight control, this is another $150 value.

$200 Instant Rebate

Plus in addition to the Language Library, the SuperPhonics, Super Speed Reading, Super Memory, and Super Vocabulary programs, the Mind Sync Library,

and the InnerMind Programming Library (a $600 combined value), I'm offering you a $200 instant rebate off the list price. I figure you'll be so impressed, you'll use the extra $200 to buy more Learning Discs.

The list price for the Learning Machine is $499.95. But you can have it for $299.95 plus shipping. Remember, in addition to the $200 rebate, I'm including hundreds of dollars worth of free Learning Discs. Making this an incredible offer.

30-Day Risk Free Trial

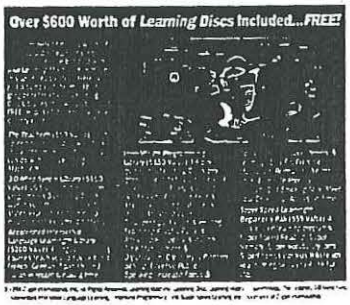
Try the Learning Machine risk free for 30 days. Exercise it language- triple your reading speed, boost your concentration, increase your memory, and reprogram one or two bad habits. Now imagine what you can do during the second month! But hurry. This is a limited introductory offer, so reserve your Learning Machine now.

To order, call toll free or send your check or money order for $299.95 plus $12 shipping & handling to the address below. Allow 1-6 weeks for delivery.

Learning Machine Special Offer
Item #4501 ..... $299.95 + $12.00

Need a CD Player? We have an excellent portable — at a great price!
Portable Kenwood CD Player
Item #91021 ..... $119.95 + $9.00

FOR FASTEST SERVICE ORDER TOLL FREE
1-800-925-3263
ZYGON



Over $600 Worth of *Learning Discs* Included...FREE!

EXHIBIT C

Document dated August 1994

EXHIBIT D

BEYOND VIRTUAL REALITY

Advertisement

Learning Machine Breakthrough!

Amazing new technology teaches you foreign languages, reprograms your mind for success & launches you into virtual fantasy experiences

BY DANE SPOTTS

THE FIRST TIME I plugged my mind into the Learning Machine™ I was reminded of the 50s sci-fi classic *Forbidden Planet*. If you've never seen the movie, an astronaut on the planet Krell discovers an incredible learning technology — a helmet hooked up to a super sophisticated computer that downloads knowledge directly onto your brain cells. Impossible? Maybe not.

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During your learning session you'll be asked to listen to audio instructions while you review written materials. While this information is still fresh in your mind, the narrator instructs you to lower your Light Pulse Shield, and the Learning Disc fires an amazing light-sound matrix that instantly relaxes you. This highly relaxed mind-state helps lock the new information into your memory.

Learn Foreign Languages, Speed Reading, and More

Learning foreign languages, or anything for that matter, at rocket speed can be very empowering.

And I'm going to include a ton of valuable Learning Disc software with your Learning Machine so you can get immediate results from this new technology. You'll receive 4 basic language courses — French, German, Spanish, and Italian. A Super Vocabulary course, a Super Memory course, and a Speed Reading course. And for your kids, a SuperPhonics™ reading program. Over $200 worth of Learning Discs make this the deal of the century. But I also want to show off its other amazing powers.

3-D Mind Sync Induces Virtual Fantasy Experiences

So I'll include the 3-D Mind Sync™ Library, with 10 whole brain synchronization programs on 3 CDs, to turn your Learning Machine into a meditation, self-hypnosis, and virtual fantasy computer. You'll receive the following titles: *Creativity Booster, Quick Energy, Stress Zapper, Brain Tune-Up, Virtual Visualization, Imagination Stimulator, Learning Accelerator, Super Intuition, Lucid Dreaming,* and *Super Zen States.*

A $150 value, this extensive collection is a super added bonus. But what's even more exciting is how this same machine can be used for habit control, success conditioning, and eliminating self-defeating attitudes.

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Then by infusing your "inner mind" with positive programming, you can rescript negative, self-defeating behavior. I'm including 13 awesome InnerMind programs. From success conditioning to weight control this is another $150 value.

$200 Instant Rebate

Plus in addition to the Language Library, the SuperPhonics, Super Speed Reading, Super Memory, and Super Vocabulary programs, the Mind Sync Library, and the InnerMind Programming Library (a $600 combined value), I'm offering you a $200 instant rebate off the list price. I figure you'll be so impressed, you'll use the extra $200 to buy more Learning Discs.

The list price for the Learning Machine is $499.95. But you can have it for $299.95 plus shipping. Remember, in addition to the $200 rebate, I'm including hundreds of dollars worth of free Learning Discs, making this an incredible offer.

30-Day Risk Free Trial

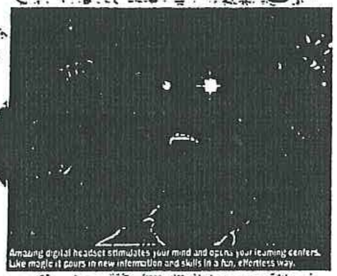
Try the Learning Machine risk free for 30 days. Sample 4 languages, triple your reading speed, boost your vocabulary, improve your memory, and reprogram one or two bad habits. Now imagine what you can do during the second month! But hurry. This is a limited introductory offer, so reserve your Learning Machine now.

To order, call toll free or send your check or money order for $299.95 plus $12 shipping & handling to the address

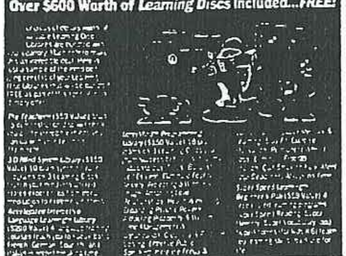
Learning Machine Special Offer
Item #4501 .... $299.95 (12.00)

Need a CD Player? We have an excellent portable — at a great price!
Portable Kenwood CD Player
Item #91021 .... $119.95 (9.50)

FOR FASTEST SERVICE ORDER TOLL FREE
1-800-925-3263
ZYGON



Amazing digital headset stimulates your mind and opens your learning centers. Like magic it pours in new information and skills in a fun, effortless way.



Over $600 Worth of Learning Discs Included...FREE!

EXHIBIT D

magazine August 1994

EXHIBIT E

Learning Machine Goes Beyond Virtual Reality...

It's the most advanced accelerated learning tool in the world!

Absolutely mind blowing!

What if you could flip a switch inside your mind to instantly activate your imagination? Speak foreign languages. Expand your mental skills. Program your subconscious to make you a sure-fire success. And pour into your mind the genius of an Einstein or a Socrates. Find out how the Learning Machine boosts mental powers, and launches virtual fantasy adventures... plus how to get $450 of Learning CDs FREE!

Try the Learning Machine for 30 days RISK FREE...Plus get $450 of FREE LEARNING CDs!

Get a Photographic Mind, Instant Motivation, Speak Foreign Languages, and More!

01/18/96 16:16:10

EXHIBIT E

The Learning Machine Home Page, World Wide Web, January 18, 1996

EXHIBIT F

Advertisement

Mind Power Breakthrough!

Plug Your Brain Into This Powerful Mind Machine To Zap Stress, Improve Mental Powers, And Free Yourself Of Self-Sabotaging Behavior. Plus Get $500 Worth Of Bonus *MindWare*™ !

By Dane Scotts

After a stressful day at work I put on my space age shades, plug in the "Dreamtime" tape, and program my *SuperMind*™ computer for a "heavy-duty" Theta session. As I punch the start button I'm reminded of NASA's virtual reality machines. Those billion dollar video games that transport your consciousness into an artificial computer world you manipulate with voice commands and gestures.

Of course, the *SuperMind*™ isn't virtual reality. No. It's more like electronic Zen.

A Vacation In 20 Minutes

After only a few moments of being plugged into this machine, I was sucked into a deep trance. Weird colors and patterns were created on the insides of my closed eyelids. I felt super relaxed and experienced the most profound sensation of peace and joy. It felt as if my soul was transported into the garden of eden. Was this the blissful ecstasy of enlightenment mystics write about? I felt an orgasmic endorphin rush stream into my brain. Yes! I was launching into Theta-land. Big time.

Using pulses of sequenced light emitted from the glasses and computer generated sound frequencies, the *SuperMind*™ synchronizes your brainwave patterns, driving your brain into an altered state of consciousness similar to dreaming.

Based on hard scientific evidence which associates states of consciousness with dominant brainwave activity, this machine coaxes your brain into an Alpha/Theta pattern (brainwaves in the 4-10Hz range), which is associated with deep meditation and mental imagery. Zen monks and yogis train for decades to achieve this same level of mental control.

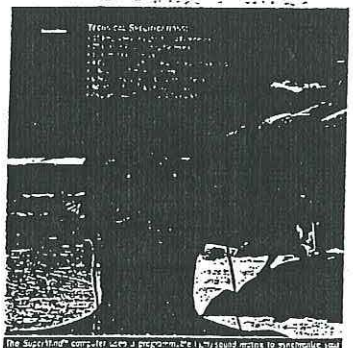
Developed by the Mind Research Laboratory, now anyone can enter profound mental states at the push of a button. And because it's computer controlled you can experiment with thousands of different frequency combinations. Or you can choose from 10 "preset programs" designed to produce specific states of consciousness - ranging from dream-like sleep and meditation to extreme alertness - all at the push of a button.

The size of a pocket calculator, it's so portable I take it with me on business trips to beat stress and jet lag. A 20-minute session gives me the equivalent of 8-hours sleep and helps reset my biological clock.

Boost Brainpower

Listen: Training your brain to generate Theta activity for even a few minutes each day has enormous benefits, including boosting the immune system, enhancing creativity, I.Q., and psychic abilities, along with increasing feelings of psychological well-being.

For a little black box to do all that to your brain in 20 minutes is amazing enough, but it's only part of the story. Because this machine can also be used to accelerate learning and modify negative self-defeating behavior.



The SuperMind™ computer uses a programmable light/sound motion to synchronize your brainwaves into desired mind states. You can custom program thousands of different frequency combinations or use the built-in preset programs with amazing 3-D sound effects.

Automatic Hypnosis

Let's say you wanted to quit smoking, enhance your self-esteem, lose weight, or just play a better game of golf. You could pay a hypnotist $100 an hour or more to reprogram these new self-image and behavior patterns into your subconscious. Or, by plugging into the *SuperMind*™ you could induce a hypnotic trance in a matter of seconds. Then, while your subconscious is primed for psychological programming, you play prerecorded behavioral mindscripts, and these new success patterns become transferred onto your brain.

I'll include a special report that teaches you exactly how to create your own behavioral mindscripts on everything from success conditioning and weight control to enhancing sexual performance. Or if you wish, use Zygon's prerecorded library of MindWare™ tapes. Whichever method you choose, you'll possess an extremely flexible and powerful tool for rescripting your subconscious and improving your life.

Instant Speed Learning

Plus, you can use this machine for speed learning. Tests at the University of California have revealed the effects of Theta frequencies on learning. During their study a group of 20 students learned 1,300 words of Bulgarian in 120 hours while using Theta stimulation programs. In about 1/3 the normal time they spoke and wrote the new language.

As an additional bonus I'll be sending you a special report on how to set up your own speed learning system to learn foreign languages and new material at lightning fast speed.

Free Mood-Lifting Library

And if you order your *SuperMind*™ *now (during this special introductory period)*, you'll receive a third special bonus – FREE. Four very unique MindWare™ soundtracks, called Moodscapes™, enhance your *SuperMind*™ experience. You simply connect a stereo player to the *SuperMind*™ unit using the patch cord provided. While the frequency matrix of your *SuperMind*™ alters your mind-state, the Moodscapes™ soundtrack transports your consciousness into a beautiful and unique aural landscape. Because your brain is so "tuned in" by the light/sound frequencies, your mind creates an intense array of mental images. The combination is truly exclarating.

And that's only the beginning. Because as part of this special promotion, I'm including $500 worth of additional MindWare™ bonuses with your *SuperMind*™ computer. For a

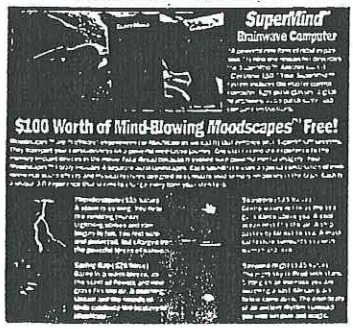


EXHIBIT F

[illegible] 3/1993

EXHIBIT F

...ature time the *SuperMind*™ comes with...

Super Motivation Library

Turn stress into success, and a loser mind-set into a winning one at the touch of a button with the 22-title Behavioral Mindscapes Library™. By first synchronizing your brainwaves into the optimum mind-state for psychological programming, the *SuperMind*™ uses these mindscripting tapes to rewire deeply embedded subconscious belief patterns. Reprogram self-sabotaging behavior and implant new success patterns automatically. Normally each title is $10, but for a limited time I'm bundling this entire $220 library with your *SuperMind*™ computer.

And there's more...

Speak French, Spanish, German, & Italian Overnight

Using the amazing accelerated language learning system, these four Instant Language courses are also bundled with your *SuperMind*™ computer. Each course works with software built into your *SuperMind*™ to imprint a super-fast working knowledge of these languages into your memory. Edited to accelerate learning time, words and phrases for speaking in each country are imprinted directly onto your brain cells. No verbs to conjugate or grammar to learn. A $200 super-value, all four language courses won't cost you a penny.

And here's something else...

3 Fantastic Mind Journeys

Trigger vivid sensory responses in your brain and transport your consciousness on a journey to other times and places with three mind-blowing experiences. "Aboriginal Dreamtime" takes you to a mystical time when the world was new and magic ruled. "Cetacean Mind Link" puts your consciousness inside a whale and dolphin to experience an incredible ocean world. And finally the ultimate mind-trip, "Near Death Experience" simulates the 5 astral stages of a journey out of your body, then back again, renewed and enlivened. Three superbly crafted *SuperMind*™ experiences are $25 each, adding another $75 bonus value to your package.

$17,000 Machine For $299

I'm super pumped up by this powerful self-improvement tool. Of all the light/sound machines I've used, the only one that even comes close to the *SuperMind*™ is a $17,000 clinical model.

This powerful brain boosting computer with all its incredible bonuses – "Auto-Hypnosis" Special Report ($25 value), the "Speed Learning System" ($25 value), Moodscapes™ Library ($100 value), and the incredible *MindWare*™ Bonus Bundle Package ($500 value), is all yours for only $299.95.

30-Day Free Trial

And you can try it entirely at my risk over the next 30 days. Take your brain on a mind machine journey into incredible mind-altering experiences, learn foreign languages at the push of a button, and reprogram a loser mind-set into a winning one. If for any reason you're not blown away by the technology, send your computer back to me for a full refund. But no matter what, keep the $100 worth of Moodscapes™ as my free gift just for giving it a shot.

To order, simply call my toll free number and ask for the *SuperMind*™ special offer (Item #405). Or send your check or money order for $299.95 plus $15 shipping & handling to the address below. Please allow 4-6 weeks for delivery.

For Fastest Service Order Toll Free
1-800-925-3263
ZYGON
P.O. Box 97022, Redmond, WA 98073-9722
For Information Please Call (206) 885-9200

$500 *MindWare* Bonus Pak!

EXHIBIT F

EXHIBIT G

Advertisement

Mind Power Breakthrough!

Plug Your Brain Into This Powerful Mind Machine To Zap Stress, Boost Mental Powers, And Launch Your Mind Into Virtual Reality-Like Fantasies. Plus Get $600 Worth Of Free MindWare™!

By Dane Spotts

After a stressful day at work, I put on my space age shades, plug in the "Dreamtime" tape, and program my *SuperMind*™ computer for a "heavy-duty" Theta session. As I punch the start button I'm reminded of NASA's virtual reality machines. Those billion dollar video games that transport your consciousness into an artificial computer world you manipulate with voice commands and gestures.

Of course, the *SuperMind*™ isn't virtual reality. No. It's more like electronic Zen.

A Vacation In 20 Minutes

After only a few moments of being plugged into this machine, I was sucked into a deep trance. Weird colors and patterns were created on the insides of my closed eyelids. I felt super relaxed and experienced a profound sensation of peace and joy. It's as if my soul were transported into the Garden of Eden. Was this the blissful ecstasy the enlightened mystics write about? I felt an orgasmic endorphin rush stream into my brain. Yes! I was launching into Alpha-Theta. Big time.

Using pulses of sequenced light emitted from the glasses and computer generated sound frequencies, the *SuperMind*™ automatically synchronizes your brainwave patterns, driving you into an altered state of consciousness similar to dreaming.

Based on scientific evidence which associates states of consciousness with dominant brainwave activity, this machine teases your brain into an Alpha-Theta pattern (brainwaves in the 4-8Hz range - which is associated with deep meditation and mental imagery. Zen monks and yogis train for decades to achieve the same level of mental control you experience in seconds.

Developed by Zygon's Mind Research Laboratory, now anyone can enter these profound mental states at the push of a button. And because it's computer controlled, you can experiment with thousands of different frequency combinations. Or you can choose from 21 "preset programs" designed to produce specific states of consciousness - ranging from dream-like sleep and meditation to extreme alertness - all at the push of a button.

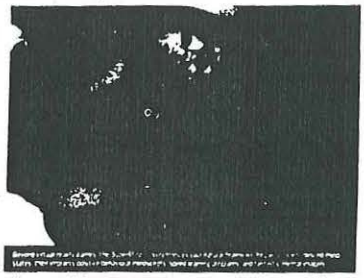
Boost Brainpower

Latest Studies reveal that training your brain to generate Theta activity for even a few minutes each day has enormous benefits, including boosting the immune system, enhancing creativity, I.Q., and psychic abilities, along with increasing feelings of psychological well-being. The size of a pocket calculator, it's so portable I take it with me on business trips to beat stress and jet lag.

For a little black box to do all that to your brain in 20 minutes is amazing enough, but it's only part of the story. Because this machine can also be used to accelerate learning and modify negative self-defeating behavior. How?

Super Motivation Library

Let's say you wanted to quit smoking, enhance your self-esteem, lose weight, or just play a better game of golf. You could pay a hypnotist $100 an hour or more to reprogram these new self-image and behavior patterns into your subconscious. Or, by plugging into the *SuperMind*™ you could induce a hypnotic trance in seconds.



Then, while your subconscious is primed for psychological programming, you play prerecorded behavioral mindscripts, and these new success patterns become transferred onto your brain cells. I'm bundling a 22-title Behavioral Mindscripting Library with your *SuperMind*™ that will turn stress into success, and a loser mind-set into a winning one at the touch of a button. A $220 value. And that's not all...

Speak French, Spanish, German, & Italian Overnight

Using the amazing accelerated language learning system, four Instant Language courses are also bundled with your *SuperMind*™ computer. Each course works with software built into your *SuperMind*™ to imprint a super-fast working knowledge of each language into your memory. Edited to speed learning time, words and phrases for speaking in each country are imprinted directly into your memory. No verbs to conjugate or grammar to learn. A $200 value, all four language courses won't cost you a penny. And here's something else...

3 Fantastic Mind Journeys

Transport your consciousness on a journey to other times and places with three mind-blowing experiences. "Aboriginal Dreamtime" takes you to a mystical time when the world was new and magic ruled. "Cetacean Mind Link" puts your consciousness inside a whale and dolphin to experience an incredible ocean world. And finally the ultimate mind-trip, "Near Death Experience" simulates the 5 astral stages of an out-of-body journey. A $75 bonus added to your package, free.

30-Day Free Trial

And you can try it entirely at my risk over the next 30 days. Take your brain on a mind machine journey into incredible mind-altering experiences, learn foreign languages at the push of a button, and reprogram a loser mind-set into a winning one. If for any reason you're not blown away by the technology, send your computer back to me for a full refund. But no matter what, I want you to keep $100 worth of Moodscapes™ (see details at left) as my free gift just for giving it a shot.

To order, simply call my toll free number and ask for the *SuperMind*™ computer with bonus bundle pak (Item #405). Or send your check or money order for $299.95 plus $15 shipping & handling to the address below. Please

For Fastest Service Order Toll Free

1-800-925-3263

ZYGON

[illegible] Bremerton Way, Bremerton, WA 98312
For Information Please Call (206) 883-9300
Fax Orders To (206) 883-1434

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EXHIBIT G

[illegible] magazine, January 1994

EXHIBIT H

"Smart Pill" Discovery!

Can This Amazing New Brain Formula Actually Help Your Mind Work Better & Faster? Test It Yourself And Get This Powerful Vitamin Protection Formula *Each And Every Month* Free!

Recently I received a news clipping about a Florida medical doctor who takes a daily dose of "smart pills" to increase memory, improve intelligence, and energize his brain. The article went on to tell of his incredible claim that these super pills not only made him smarter, but his 4-year-old son was turned into a genius because his wife took the pills while she was pregnant.

Being a self-improvement warrior I was intrigued by the concept, and started taking them myself. Instantly I was zooming. I felt like Captain Kirk on the "Star Trek" episode where time becomes super accelerated, in other words, my brain was thinking at warp speed.

Smart Pill Breakthrough

So how can a "pill" enhance cognition? Several ways. By increasing blood supply and oxygen to the brain. Enhancing brain cell metabolism. Inhibiting free radical damage to brain cells. And stimulating neuro-transmitter hormones.

My goal was to design a powerful brain formula, made entirely of natural substances.

Waking Up Your Brain

We hired the hottest pharmaceutical research lab in the country. The result is the *Brain Cognition Formula*. Twenty-six ingredients each tested for maximum purity and potency are loaded into a gelatin capsule.

Look: Popping a few pills won't make you an Einstein, but if your experiences are like mine, you'll notice an improvement in attention, focus, concentration, and mental energy. Because subtle or even major improvements in cognitive functioning often go unnoticed, it's important to have some way of measuring your progress.

So included in your package will be a special report called *The Mental Boost* that shows you how to measure your mental progress. You'll be instructed how to look for changes in alertness, mental energy, concentration, memorization, productivity, organization and planning, verbal skills, problem solving ability, mood, sexual desire, and overall health.

Super Vitamin Bonus

When you call and order your *Brain Cognition Formula*, you'll automatically be sent a fresh month's supply every four weeks. Plus as a special bonus you'll also receive our *Vitamin Protection Formula* FREE. Yes! You get two bottles for one low price! The *Brain Cognition Formula* and the *Vitamin Protection Formula*. This super bonus vitamin program is automatically sent to you each and every month along with your brain pills, for as long as you wish to continue the program.

30-Day Free Trial (Empty-The-Bottle Guarantee)

And to be sure this stuff really works, you can try it out entirely at my risk for 30 days. Order your first month's supply of both formulas. And if at any time during the 30-day trial you wish to discontinue the program, simply return the unused portion (even if it's an empty bottle), and still receive a 100% refund. Then after the first 30 days, you may cancel any subsequent shipments with a simple telephone call.

Super Vitamin Bonus

Decide For Yourself If The Brain Cognition Formula Really Works, And Get This Vitamin Protection Formula Every Month Free!

The *SuperBrain™ Nutrient Program* includes a monthly supply of the *Brain Cognition Formula* and the *Vitamin Protection Formula*. Each of these programs work synergistically to promote overall health and optimum mental functioning. Both bottles are sent to you automatically each month for one low monthly price. You may cancel at any time by simply calling and telling us not to send it anymore.

SuperBrain Nutrient Program
Item # 6021M ..... $24.95[3.00]

12

EXHIBIT H

Zygon's Supplement

EXHIBIT I

Fat Burner Pills

Not only is *Fat Burner* the fastest selling product in its class, but it contains an incredible 500 mg of pure L-Carnitine (a special amino acid used in metabolism) per serving. Combined with a special blend of Lipotropics and Chromium, you'll be on your way to a trimmer, firmer, leaner body.

Try this supplement with any of the other weight control products in this catalog for a super combined effect that will enhance your weight control program. *(60 Capsules)*

A special blend of Lipotropics plus 500 mg of L-Carnitine enhances the body's ability to burn fat.

Fat Burner Pills
Item # 84011. .....$14.95[3.00]

EXHIBIT I

Zygon's SuperLife catalog

195 Complaint

EXHIBIT J

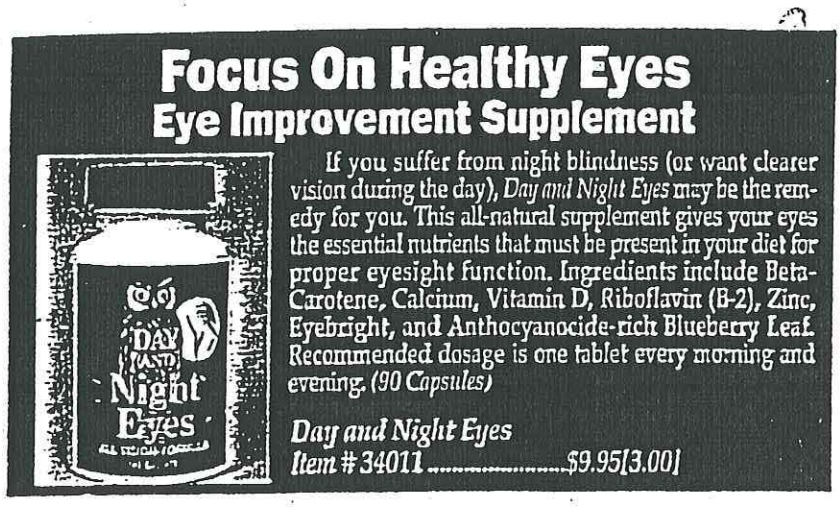
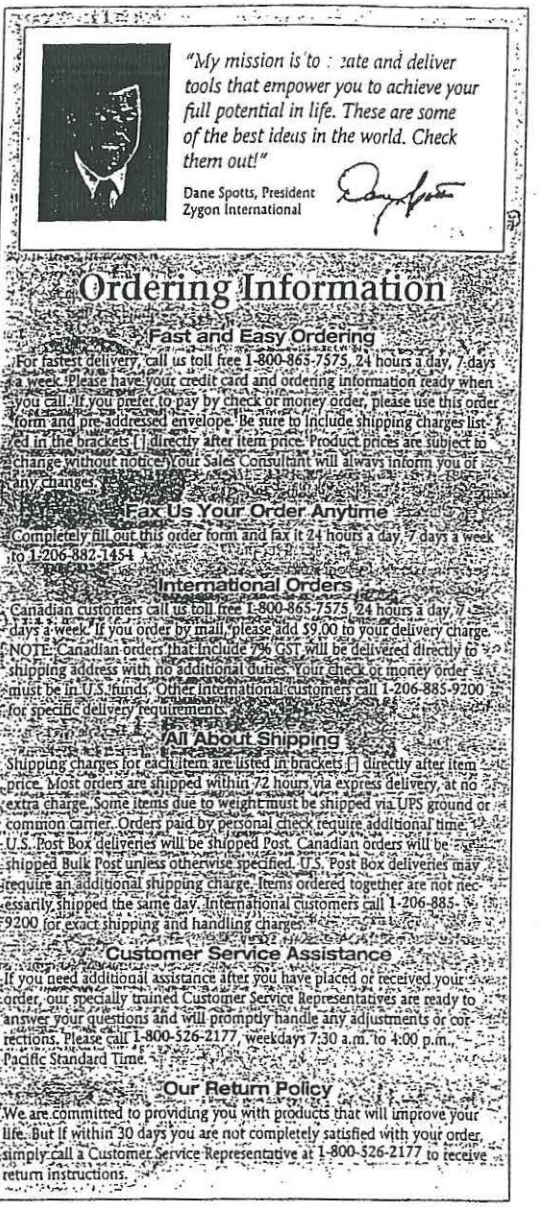


EXHIBIT J

Zygon's SuperLife catalog

EXHIBIT K



"My mission is to : :ate and deliver tools that empower you to achieve your full potential in life. These are some of the best ideas in the world. Check them out!"

Dane Spotts, President
Zygon International

Ordering Information

Fast and Easy Ordering

For fastest delivery, call us toll free 1-800-865-7575, 24 hours a day, 7 days a week. Please have your credit card and ordering information ready when you call. If you prefer to pay by check or money order, please use this order form and pre-addressed envelope. Be sure to include shipping charges listed in the brackets [ ] directly after item price. Product prices are subject to change without notice. Your Sales Consultant will always inform you of any changes.

Fax Us Your Order Anytime

Completely fill out this order form and fax it 24 hours a day, 7 days a week to 1-206-882-1454.

International Orders

Canadian customers call us toll free 1-800-865-7575, 24 hours a day, 7 days a week. If you order by mail, please add $9.00 to your delivery charge. NOTE: Canadian orders that include 7% GST will be delivered directly to shipping address with no additional duties. Your check or money order must be in U.S. funds. Other international customers call 1-206-885-9200 for specific delivery requirements.

All About Shipping

Shipping charges for each item are listed in brackets [ ] directly after item price. Most orders are shipped within 72 hours via express delivery, at no extra charge. Some items due to weight must be shipped via UPS ground or common carrier. Orders paid by personal check require additional time. U.S. Post Box deliveries will be shipped Post. Canadian orders will be shipped Bulk Post unless otherwise specified. U.S. Post Box deliveries may require an additional shipping charge. Items ordered together are not necessarily shipped the same day. International customers call 1-206-885-9200 for exact shipping and handling charges.

Customer Service Assistance

If you need additional assistance after you have placed or received your order, our specially trained Customer Service Representatives are ready to answer your questions and will promptly handle any adjustments or corrections. Please call 1-800-526-2177, weekdays 7:30 a.m. to 4:00 p.m., Pacific Standard Time.

Our Return Policy

We are committed to providing you with products that will improve your life. But if within 30 days you are not completely satisfied with your order, simply call a Customer Service Representative at 1-800-526-2177 to receive return instructions.

EXHIBIT K

Zygon's SuperLife catalog