

# FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS  
JANUARY 1, 1997 TO JUNE 30, 1997

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PUBLISHED BY THE COMMISSION  
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VOLUME 123



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**MEMBERS OF THE FEDERAL TRADE COMMISSION**

**DURING THE PERIOD JANUARY 1, 1997 TO JUNE 30, 1997**

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Took oath of office April 12, 1995.

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Took oath of office November 27, 1984.

**JANET D. STEIGER, *Commissioner***

Took oath of office August 11, 1989.

**ROSCOE B. STAREK, III, *Commissioner***

Took oath of office November 14, 1990.

**CHRISTINE A. VARNEY, *Commissioner***

Took oath of office October 14, 1994.

**DONALD S. CLARK, *Secretary***

Appointed August 28, 1988.

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# FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

## WESLEY-JESSEN 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-3700. Complaint, Jan. 3, 1997--Decision, Jan. 3, 1997*

This consent order requires, among other things, an Illinois-based manufacturer of opaque contact lenses to divest, within four months, the Pilkington Barnes Hind's opaque lens business to a Commission-approved acquirer.

### *Appearances*

For the Commission: *Catharine M. Moscatelli and Ann Malester.*  
For the respondent: *William C. Pelster, Skadden Arps, New York, N.Y. and Mary Lou Steptoe, Skadden Arps, Washington, D.C.*

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent, Wesley-Jessen Corporation ("Wesley-Jessen"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of Pilkington Barnes Hind International, Inc. ("PBH International"), a corporation, Barnes-Hind International Inc. ("Barnes-Hind International"), a corporation, Pilkington Barnes Hind (Services) Limited ("PBH Services"), Pilkington Barnes Hind N.V. ("PBH NV"), Pilkington Barnes Hind SA ("PBH France"), Pilkington Barnes Hind, S.A. ("PBH Spain"), Pilkington Barnes-Hind Pty Ltd. ("PBH Australia"), Pilkington Barnes Hind Japan KK ("PBH Japan"), Pilkington Barnes Hind Nederland B.V. ("PBH BV"), Pilkington Barnes Hind SpA ("PBH SpA"), Pilkington Barnes-Hind Limited ("PBH Ltd."), Pilkington Diffractive Lenses Limited ("Diffractive"), Pilkington Barnes Hind, Inc., a corporation, ("PBH"), and certain assets of Pilkington Deutschland GmbH ("PD"), from Pilkington plc ("Pilkington"),

subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

#### I. RESPONDENT

1. Respondent Wesley-Jessen Corporation ("Wesley-Jessen") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 333 East Howard Avenue, Des Plaines, Illinois.

#### II. THE ACQUIRED COMPANY

2. Pilkington plc ("PBH") is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its principal place of business located at Prescott Road, St. Helens, Merseyside, England.

#### III. JURISDICTION

3. 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### IV. THE ACQUISITION

4. On or about March 27, 1996, Wesley-Jessen and PBH signed a Letter of Intent whereby Wesley-Jessen would acquire all the voting securities of PBH, voting securities of certain foreign issuers controlled by PBH and certain assets located outside the United States for approximately \$80 million ("Acquisition").

## V. THE RELEVANT MARKETS

5. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of opaque contact lenses.

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

## VI. STRUCTURE OF THE MARKET

7. The market for the manufacture and sale of opaque contact lenses is highly concentrated as measured by the Herfindahl-Hirschmann Index. The parties to the Acquisition combined account for over 90% of the market.

## VII. BARRIERS TO ENTRY

8. Entry into the manufacture and sale of opaque contact lenses is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result. The existence of broad patents governing design and manufacture make new entry both difficult and unlikely.

## VIII. EFFECTS OF THE ACQUISITION

9. The effects of the Acquisition if consummated may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among others:

(a) Eliminating actual, direct and substantial competition based on pricing, service and innovation between Wesley-Jessen and PBH International in the relevant market;

(b) Increasing the likelihood that Wesley-Jessen will unilaterally exercise market power in the relevant market;

(c) Creating a dominant firm in the relevant market; and

(d) Enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant market.

#### IX. VIOLATIONS CHARGED

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

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

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the respondent named in the caption of all of the voting securities of Pilkington Barnes Hind International, Inc. ("PBH International"), a corporation, Barnes-Hind International Inc. ("Barnes-Hind International"), a corporation, Pilkington Barnes Hind (Services) Limited ("PBH Services"), Pilkington Barnes Hind N.V. ("PBH NV"), Pilkington Barnes Hind SA ("PBH France"), Pilkington Barnes Hind, S.A. ("PBH Spain"), Pilkington Barnes-Hind Pty Ltd. ("PBH Australia"), Pilkington Barnes Hind Japan KK ("PBH Japan"), Pilkington Barnes Hind Nederland B.V. ("PBH BV"), Pilkington Barnes Hind SpA ("PBH SpA"), Pilkington Barnes-Hind Limited ("PBH Ltd."), Pilkington Diffractive Lenses Limited ("Diffractive"), Pilkington Barnes Hind, Inc., a corporation, ("PBH"), and certain assets of Pilkington Deutschland GmbH ("PD"), from Pilkington plc ("Pilkington"), and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of

said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Wesley-Jessen Corporation ("Wesley-Jessen") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business located at 333 East Howard Avenue, Des Plaines, Illinois.

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

## ORDER

### I.

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

A. "*Respondent*" or "*Wesley-Jessen*" means Wesley-Jessen Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, affiliates and groups controlled by respondent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*PBH*" means Pilkington plc, a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its principal place of business at Prescott Road, St. Helens, Merseyside, England WA 10 3TT, and including all of its subsidiaries, affiliates, divisions and groups.

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

D. "*Pilkington Acquisition*" means the acquisition which is the subject of an agreement between Wesley-Jessen and Pilkington dated July 5, 1996, in which respondent will acquire voting securities of Pilkington Barnes Hind International, Inc., Barnes-Hind International Inc., Pilkington Barnes Hind (Services) Limited, Pilkington Barnes Hind N.V., Pilkington Barnes Hind SA, Pilkington Barnes Hind, S.A., Pilkington Barnes-Hind Pty Ltd., Pilkington Barnes Hind Japan KK, Pilkington Barnes Hind Nederland B.V., Pilkington Barnes Hind SpA, Pilkington Barnes-Hind Limited, Pilkington Diffractive Lenses Limited, PBH, and certain assets of Pilkington Deutschland GmbH.

E. "*Acquirer*" means the person to whom Wesley-Jessen divests PBH's Opaque Lens Business pursuant to paragraph II.A of this order.

F. "*New Acquirer*" means the person to whom the trustee divests PBH's Opaque Lens Business pursuant to paragraph V of this order.

G. "*Divestiture Agreement*" means the agreement between Wesley-Jessen and the Acquirer or New Acquirer whereby PBH's Opaque Lens Business is divested.

H. "*Supply Agreement*" means the agreement between Wesley-Jessen and the Acquirer or New Acquirer required by paragraph III.A. of this order.

I. "*Licensed Territory*" means the United States and its territories and possessions.

J. "*Opaque Contact Lenses*" means contact lenses containing opaque materials that cover the iris and that are designed to change the apparent color of the eye.

K. "*PBH's Opaque Lens Products*" means Opaque Contact Lenses researched, developed, manufactured, distributed and sold by PBH in the United States, including but not limited to those marketed and sold under the brand name Natural Touch™.

L. "*PBH's Opaque Lens Business*" means the following rights and assets (other than assets that are part of PBH's physical facilities) relating to the research, development, distribution or sale of PBH's Opaque Lens Products by PBH, including, but not limited to:

(1) All books, records, manuals, reports, lists, advertising and promotional materials, computer records and other documents relating to PBH's Opaque Lens Products;

(2) Natural Touch product line Profit and Loss statements relating to each of PBH's Opaque Lens Products for the United States;

(3) All legal or equitable rights in trademarks and tradenames registered in the United States together with all trademark registrations and applications and trade names therefor relating to PBH's Opaque Lens Products;

(4) All lists of stock keeping units ("SKUs"); *i.e.*, all forms, package sizes and other units in which PBH's Opaque Lens Products are sold and which are used in records of sales and inventories;

(5) All Bills of Materials for each of PBH's Opaque Lens Products, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including all lists of authorized sources for materials and components;

(6) All artwork and mechanical drawings currently in use relating to each of PBH's Opaque Lens Products;

(7) All customer lists, including but not limited to, lists of distributors, opticians, ophthalmologists, optometrists, and eye-care chains who have bought PBH's Opaque Lens Products, including, but not limited to, all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales monthly, by product, to each customer in the United States;

(8) All marketing information relating to PBH's Opaque Lens Products, including but not limited to PBH's consumer and trade promotion, marketing and business programs;

(9) Inventories of finished goods, packaging and raw materials relating to PBH's Opaque Lens Products equal to the percentage of PBH's worldwide sales of Opaque Lens Products for which United States sales account as of August 31, 1996;

(10) All documents containing or relating to product testing and laboratory research data relating to PBH's Opaque Lens Products, including but not limited to all regulatory registrations and correspondence;

(11) All consumer correspondence and documents relating to PBH's Opaque Lens Business;

(12) All documents constituting or relating to price lists for PBH's Opaque Lens Products;

(13) All documents and information relating to costs of production for each of PBH's Opaque Lens Products, including but

not limited to raw material costs, packaging costs, and advertising and promotional costs;

(14) All documents containing sales data relating to PBH's Opaque Lens Products;

(15) Subject to the Patent Assignment Agreement granted to Allergan, Inc., dated December 17, 1992, a royalty-free license under the patents listed in Appendix A of this order to manufacture, import, offer for sale, use and sell Opaque Contact Lenses in the Licensed Territory, said license to be exclusive with respect to the sale of Opaque Contact Lenses. Further, Wesley-Jessen Corporation shall release Acquirer or New Acquirer from all claims that Wesley-Jessen has or may have against Acquirer or New Acquirer with respect to PBH's patents listed in Appendix A, including but not limited to the Request for Interference filed on April 11, 1995, by Schering Plough (Wesley-Jessen's U.S. Continuation Application of 07/984,817) against US Patent No. 5,302,978, issued April 12, 1994 (Evans, et al.), provided that said release is not in violation of any applicable law. Further, if, pursuant to any interference proceeding, with respect to the patents listed in Appendix A, Wesley-Jessen is awarded claims in any pending patent application in replacement of the claims presently held in the PBH patents listed in Appendix A, then Wesley-Jessen shall license those claims to Acquirer or New Acquirer under terms consistent with the terms of the license granted in the first sentence of this paragraph. Moreover, if the US Patent Office declares an interference between any Janke patent application and any PBH patent listed in Appendix A, then Wesley-Jessen shall agree to settle the action consistent with the terms of the license granted in the first sentence of this paragraph with all costs and attorneys fees for both parties paid by Wesley-Jessen;

(16) A non-transferable, irrevocable, non-exclusive, royalty-free license under the patents listed in Appendix B of this order to manufacture, import, offer for sale, use and sell Opaque Contact Lenses in the Licensed Territory, except that the Acquirer or New Acquirer may transfer this license as part of a sale of all of PBH's Opaque Lens Business of the Acquirer or New Acquirer but not until the Acquirer or the New Acquirer has obtained all necessary United States Food and Drug Administration ("FDA") approvals to manufacture PBH's Opaque Lens Products for sale in the United States;

(17) A non-transferable, irrevocable, non-exclusive assignment of PBH's rights and obligations under the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994, (or a license providing at least equivalent rights and obligations) to enable the Acquirer or New Acquirer to manufacture, import, offer for sale, use, distribute and sell PBH's Opaque Lens Products in the Licensed Territory, except that the Acquirer or New Acquirer may transfer this assignment as part of a sale of all of PBH's Opaque Lens Business of the Acquirer or New Acquirer but not until the Acquirer or New Acquirer has obtained all necessary FDA approvals to manufacture PBH's Opaque Lens Products and otherwise consistent with the terms of the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994; and

(18) All trade secrets, technology and knowhow of PBH relating to researching, developing, manufacturing, distributing, and selling PBH's Opaque Lens Products, including, but not limited to, books and records, documents containing the results of research and development efforts, filings with the FDA, scientific and clinical reports, designs, manuals, drawings, and design material and equipment specifications.

Provided, however, that Wesley-Jessen may retain copies of documents or information to the extent such documents or information relate to products other than PBH Opaque Lens Products.

M. "*Supplied Products*" means non-disposable opaque colored contact lenses approved by the FDA as daily wear lenses having a planned replacement period of ninety (90) days or more, and which are promoted, advertised or marketed solely as daily wear lenses and are sold in vials with labeling claims for frequency of use and replacement no less restrictive than those currently approved for the PBH Natural Touch™ lenses by the FDA. The specifications for these are:

The polymacon material is a hydrophilic polymer of 2-hydroxyethyl methacrylate cross-linked with ethylene glycol dimethacrylate. When fully hydrated in 0.9% sodium chloride solution, the composition of the polymacon lens is 62% polymacon polymer and 38% water by weight. The material has a refractive index of 1.44, as measured in 0.9% sodium chloride solution. Lenses are tinted with one or more of the following vat dyes: Cl#59825, 69825, 73335, 61725. Lenses range in power from -10.00 to +4.00 (including plano) in quarter diopters, and are to be disinfected using either a thermal (heat), chemical (not heat), or hydrogen peroxide disinfection system.

N. "*Information Relating to Licensing of Patents*" means any information not in the public domain disclosed by the Acquirer or New Acquirer to respondent relating to the assignment of the licensing agreement between Wesley-Jessen and PBH dated August 1, 1994, as referenced in paragraph I.L.17.

## II.

*It is further ordered, That:*

A. Wesley-Jessen shall divest, absolutely and in good faith and at no minimum price, PBH's Opaque Lens Business. PBH's Opaque Lens Business shall be divested within four (4) months of the date this Agreement is signed, to an Acquirer that receives the prior approval of the Commission and only pursuant to a Divestiture Agreement that receives the prior approval of the Commission.

The purpose of this divestiture is to create an independent competitor in the research, development, manufacture, distribution and sale of Opaque Contact Lenses and to remedy the lessening of competition resulting from the Pilkington Acquisition as alleged in the Commission's complaint.

B. Upon reasonable notice and request from the Acquirer or New Acquirer to Wesley-Jessen, Wesley-Jessen shall provide information, technical assistance and advice to the Acquirer or New Acquirer such that the Acquirer or New Acquirer will be capable of continuing the current research, development, manufacture, distribution and sale with respect to PBH's Opaque Lens Products. Such assistance shall include reasonable consultation with knowledgeable employees of Wesley-Jessen and training at the facility of the Acquirer or New Acquirer, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel are adequately knowledgeable about PBH's Opaque Lens Products. However, respondent shall not be required to continue providing such assistance for more than eighteen (18) months after divestiture to the Acquirer or New Acquirer of PBH's Opaque Lens Products. Respondent may require reimbursement from the Acquirer or New Acquirer for all of its own direct costs incurred in providing the services required by this subparagraph. Direct costs, as used in this subparagraph, means all actual costs incurred exclusive of overhead costs.

C. Pending the divestiture of PBH's Opaque Lens Business, respondent shall take such actions as are necessary to maintain the viability and marketability of PBH's Opaque Lens Business (including, but not limited to, any planned research and development programs, marketing plans, capital improvements, or business plans) and to prevent the destruction, removal, wasting, or impairment of PBH's Opaque Lens Business except for ordinary expiration of patents and ordinary wear and tear.

### III.

*It is further ordered, That:*

A. Respondent shall enter into a Supply Agreement with the Acquirer or New Acquirer contemporaneously with the Divestiture Agreement. The Supply Agreement shall be subject to the prior approval of the Commission and shall require the respondent to supply the Acquirer or New Acquirer with the amount of Supplied Products requested by the Acquirer or New Acquirer. The Supply Agreement will remain in effect for eighteen (18) months; provided, however, the 18 month period may be extended by the Commission for a period not to exceed 24 months, if the Commission determines that the Acquirer or New Acquirer made a good faith effort to obtain all necessary FDA approvals for the manufacture of PBH's Opaque Lens Products and that such FDA approvals appear likely to be obtained within the extended time period.

During the term of the Supply Agreement, upon reasonable request by the Acquirer or New Acquirer Wesley-Jessen shall make available to the Acquirer or New Acquirer all records kept in the normal course of business that relate to the cost of manufacturing the Supplied Products.

B. The Divestiture Agreement shall include the following and Wesley-Jessen shall commit to satisfy the following:

1. Wesley-Jessen shall commence delivery of Supplied Products to the Acquirer or the New Acquirer within two (2) months from the date the Commission approves the Acquirer and the Divestiture Agreement (or the New Acquirer and its Divestiture Agreement), or such later time as the Acquirer or New Acquirer may require.

2. Wesley-Jessen shall make representations and warranties to the Acquirer or New Acquirer that the Supplied Products meet FDA approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* Wesley-Jessen shall agree to indemnify, defend and hold the Acquirer or New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Supplied Products supplied by Wesley-Jessen to meet FDA specifications. This obligation may be contingent upon the Acquirer or the New Acquirer giving Wesley-Jessen prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Wesley-Jessen to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require Wesley-Jessen to be liable for any negligent act or omission of the Acquirer or New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or New Acquirer that exceed the representations and warranties made by Wesley-Jessen to the Acquirer or New Acquirer, as applicable.

3. The Divestiture Agreement shall require the Acquirer or New Acquirer to submit to the Commission with the divestiture application, a certification attesting to the good faith intention of the Acquirer or New Acquirer, and including an actual plan by the Acquirer or New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States.

4. The Divestiture Agreement shall require the Acquirer or New Acquirer to submit to the trustee appointed pursuant to paragraph IV. of this order periodic verified written reports setting forth in detail the efforts of the Acquirer or New Acquirer to sell in the United States PBH's Opaque Lens Products supplied by Wesley-Jessen and to obtain all FDA approvals necessary to manufacture its own PBH's Opaque Lens Products for sale in the United States. The Divestiture Agreement shall require such reports to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary FDA approvals are obtained by the Acquirer or New Acquirer to manufacture PBH's Opaque Lens Products for sale in the United States. The Divestiture Agreement shall also require the Acquirer or New Acquirer to report to the Commission and the trustee at least thirty (30) days prior to its

ceasing the manufacture or sale of PBH's Opaque Lens Products in the United States for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture its own PBH's Opaque Lens Products for sale in the United States.

C. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or New Acquirer: (1) ceases for sixty (60) days or more the sale of PBH's Opaque Lens Products prior to obtaining all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States; (2) abandons its efforts to obtain all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States; or (3) fails to obtain all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States within eighteen (18) months from the date the Commission approves a Divestiture Agreement with the Acquirer or New Acquirer; provided, however, that the eighteen (18) month period may be extended for a period not to exceed twenty-four (24) months if the Commission determines that the Acquirer or the New Acquirer made good faith efforts to obtain all necessary FDA approvals for manufacturing PBH's Opaque Lens Products for sale in the United States and that such FDA approvals appear likely to be obtained within the extended time period.

D. While the obligations imposed by paragraphs II and III of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to research, develop, manufacture, offer for sale, use and sell PBH's Opaque Lens Products in the United States; (2) to maintain the viability and marketability of PBH's Opaque Lens Business as well as all tangible assets, including manufacturing facilities needed to contract manufacture the Supplied Products; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of PBH's Opaque Lens Business or tangible assets including manufacturing facilities needed to contract manufacture and sell PBH's Opaque Lens Products except for ordinary wear and tear.

E. Respondent shall not provide, disclose or otherwise make available to any department/division of respondent other than the legal and accounting departments any Information Relating to Licensing of Patents.

F. Respondent shall use any Information Relating to Licensing of Patents obtained by respondent only in respondent's capacity as a licensor of certain patents in order to collect royalties, pursuant to paragraph II of this order.

#### IV.

*It is further ordered, That:*

A. Within three (3) months of the date this Agreement is signed, or any time thereafter, the Commission may appoint a trustee to monitor that Wesley-Jessen and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this order, the Divestiture Agreement, and the Supply Agreement approved by the Commission. Wesley-Jessen shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

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

(2) The trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and the compliance of the respondent with the terms of the Divestiture Agreement and the Supply Agreement. If directed by the Commission to divest PBH's Opaque Lens Business pursuant to paragraph V of this order, the Trustee shall also have the power and the authority as described in paragraph V to divest those assets.

(3) Within ten (10) days after appointment of the trustee, Wesley-Jessen shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement and the Supply Agreement with the Acquirer or New Acquirer and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement and the Supply

Agreement. Further, the trust agreement shall confer on the trustee all the rights and powers necessary for the trustee to divest PBH's Opaque Lens Business pursuant to paragraphs II and V of this order, if necessary.

(4) The trustee shall serve until such time as the Acquirer or the New Acquirer has received all necessary FDA approvals to manufacture PBH's Opaque Lens Products for sale in the United States.

(5) The trustee shall have full and complete access to the personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of PBH's Opaque Lens Products, or to any other relevant information, as the trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to the cost of manufacturing PBH's Opaque Lens Products. Respondent shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to monitor respondent's compliance with paragraphs I and III of this order and the Divestiture Agreement and Supply Agreement with the Acquirer or the New Acquirer.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Wesley-Jessen, on such reasonable and customary terms and conditions as the Commission may set. The trust agreement shall provide that, if the Commission directs the trustee to divest PBH's Opaque Lens Business, the trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting PBH's Opaque Lens Business. The trustee shall have authority to employ, at the cost and expense of Wesley-Jessen, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

(7) 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 preparations for, or defense of any claim whether or not resulting in any liability, except to the extent

that such liabilities, losses, damages, claims, or expenses result from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

(8) 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 of this order.

(9) The Commission 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 assure compliance with the requirements of paragraph II of this order and the Divestiture Agreement and Supply Agreement with the Acquirer or the New Acquirer.

(10) The trustee shall report in writing to the Commission every three months concerning compliance by the respondent and the Acquirer or the New Acquirer with the provisions of paragraphs II and III of this order and the efforts of the Acquirer or the New Acquirer to receive all necessary FDA approvals to manufacture Opaque Contact Lenses for sale in the United States.

B. Respondent shall comply with all reasonable directives of the trustee regarding respondent's obligation to cooperate with the trustee's efforts to monitor the compliance of the respondent and the Acquirer or New Acquirer with this order, the Divestiture Agreement, and the Supply Agreement.

C. If the Commission terminates the Divestiture Agreement pursuant to paragraph III.C of this order, the Commission may direct the trustee to seek a New Acquirer, as provided for in paragraph V of this order.

## V.

*It is further ordered, That:*

A. If Wesley-Jessen has not divested PBH's Opaque Lens Business as required by paragraph II.A of this order, or if the Commission terminates the Divestiture Agreement pursuant to paragraph III.C of this order, the Commission may direct the trustee appointed pursuant to paragraph IV of this order to divest PBH's Opaque Lens Business. 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, Wesley-Jessen shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If the trustee is directed by the Commission or a court pursuant to paragraph V.A of this order to divest PBH's Opaque Lens Business, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

(1) Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest PBH's Opaque Lens Business.

(2) The trustee shall have twelve (12) months from the date the Commission directs the trustee to divest PBH's Opaque Lens Business to accomplish the divestiture of PBH's Opaque Lens Business, which divestiture shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12) month period, the trustee has submitted a divestiture candidate 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 the twelve (12) month period only two (2) times.

(3) The trustee shall have full and complete access to the personnel, documents, books, records and facilities related to PBH's Opaque Lens Business and 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 to accomplish the 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.

(4) 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 pursuant to a Divestiture Agreement approved by the Commission and to a New Acquirer approved by the Commission; provided, however, if the trustee receives *bona fide* offers from more than one entity, and if the Commission determines to approve more than one such entity, the trustee shall divest to the entity selected by respondent from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power to divest PBH's Opaque Lens Business pursuant to this paragraph shall be terminated.

(6) 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.

(7) 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.

(8) 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.

(9) The trustee shall have no obligation or authority to operate or maintain PBH's Opaque Lens Business.

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

## VI.

*It is further ordered*, That, for a period of ten (10) years after the date the order becomes final, respondent shall not, without prior notice to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 5% of any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the research, development, manufacture, importation, distribution or sale of opaque contact lenses in the United States; or

B. Acquire any assets at the time of the proposed acquisition used for or used in the previous two years for (and still suitable for use for) the research, development, manufacture, distribution or sale of Opaque Contact Lenses in the United States. Provided, however, that this paragraph VI shall not apply to the acquisition of equipment, machinery, supplies or facilities constructed, manufactured or developed by or for respondent.

The prior notifications required by this paragraph VI shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to

as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

## VII.

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

## VIII.

*It is further ordered,* That respondent, for the purpose of determining and securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five (5) days' notice to respondent, shall permit any duly authorized representative(s) 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 respondent's officers, directors, or employees, who may have counsel present, regarding such matters.

## IX.

*It is further ordered, That this order shall terminate on January 3, 2017.*

## APPENDIX A

<u>Patent No.</u>	<u>Title</u>	<u>Inventor</u>	<u>Country</u>	<u>Issue or Grant Date</u>
5,034,166	Method of Molding a Colored Contact Lens	Rawlings, et. al.	U.S.	July 23, 1991
5,116,112	Colored Lens and Method of Manufacture	Rawlings	U.S.	May 26, 1992
5,120,121	Colored Lens	Rawlings, et. al.	U.S.	June 9, 1992
5,158,718	Contact Lens Casting (corona mold treatment)	Thakrar et. al.	U.S.	October 27, 1992
5,160,463	Method of Manufacturing Contact Lens	Evans et. al.	U.S.	November 3, 1992
5,302,978	Contact Lens (limbal ring)	Evans, et. al.	U.S.	April 12, 1994
Application 08/053,504	Novel Colored lens and method of manufacture	Rawlings, et. al.	U.S.	April 26, 1993 filing date. Earliest effective filing date July 21, 1988
Application 08/143,373	Colored Contact Lens and Method for Making Same	Thakrar, et. al.	U.S.	October 26, 1993, filing date. Earliest effective date, February 16, 1989

Decision and Order

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## APPENDIX B

<u>Patent No.</u>	<u>Title</u>	<u>Inventor</u>	<u>Country</u>	<u>Issue or Grant Date</u>
4,955,580	Contact Lens Mold (no lip molding)	Seden et. al.	U.S.	September 11, 1990
5,036,971	Molding Contact Lenses (no lip molding)	Seden et. al.	U.S.	August 6, 1991
5,114,629	Process for Casting Lenses (lens casting)	Morland, et. al.	U.S.	May 19, 1992
4,944,899	Process and Apparatus for Casting Lenses (lens casting)	Morland, et. al.	U.S.	July 31, 1990

## IN THE MATTER OF

## FILTRATION MANUFACTURING, INC., ET AL.

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

*Docket C-3702. Complaint, Jan. 6, 1997--Decision, Jan. 6, 1997*

This consent order prohibits, among other things, an Alabama-based corporation and three of its officers from making any representation regarding the performance, health or other benefits, or efficacy of air cleaning products, and from using the name "Allergy 2000" or any other trade names that represents that such products will relieve allergy symptoms, unless the respondents possess competent and reliable scientific evidence to substantiate such representations.

*Appearances*

For the Commission: *Brinley H. Williams* and *Michael Milgrom*.  
For the respondents: *Thomas Collins, Jr.*, Cleveland, OH.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Filtration Manufacturing, Inc., a corporation, and Gary L. Savell, Horace R. Allen, and Brandon R. Clausen, individually and as officers of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Filtration Manufacturing, Inc., is an Alabama corporation with its principal office or place of business at 1110 Montlimar Place, Suite 290, Mobile, Alabama.

Respondent Gary L. Savell is the President, Chief Executive Officer, and an owner and director of the corporate respondent. His principal office or place of business is the same as that 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.

Respondent Horace R. Allen is the Secretary, Treasurer, and an owner and director of the corporate respondent. His principal office or place of business is the same as that 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.

Respondent Brandon R. Clausen is the Vice President, and an owner and director of the corporate respondent. His principal office or place of business is the same as that 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.

PAR. 2. Respondents have manufactured, labeled, advertised, promoted, offered for sale, sold, and distributed the "Allergy 2000" air filters.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Allergy 2000 air filters, including but not necessarily limited to the attached Exhibits A through G. These advertisements contain the following statements and depictions:

1. Prescribe the ultimate in care for your patient's indoor air today!

\* \* \*

Clearly improving the quality of air your patients breathe can be an important step to improving their overall health.

How? By prescribing the Allergy 2000 air conditioning filter. This super high efficiency four-stage electrostatic air filter with advanced state-of-the-art materials and a computerized design to provide the perfect mixture of air filtration and air flow.

Studies by independent labs have confirmed that the Allergy 2000 gathers an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles of 5 microns or less. By contrast, most commercially purchased fiberglass filters are only 7% efficient in stopping dirt, dust, pollen, etc. passing through it, according to ASHRAE.

The extremely low resistance of the Allergy 2000 means less strain on the air conditioning unit, which means higher efficiency and energy savings-so it can literally pay for itself! (Exhibit A.)

2. Isn't it time you stopped leaving your family's health up in the air?

Introducing the amazing Allergy 2000. The last air conditioning filter you'll ever buy.

\* \* \*

Superior arrestance capability, 83% average with 85% peak. Superior loading capacity, 150 grams holding capacity.

\* \* \*

The ultimate care for your air!

The Allergy 2000 represents the absolute state-of-the-art in air conditioning filter technology, providing the perfect mixture of air filtration and air flow. Scientific studies have shown that it gathers an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles. In fact, the ALLERGY 2000 can be paid for by some health insurance when prescribed by a doctor! Considering all the contaminants floating around in the air, installing an ALLERGY 2000 may be the best thing you will ever do for the health of you and your family. (Exhibit B.)

3. Traps allergy causing contaminants: Dust, Pollen, Mold Spores, Pet Dander & Smoke.

\* \* \*

Traps more particles while maintaining greater air flow.

\* \* \*

For a cleaner, healthier indoor environment! (Exhibit C.)

4. The Ultimate Care for your indoor air!

\* \* \*

Among the lowest initial resistance in the industry, .13, meaning less strain on the unit, higher efficiency and energy savings.

\* \* \*

Your indoor pollution solution! (Exhibit D.)

5. The cold and flu season, traditionally only associated with the winter months (when people are forced to stay indoors), has gradually expanded to almost year-round. Why? One key factor may well be that buildings are now much more tightly sealed and energy efficient. They just don't "breathe" like they used to, and the air in them is more polluted than ever.

What can you do to help? Plenty. You can treat these illnesses before they become illnesses. You can treat the cause instead of the effects. You can treat the air.

How? By prescribing the Allergy 2000 air filter for your patients suffering from sinus or respiratory ailments. The Allergy 2000's unique design and construction removes many allergy and disease-causing contaminants from the air before they're inhaled. The result—a cleaner, healthier indoor environment. (Exhibit E.)

6. Constructed of durable space-age materials, ALLERGY 2000's unique design uses static electricity to attract and hold indoor pollutants and germ-carrying particles of 5 microns or less.

\* \* \*

Superior arrestance capabilities, 85% peak.

Superior loading capacity, 150 grams psi. (Exhibit F.)

7. DID YOU KNOW . . .

-- That common house dust is more dangerous than outside dust? (Environmental Protection Agency.)

-- That indoor air is found to be up to 70 times more polluted than outdoor air?

-- That 50% of all illnesses are either caused or aggravated by polluted indoor air? (American College of Allergists.) (Exhibit G.)

PAR. 5. Through the use of the trade name, Allergy 2000, and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through G, respondents have represented, directly or by implication, that:

A. Use of the Allergy 2000 filter will substantially reduce the incidence of allergies caused by indoor allergens under household living conditions.

B. Use of the Allergy 2000 filter will substantially reduce the amount of disease-causing germs in the air people breathe under household living conditions.

C. Use of the Allergy 2000 filter will substantially reduce the incidence of disease caused by germs in the air people breathe under household living conditions.

D. People living in homes using the Allergy 2000 air filter will be healthier and have fewer illnesses than they would if a conventional filter were used.

E. The Allergy 2000 air filter removes substantially all of the airborne contaminants, including allergens, from the air people breathe under household living conditions.

F. Replacement of conventional air filters with the Allergy 2000 will result in lower utility bills for households.

PAR. 6. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through G, 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.

PAR. 8. 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 Section 5(a) of the Federal Trade Commission Act.

Complaint

EXHIBIT A

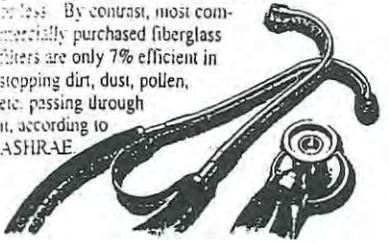


Most allergists and other physicians have prescribed the Allergy 2000 air conditioning filter.

Dust, pollen, mold spores, pet dander and smoke. As a physician, you know the problems these airborne contaminants cause for your patients. But did you also know that indoor air is found to be up to 10 times more polluted than outdoor air? Or that 50% of all illnesses are either caused or aggravated by polluted indoor air?\*

Clearly, improving the quality of air your patients breathe can be an important step to improving their overall health. How? By prescribing the Allergy 2000 air conditioning filter. This super high efficiency four-stage electrostatic air filter which advanced state-of-the-art materials and a computerized design to provide the perfect mixture of air filtration and air flow.

Studies by independent labs have confirmed that the Allergy 2000 gathers an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles of 5 microns or less. By contrast, most commercially purchased fiberglass filters are only 7% efficient in stopping dirt, dust, pollen, etc. passing through it, according to ASHRAE.



# Prescribe the ultimate in care for your patient's indoor air today!

The extremely low resistance of the Allergy 2000 means less strain on the air conditioning unit, which means higher efficiency and energy savings—so it can literally pay for itself!

Best of all, the Allergy 2000 represents an exceptional value for your patients. It is a permanent air conditioning filter with a lifetime guarantee. It uses NO FOAM, so there's nothing to clog, degrade or replace—ever! Plus, it cleans in a snap—and it cleans 100% every time.

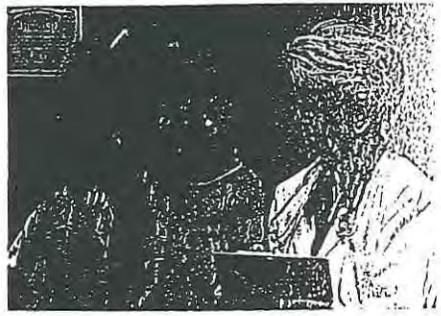


When you agree to prescribe the Allergy 2000 for your patients, we'll provide you with an attractive, compact display to put in your office waiting room.



Most commercially purchased fiberglass filters are only 7% efficient in stopping pollutants passing through it. (ASHRAE) The Allergy 2000 traps these allergy-causing contaminants!

\*Source: Environmental Protection Agency \*\*Source: American College of Allergists



The display affords your patients easy access to a colorful and informative Allergy 2000 brochure.

As a physician, you've seen the problem caused by all the things going around in the air. Give your patients a new measure of relief—the Allergy 2000 air conditioning filter. We'll catch it, before your patients do.

## ALLERGY 2000



# ISN'T IT TIME YOU STOPPED LEAVING YOUR FAMILY'S HEALTH UP IN THE AIR?



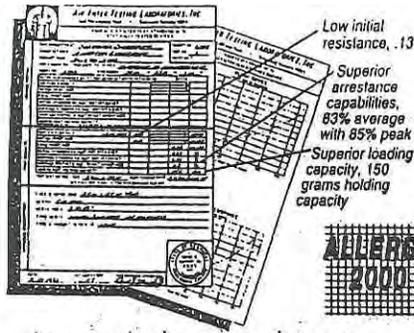
Introducing the amazing Allergy 2000. The last air conditioning filter you'll ever buy!

Dust, pollen, mold spores, pet dander and smoke. These are just a few of the contaminants you breathe every day—inside your homes, workplaces; anywhere you're indoors. As buildings become more energy efficient, the indoor pollution problem will only get worse.

Fortunately, there is an answer! The ALLERGY 2000, a super high efficiency four-stage electrostatic air filter designed to trap more airborne particles for a far cleaner and healthier indoor environment. *It's your indoor pollution solution!*

## Permanent...lifetime guarantee!

Constructed of durable space age materials, the ALLERGY 2000's computerized peak and valley design uses the natural phenomenon of static electricity to attract and hold indoor pollutants. There's NO FOAM to clog, degrade or replace—ever! Since your ALLERGY 2000 has a lifetime guarantee, it's literally the last air conditioning filter you'll ever buy!



## Among the lowest resistance in the industry!

The unique design of the ALLERGY 2000 gives it an initial resistance of .13, among the lowest in the industry! This means less strain on the operating unit, much higher efficiency, and energy savings.

## Easy to install. Easy to maintain.

Your ALLERGY 2000 installs as easily as any disposable air conditioning filter. And it cleans in a snap: simply back wash with light water hose spray to release particles. Since it uses no foam, it cleans 100% every time. Best of all, the ALLERGY 2000 is an environmentally friendly product, because there's nothing to dispose of!



## Superior design and construction

FOAMLESS filtering media. No clogging or degradation—ever. Cleans 100% every time. Polystyrene charged cell and computerized peak and valley design. Catches airborne particles while allowing maximum air flow.



Polystyrene frame, not aluminum.

## Traps allergy-causing contaminants

PLANT	ANIMAL	MANMADE
Mold Spores	Pet Dander	Acid rain
Cellulose	House dust Mites	Dacron
Cotton	Fragments:	Fiberglass
Linen	Feathers	Lycra
Kapok	Moths	Nylon
Jute	Cockroaches	Oilon
Wood	Spiders	Rayon
Pollen	Silverfish	Spandex
	Fleas	Paint
	Mosquitoes	Plastic
	Silk	Rubber
	Felts	Smoke
	Furs	Fireplaces
	Wool	
	Mohair	

## The ultimate care for your air

The ALLERGY 2000 represents the absolute state-of-the-art in air conditioning filter technology, providing the perfect mixture of air filtration and flow. Scientific studies have shown that it catches an exceptionally wide range of indoor contaminants, including microscopic germ-carrying particles. In fact, the ALLERGY 2000 can be paid for by some health insurance when prescribed by a doctor! Consider the contaminants floating around in the air, and the ALLERGY 2000 may be the best thing you can do for the health of you and your family.

### Standard Sizes Include:

12 X 12	15 X 20	20 X 24
12 X 20	16 X 16	20 X 25
12 X 24	16 X 20	20 X 30
12 X 25	16 X 24	24 X 24
14 X 20	16 X 25	24 X 30
14 X 24	18 X 18	25 X 25
14 X 25	18 X 25	
14 X 30	20 X 20	

Custom Sizes Also Available! Need a non-standard size for the Allergy 2000 can be custom made to fit your size requirements.

000126

# ALLERGY 2000



allergy-causing  
contaminants:  
DUST, POLLEN, MOLD SPORES,  
PET DANDER & SMOKE

- ✓ Environmentally friendly-  
No foam to clog, degrade or  
replace-ever!
- ✓ Saves on energy bills and  
extends the life of A/C and  
heating units.
- ✓ Traps more particles while  
maintaining greater air flow.
- ✓ Paid for by some health  
insurance when prescribed  
by a doctor.



## PERMANENT AIR CONDITIONING FILTER

For A Cleaner, Healthier Indoor Environment!

F-000019

### Cleaning Instructions

Backwash on a regular basis with a water hose  
If exposed to smoke or grease, spray with a mild degreaser  
& then backwash.



ALL FILTERS MUST  
CLASSIFIED BY  
UNDERWRITERS LABORATORIES  
AS TO FLUOROCARBON  
CLASS 2

Filtration Manufacturing, Inc.  
P.O. Box 1025 • Andalusia, AL 36420

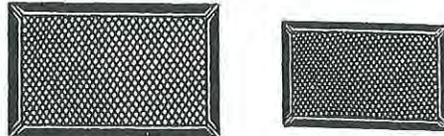
Filtration Manufacturing, Inc. warrants this product to be free from any defects that are due to any faulty materials or workmanship, under normal use and conditions, for as long as you own it. If warranty service is required during the warranty period, the service will be provided without charge upon delivery of the product to the store with proof of purchase. If you have any questions, please write to Filtration Manufacturing, Inc. at P.O. Box 1025, Andalusia, AL 36420.

EXHIBIT D

Allergy 2000 Logos



Allergy 2000 Line Art



Allergy 2000 Cutaway



Logos



**THE ULTIMATE CARE FOR YOUR INDOOR AIR!**

- Permanent air conditioning filter. No metal to rust—ever!
- No foam to clog or degrade. Cleans 100% every time.
- Among the lowest initial resistance in the industry, .13, meaning less strain on the unit, higher efficiency and energy savings.
- Lifetime warranty



**ALLERGY 2000**



**CLEAN UP WITH THE NEW ALLERGY 2000**

- Permanent air conditioning filter. No metal to rust—ever!
- No foam to clog or degrade. Cleans 100% every time.
- Among the lowest initial resistance in the industry, .13, meaning less strain on the unit, higher efficiency and energy savings.
- Lifetime warranty



**ALLERGY 2000**



**INVEST IN YOUR FAMILY HEALTH!**

**YOUR INDO POLLUTION SOLUTION**

**FOAMLES! LIFETIME WARRANTY**

**THE LAST FILTER YOU EVER BUY**

Complaint

EXHIBIT E



**Filtration MFG. Inc.**  
Permanent Air Filter

Sample Cover Letter

Dear Name of Physician:

As you well know, chronic respiratory and allergy-related problems make up a significant portion of commonly treated illnesses. Airborne contaminants not only aggravate typical allergy and hayfever symptoms, but also can carry germs which may be responsible for a host of other sinus and respiratory diseases.

The cold and flu season, traditionally only associated with the winter months (when people are forced to stay indoors), has gradually expanded to be almost year-round. Why? One key factor may well be that buildings are now much more tightly sealed and energy efficient. They just don't "breathe" like they used to, and the air in them is more polluted than ever.

What can you do to help? Plenty. You can treat these illnesses before they become illnesses. You can treat the cause instead of the effects. You can treat the air.

How? By prescribing the Allergy 2000 air filter for your patients suffering from sinus or respiratory ailments. The Allergy 2000's unique design and construction removes many allergy and disease-causing contaminants from the air before they're inhaled. The result: a cleaner, healthier indoor environment.

The enclosed brochure will tell you more. As you'll see, all we ask of you is a very small amount of space in your waiting area for a small rack which holds Allergy 2000 brochures. That's it.

So why not get with the program! We'll provide you with a FREE Allergy 2000 air filter (just tell us the size you need) along with a FREE counter rack and brochures for your waiting room. You'll notice the difference - and so will your patients!

Thank you very much for your time and consideration.

Sincerely,



EXHIBIT E

F-000022

EXHIBIT F

# ALLERGY 2000

## AMONG THE LOWEST INITIAL RESISTANCE IN THE INDUSTRY!



*Constructed of durable space-age materials, Allergy 2000's unique design uses static electricity to attract and hold indoor pollutants and germ-carrying particles of 5 microns or less. There's no foam to clog, degrade or replace. And, Allergy 2000 can be paid for by health insurance when prescribed by a doctor.*

- **No Foam!**
- **Low Initial Resistance, .13**
- **Superior Arrestance Capabilities, 85% peak**
- **Superior Loading Capacity, 150 grams psi**
- **Tough, Lifetime Construction**



For More Information, Please Contact:

000128

Complaint

EXHIBIT G

**DID YOU KNOW...**

—That common house dust is more dangerous than outside dust?

(Environmental Protection Agency)

—That indoor air is found to be up to 70 times more polluted than outdoor air?

(Environmental Protection Agency)

—That 50% of all illnesses are either caused or aggravated by polluted indoor air?

(American College Of Allergists)

—That nine out of ten system failures are caused by dirt and dust?

(Louisiana Cooperative Extension)

**ALLERGY 2000 FEATURES AT A GLANCE.**

- Low initial resistance, .13 Less strain on operating unit, better efficiency, energy savings
- Superior arrestance capabilities, 85% peak arrestance, 83% average Extends life of coils and unit, saves energy, cleaner and cooler indoor environment
- Superior loading capacity, 150 grams per square Larger gathering capacity of airborne particles, less frequent filter cleaning, maintains lower resistance
- FOAMLESS filtering media No clogging or degradation within filter, cleans 100% every time, maintains low initial resistance
- Filter constructed of space age material Lifetime guaranteed product
- Computerized peak and valley design of polypropylene fabric More effective filtration and air flow, catches airborne particles in valleys — allows maximum air flow to continue over peak areas
- Polyglass charged cell Large charged surface area to gather particles for a cleaner and cooler air
- Lifetime warranty One time purchase, Allergy 2000 can be reeled or reconditioned if you move or purchase new equipment
- Environmentally friendly Helps environment, never becomes part of a landfill

ALLERGY 2000 Distributed By:



AIR FILTER UNIT  
CLASSIFIED BY:  
UNDERWRITERS LABORATORIES INC.®  
AS TO PERMEABILITY ONLY  
CLASS 1 1293

© 1993 Filtration Manufacturing



Exhibit G

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents, Filtration Manufacturing, Inc., Gary L. Savell, Horace R. Allen and Brandon R. Clausen, and the respondents having been furnished thereafter with a copy of a draft of the complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Filtration Manufacturing, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama with its office and principal place of business at 1110 Montlimar Place, Suite 290, Mobile, Alabama.

Respondent Gary L. Savell is the President, Chief Executive Officer, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

Respondent Horace R. Allen is the Secretary, Treasurer, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

Respondent Brandon R. Clausen is the Vice President, and an owner and director of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

#### DEFINITIONS

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

1. The term "*air cleaning product*" or "*product*" means any device, equipment or appliance designed or advertised to remove, treat or reduce the level of any contaminant(s) in the air.

2. The term "*contaminant(s)*" refers to one or more of the following: fungal (mold) spores, pollen, lint, tobacco smoke, household dust, animal dander or any other gaseous or particulate matter found in indoor air.

#### ORDER

##### I.

*It is ordered*, That respondents Filtration Manufacturing Inc., a corporation, its successors and assigns, and its officers, and Gary L. Savell, individually and as an officer of said corporation, Horace R. Allen, individually and as an officer of said corporation, and Brandon R. Clausen, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Allergy 2000 or any other air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the performance, health or other benefits, or efficacy of such product, unless, at the time of making such representation, respondents possess and rely upon competent and

reliable evidence which, when appropriate, must be competent and reliable scientific evidence that substantiates such representation.

B. Making any representation, directly or by implication, that any air cleaning product will perform under any set of conditions, including household living conditions, unless at the time of making the representation(s) respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

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

## II.

*It is further ordered,* That respondents Filtration Manufacturing, Inc., a corporation, its successors and assigns, and its officers, and Gary L. Savell, individually and as an officer of said corporation, Horace R. Allen, individually and as an officer of said corporation, and Brandon R. Clausen, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Allergy 2000 air cleaning product or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "Allergy 2000" or any other trade name that represents, directly or by implication, that such product will relieve allergy symptoms unless, at the time of making the representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

## III.

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

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

## IV.

*It is further ordered*, That respondent Filtration Manufacturing, Inc., its successors and assigns, shall:

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

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's 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 within three (3) days after the person assumes his or her position.

## V.

*It is further ordered*, That respondents Gary L. Savell, Horace R. Allen and Brandon R. Clausen shall, for a period of ten (10) years from the date of service of this order, notify the Commission within thirty (30) days of the discontinuance of their present business or employment and of their affiliation with any new business or employment involving the manufacturing, labeling, advertising,

marketing, promotion, offering for sale, sale or distribution of any air filter or substantially similar device. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

#### VI.

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

#### VII.

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

#### VIII.

This order will terminate on January 6, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

AAF-McQUAY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3703. Complaint, Jan. 6, 1997--Decision, Jan. 6, 1997*

This consent order prohibits, among other things, a Kentucky-based manufacturer of residential air filters from making any representation regarding the performance, health or other benefits, or efficacy of air cleaning products, unless the respondent possesses competent and reliable scientific evidence to substantiate such representations.

*Appearances*

For the Commission: *Brinley H. Williams* and *Michael Milgrom*.  
For the respondent: *Dennis J. Reinhold*, Louisville, KY.

## COMPLAINT

The Federal Trade Commission, having reason to believe that AAF-McQuay, Inc., d/b/a AAF International, 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 AAF-McQuay, Inc., d/b/a AAF International, is a Delaware corporation with its principal office or place of business at 215 Central Avenue, Louisville, Kentucky.

PAR. 2. Respondent has manufactured, labeled, advertised, promoted, offered for sale, sold, and distributed air filters for use in residences under the brand names ElectroKlean and Dirt Demon.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the ElectroKlean and Dirt Demon air filters, including but not necessarily

limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions:

**A. ElectroKlean ELECTROSTATIC Permanent Air Filter Eliminates 95% of Household Dust, Lint and Pollen**

.....  
 Helps reduce sources of allergy problems by eliminating microscopic airborne particles, including pet dander. [Depiction of cat and dog]  
 Stops pollen, molds, dust and lint from recirculating through-out your home. [Depiction of flowers releasing pollen].  
 Special filter material is noticeably better than ordinary air filters in purifying the air you breathe. [Depiction of cigarette releasing smoke]

\* \* \* \* \*

Treated with EPA Registered Intersept Antimicrobial Special additive makes ElectroKlean superior to ordinary filters, helps to significantly improve indoor air quality. Inhibits growth of odor-causing bacteria, mold, mildew and other organisms that can quickly multiply in your heating and cooling system.

\* \* \* \* \*

Breathe cleaner air all the time with ElectroKlean. Eliminate 95% of household dust, lint and pollen.

\* \* \* \* \*

What is Intersept Antimicrobial?

The ElectroKlean Air Filter is treated with Intersept Antimicrobial, a special additive that inhibits the growth and build up of bacteria, mold, mildew and other organisms in your heating and cooling system. This means you're breathing cleaner and healthier air!

\* \* \* \* \*

I have allergies. Will this filter help?

It should. ElectroKlean removes most of the contaminants that aggravate your condition. It eliminates 95% of household dirt, lint, animal danders, pollen and other irritants.

\* \* \* \* \*

Is this filter considered an allergy relief aid?

It can be. Your doctor may actually prescribe a special home air filter to help eliminate the sources (dust, pollen, etc.) of your allergies. The purchase price of this filter may be tax deductible. (Exhibit A)

**B. DIRT DEMON**

**High Efficiency Pleated Air Filter**

**6 TIMES BETTER THAN STANDARD AIR FILTERS REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN & LINT HELPS RELIEVE ALLERGY SYMPTOMS**

\* \* \* \* \*

Stops pollen, molds, dust and lint from recirculating throughout your home. [Depiction of flowers releasing pollen]

\* \* \* \* \*

Special filter material and pleated design are noticeably better than ordinary air filters in purifying the air you breathe. [Depiction of cigarette releasing smoke] (Exhibit B)

**C. ElectroKlean ELECTROSTATIC Permanent Air Filter**

Complaint

123 F.T.C.

- Removes 95% of household dust, dirt, lint and pollen
- Inhibits growth of bacteria, molds and mildews that effect [sic] allergy sufferers (Exhibit C)

## D. DIRT DEMON

## HIGH EFFICIENCY PLEATED AIR FILTER

REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN &amp; LINT.

HELPS RELIEVE ALLERGY SYMPTOMS (Exhibit D)

## E. DIRT DEMON

High Efficiency Pleat with Intersept Extraordinary pleated design removes up to 95% of lint, dust and pollen passing through the filter. Keeps air throughout the house cleaner and easier to breathe in any season.

\* \* \* \*

## Intersept Antimicrobial

Air filters can be a source of microbial contamination. American AirFilter products treated with Intersept will keep the filter from being a potential incubator of mold, mildew, fungi and bacteria. Intersept inhibits the growth of these microorganisms in the filter media, thereby removing it as a potential source of contamination.

\* \* \* \*

The filter effectively removes airborne dust mite allergens [Depiction of dust mite (magnified)]

Reduces pollen, molds, mildew, bacteria, fungi, dust and lint [Depiction of pollen grain (magnified)]

Helps reduce aggravating particles such as pet dander [Depiction of cat]

Special media is more effective in reducing pollutants in the air you breathe. [Depiction of cigarette smoker exhaling smoke] (Exhibit E)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through E, respondent has represented, directly or by implication, that:

A. Use of the ElectroKlean and Dirt Demon filters will substantially reduce the incidence of allergies caused by indoor allergens under household living conditions.

B. The ElectroKlean and Dirt Demon air filters remove 95 percent of airborne contaminants from the air that people breathe under household living conditions.

C. The Dirt Demon traps 95% of the lint, dust and pollen from the household air passing through it.

D. The Dirt Demon filter is six times as efficient at removing pollutants as a standard air filter.

E. The addition of Intersept antimicrobial to the ElectroKlean makes air cleaner and healthier than it would otherwise be under household living conditions.

F. The addition of Intersept antimicrobial to the ElectroKlean inhibits the growth of microbes in household heating and cooling systems.

G. The addition of Intersept antimicrobial to the Dirt Demon removes the filter as a potential source of contamination of household air.

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

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

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits B, D, and E, respondent has represented, directly or by implication, that the Dirt Demon is a HEPA (High Efficiency Particulate Air) filter.

PAR. 9. In truth and in fact the Dirt Demon is not a HEPA filter according to industry standards. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

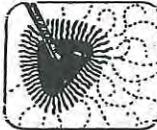
20 • 1

Actual Filter Size  
5 7/8 in • 19 5/8 in • 7/8 in  
33mm • 498mm • 22mm



# ElectroKlean™ ELECTROSTATIC Permanent Air Filter

Eliminates 95% of Household  
Dust, Lint and Pollen



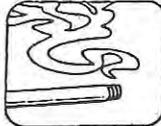
So effective that you  
won't have to dust  
as often.



Helps reduce sources  
of allergy problems  
by eliminating micro-  
scopic airborne  
particles, including  
pet dander.



Stops pollen, molds,  
dust and lint from  
recirculating through-  
out your home.



Special filter material  
is noticeably better  
than ordinary air  
filters in purifying  
the air you breathe.

### Treated with EPA Registered Intersept® Antimicrobial

- Special additive makes ElectroKlean superior to ordinary air filters, helps to significantly improve indoor air quality.
- Inhibits growth of odor-causing bacteria, mold, mildew and other organisms that can quickly multiply in your heating and cooling system.
- Remains active over the life of the filter.

Intersept® is a registered trademark of Interface, Inc.



**American Air Filter**  
Snyder-Gessner

Complaint

EXHIBIT A

# ElectroKlean™ ELECTROSTATIC Permanent Air Filter

Breathe cleaner air all the time with ElectroKlean.  
Eliminate 95% of household dust, lint and pollen.

**Easy to Install and Maintain**

Install your ElectroKlean as you would any filter.

- No electrical power required.
- Self generating electrostatic charge attracts dirt, dust, pollen, pet dander, molds and microscopic dust mites.



Remove and rinse every 30 days. Let dry before reinstalling.



You have a superior cleaning filter that maintains the quality of the air you breathe.

**Why do you say it is "Electrostatic"?**

Have you ever noticed how dust seems to quickly build up on your television screen? That's because the screen has an electrostatic charge. The ElectroKlean Air Filter works the same way to actually attract dirt, dust and other pollutants.

**What is Intersept® Antimicrobial?**

The ElectroKlean Air Filter is treated with Intersept® Antimicrobial, a special additive that inhibits the growth and build up of bacteria, mold, mildew and other organisms in your heating and cooling system. This means you're breathing cleaner and healthier air!

**I have allergies. Will this filter help?**

It should. ElectroKlean removes most of the contaminants that aggravate your condition. It eliminates 95% of household dirt, lint, animal danders, pollen and other irritants. For best results, keep the heating/air conditioning fan running continuously.

**What makes ElectroKlean such a good investment?**

The ElectroKlean Electrostatic Air Filter will last for years, so the filter quickly pays for itself.

**Is this an "environmentally friendly" product?**

Yes. Because the ElectroKlean filter is not replaced, you won't be throwing it away, thereby filling up landfill space with discarded filters.

**Is this filter considered an allergy relief aid?**

It can be. Your doctor may actually prescribe a special home air filter to help eliminate the sources (dust, pollen, etc.) of your allergies. The purchase price of this filter may be tax deductible.

**Will I have to dust less often?**

Yes! With proper maintenance (cleaning about every 30 days), this filter will definitely cut down on the amount of dusting that your home requires.

**LIMITED WARRANTY**

From the date of original purchase, SynerGeneral as general, less of charge, a replacement ElectroKlean™ Electrostatic Air Filter ("Air Filter") if the Air Filter is found to be defective in design or workmanship, provided that the defective Air Filter is returned to SynerGeneral in its original shipping container, and with proof of this purchase.

THIS WARRANTY APPLIES ONLY TO THE AIR FILTER. IT DOES NOT COVER DAMAGE TO THE AIR FILTER OR TO THE HEATING, COOLING OR VENTILATION SYSTEM, AIR CONDITIONING SYSTEM, OR TO THE HEATING EQUIPMENT OR TO THE HEATING SYSTEM.

THIS IS SYNERGENERAL'S SOLE WARRANTY AND SHALL BE THE FULL EXTENT OF SYNERGENERAL'S LIABILITY. SYNERGENERAL SHALL NOT BE LIABLE FOR THE RESULTS, REPAIRS OR DAMAGES, WHETHER DIRECT, INDIRECT, CONSEQUENTIAL OR OTHERWISE, SYNERGENERAL MAKES NO OTHER WARRANTY OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED BY SYNERGENERAL AND EXCLUDED FROM THIS WARRANTY.

\*These will be delivered at \$125.00 for parts shipping in vehicles. A return shipping fee is required on all returns.

SynerGeneral Corporation, P.O. Box 1200, Lincoln, NE 68502-0200

Made in America



018-217-300

**American Air Filter**  
SynerGeneral Corporation 215 Central Avenue Lincoln, Nebraska

Complaint

123 F.T.C.

## EXHIBIT B

**DIRTY DEMON**

# High Efficiency Pleated Air Filter

**6 TIMES BETTER THAN  
STANDARD AIR FILTERS**

- REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN & LINT
- HELPS RELIEVE ALLERGY SYMPTOMS
- IMPROVES INDOOR AIR QUALITY
- CLEANS AIR UP TO 90 DAYS





Stops pollen, molds, dust and lint from recirculating throughout your home.



So effective that you won't have to dust as often.



Helps reduce sources of allergy problems by eliminating microscopic airborne particles, including pet dander.



Special filter material and pleated design are noticeably better than ordinary air filters in purifying the air you breathe.

**American Air Filter**  
Snyder General

AAAF

## EXHIBIT B



# High Efficiency Pleated Air Filter

*... From  
The World Leader in Clean Air Technology.*

- Hospitals, industrial plants, "cleanroom" environments, and nuclear installations all rely on AAF products.
- AAF systems have even been used in NASA space modules!
- AmericanAirFilter products have been made since 1925, and pleated filters for commercial and industrial facilities for more than 40 years.

*Now, this technological expertise is available to clean the air you breathe in your home.*

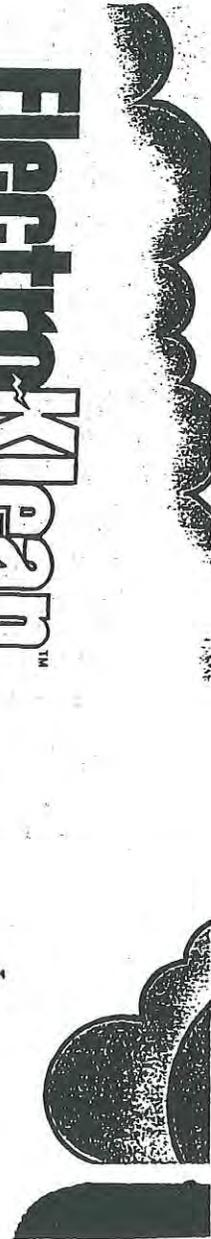
- Six times better than standard air filters.
- Cleans air up to 90 days (How often the Dirt Demon should be replaced depends on such things as how long the fan runs and windows are left open, and the amount of carpeting in your home.)
- UL Classified for safety.
- Made in the USA.

**American Air Filter**  
Snyder General

Complaint

123 F.T.C.

EXHIBIT C

**ElectroKlean™****ELECTROSTATIC****Permanent Air Filter**

- Removes 95% of household dust, dirt, lint and pollen
- Inhibits growth of bacteria, molds and mildews that effect allergy sufferers
- Long term value... rinse and reuse instead of replacing every month

Ex.C

EXHIBIT D

**HIGH EFFICIENCY PLEATED AIR FILTER**

**REMOVES 95% OF HOUSEHOLD DIRT, DUST, POLLEN & LINT.**

**HELPS RELIEVE ALLERGY SYMPTOMS**

**BREATHE CLEANER AIR!**

**Snyder General**

**American Air Filter**

Snyder General Corporation P.O. Box 44500 San Diego, California 92164-0500

EXHIBIT E

AmericanAirFilter

# High Efficiency Pleat with Intersept®



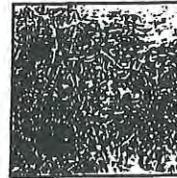
Extraordinary pleated design removes up to 95% of lint, dust and pollen passing through the filter. Keeps air throughout the house cleaner and easier to breathe in any season.

Treated with Intersept®



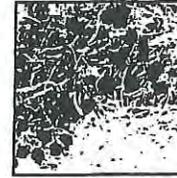
High efficiency pleated filter treated with Intersept® antimicrobial.

Untreated



Microscopic view of untreated filter with Gram-negative bacteria growth. (*Serratia marcescens*)

Untreated



Microscopic view of untreated filter with fungal growth. (*Aspergillus niger*)

### Intersept® antimicrobial

*Air filters can be a source of microbial contamination. AmericanAirFilter products treated with Intersept will keep the filter from being a potential incubator of mold, mildew, fungi and bacteria. Intersept inhibits the growth of these microorganisms in the filter media, thereby removing it as a potential source of contamination.*

### Low maintenance

*Easy to install, lasts up to 90 days, then disposes easily. Helps heating/cooling system operate more efficiently.*

Replace filter every 90 days

Copy

Complaint

EXHIBIT E

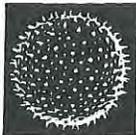
# High Efficiency Pleat with Intersept®

## AmericanAirFilter

America's #1 selling line of residential air filters.



The filter effectively removes airborne dust mite allergens.



Reduces pollen, molds, mildew, bacteria, fungi, dust and lint.



Helps reduce aggravating particles such as pet dander.



Special media is more effective in reducing pollutants in the air you breathe.

### Improve Your "Indoor Air Quality"

Pleated design with larger surface area cleans air more thoroughly than standard flat filters.

Call 1-800-927-6789 to receive your free informative brochure, "How to Improve Your Indoor Air Quality."

ElectroKlean with Intersept

Best

Wash, rinse and reuse.

Pleated with Intersept

Better

Replace every 90 days.

AAF with Intersept

Good

Replace every 60 days.

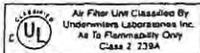
AAF

Standard

Replace every 30 days.

A Complete Line of Air Filters  
From Standard to ElectroKlean,<sup>™</sup>  
AmericanAirFilter has just what you need.

†For best results, keep the heating/air conditioning fan running continuously.  
\*Based on arrestance, ASHRAE standard 52.1-1992



AmericanAirFilter™ High Efficiency Pleat with Intersept®

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent, AAF-McQuay, Inc., and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

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

1. AAF-McQuay, Inc., d/b/a AAF International, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 215 Central Avenue, Louisville, Kentucky.

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

## DEFINITIONS

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

1. The term "*air cleaning product*" or "*product*" means any device, equipment or appliance designed or advertised to remove, treat or reduce the level of any contaminant(s) in the air.

2. The term "*contaminant(s)*" refers to one or more of the following: fungal (mold) spores, pollen, lint, tobacco smoke, household dust, animal dander or any other gaseous or particulate matter found in indoor air.

## ORDER

### I.

*It is ordered*, That respondent AAF-McQuay, Inc., d/b/a AAF International, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any air cleaning product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, in any manner, directly or by implication, regarding the performance, health or other benefits, or efficacy of such product, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates such representation.

B. Making any representation, directly or by implication, that any air cleaning product will perform under any set of conditions, including household living conditions, unless at the time of making the representation(s) respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by

persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## II.

*It is further ordered*, That respondent AAF-McQuay, Inc., d/b/a AAF International, 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 manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of the Dirt Demon, the ElectroKlean, or any other air filter for insertion into household central heating and/or cooling systems, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication that such filter is a HEPA (High Efficiency Particulate Air) filter.

## III.

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

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

## IV.

*It is further ordered*, That respondent AAF-McQuay, Inc., d/b/a AAF International, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals,

officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's 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 within three (3) days after the person assumes his or her position.

#### V.

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

#### VI.

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

#### VII.

This order will terminate on January 6, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

## IN THE MATTER OF

## THE PENN TRAFFIC COMPANY

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

*Docket C-3577. Consent Order, May 15, 1995--Modifying Order, Jan. 10, 1997*

This order reopens a 1995 consent order -- that required the respondent to divest one supermarket in each of the three Pennsylvania areas designated -- and this order modifies the consent order by terminating the respondent's obligation to divest one of its two supermarkets in Mount Carmel, Pennsylvania, in part, because Penn Traffic has demonstrated that new entrants into the Mount Carmel market has eliminated the need for the divestiture.

## ORDER REOPENING AND MODIFYING ORDER

On September 13, 1996, respondent The Penn Traffic Company ("Penn Traffic") filed a Petition of Respondent the Penn Traffic Company to Reopen and Set Aside the Provisions of Paragraph II.A.3 of the Order Entered Herein ("Petition"). In its Petition, Penn Traffic requests that the Commission reopen the order in Docket No. C-3577 ("order") to set aside paragraph II.A.3 which requires Penn Traffic to divest either one of two supermarkets it owns in Mt. Carmel, Pennsylvania. The Petition addresses the remaining one of three supermarket divestitures required by the order. The Commission previously approved Penn Traffic's application for divestiture of the other two supermarkets on June 17, 1996.<sup>1</sup>

For the reasons discussed below, the Commission has determined that Penn Traffic has demonstrated changed conditions of fact sufficient to require the reopening and modification of the order.

## I. THE PETITION

In its Petition,<sup>2</sup> Penn Traffic requests that the Commission modify the order to eliminate the remaining required divestiture under the

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<sup>1</sup> Penn Traffic completed the sale of the assets of the supermarket in Towanda, Pennsylvania on July 2, 1996 (required pursuant to ¶ II.A.1 of the order), and completed the sale of the supermarket in Pittston, Pennsylvania on July 5, 1996 (required pursuant to ¶ II.A.2 of the order).

<sup>2</sup> In support of its Petition, Penn Traffic provided the affidavit of Robert G. Coleman, Director of Real Estate for the Riverside Division of the Penn Traffic Company ("Coleman Affidavit").

order--*i.e.* a supermarket divestiture in Mt. Carmel.<sup>3</sup> Penn Traffic bases its Petition on changed conditions of fact and public interest considerations.<sup>4</sup> The changes of fact alleged by Penn Traffic include the actual entry into the Mt. Carmel market of a Sav-A-Lot store and the prospective entry (in March 1997) of a Wal-Mart Supercenter (featuring a large supermarket), just outside the Mt. Carmel Township limits. At the time the order became final (May 22, 1995), Sav-A-Lot had not opened its store and Wal-Mart had not announced its decision to build a Supercenter near Mt. Carmel.

In addition to change of fact, Penn Traffic argues that it is in the public interest to grant its Petition, because a further divestiture would, in effect, force Penn Traffic to exit the local Mt. Carmel market. Penn Traffic alleges that the above-described changes in the competitive conditions have contributed to its inability to effect a divestiture in Mt. Carmel. According to Penn Traffic, these conditions have eroded the marketability and long-term viability of its smaller Mt. Carmel supermarket location for use as a supermarket. Therefore, Penn Traffic states that if required to divest in Mt. Carmel, it will attempt to sell its larger supermarket and then close the smaller supermarket, thereby exiting the local Mt. Carmel market.<sup>5</sup>

## II. 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-

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<sup>3</sup> Order, ¶ II.A.3.

<sup>4</sup> Penn Traffic does not assert that any change of law requires reopening the order.

<sup>5</sup> Petition at pp. 11-13. Coleman Affidavit at ¶¶ 8-9, 22-24.

2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").<sup>6</sup>

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.<sup>7</sup> In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.<sup>8</sup> For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."<sup>9</sup> 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.<sup>10</sup> The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.<sup>11</sup>

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

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<sup>6</sup> *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.").

<sup>7</sup> Hart Letter at 5; 16 CFR 2.51.

<sup>8</sup> 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.

<sup>9</sup> Damon Corp., Docket No. C-2916, 101 FTC 689, 692 (1983).

<sup>10</sup> Damon Letter at 2.

<sup>11</sup> Damon Letter at 4.

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).

III. PENN TRAFFIC HAS DEMONSTRATED CHANGED CONDITIONS OF FACT THAT REQUIRE THE REOPENING AND MODIFICATION OF THE ORDER

Penn Traffic's Petition demonstrates that new entry into the relevant market eliminates the need for a divestiture pursuant to paragraph II.A.3 of the order. The Petition does not contain sufficient information for the Commission to conclude that the Sav-A-Lot is a "supermarket," as defined by the order, and is, thereby, in the relevant product market.<sup>12</sup> However, the Wal-Mart Supercenter will feature a full-line supermarket of at least 40,000 square-feet<sup>13</sup> (larger than either of Penn Traffic's two Mt. Carmel supermarkets)<sup>14</sup> and is, thus, in the relevant product market.<sup>15</sup>

This Supercenter will be located approximately one mile from the city limits of Mt. Carmel, the geographic market identified in the complaint,<sup>16</sup> and less than two miles from either of Penn Traffic's two Mt. Carmel supermarkets.<sup>17</sup> The Supercenter location is in a relatively undeveloped area between Mt. Carmel and Shamokin and is easily accessible by car from both of these more developed population centers. Such a sizable, well-recognized entrant, in this semi-rural area, where most supermarket shopping is done by car, will draw customers from a broader geographic region than is identified in the

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<sup>12</sup> Although Sav-A-Lot offers many items sold through supermarkets, Penn Traffic has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in paragraph I.D of the order as defining a "supermarket," e.g. fresh meat, nor that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Penn Traffic's comparable supermarkets.

<sup>13</sup> Wal-Mart sources estimate the grocery and grocery-related product area of this Supercenter to be between 40,000 and 60,000 square feet.

<sup>14</sup> Penn Traffic operates one 29,000 square foot supermarket and one 25,000 square foot supermarket in Mt. Carmel.

<sup>15</sup> The Supercenter, currently under construction, will have a total of 186,000 square feet.

<sup>16</sup> Paragraph 7(b) of the complaint in this matter identifies the Mount Carmel, Pennsylvania area to include "the Borough of Mount Carmel and the Township of Mount Carmel."

<sup>17</sup> Prior to the opening of the Supercenter, the nearest supermarkets to Penn Traffic's Mt. Carmel supermarkets are in Shamokin, Pennsylvania, eight miles east of Mt. Carmel.

complaint.<sup>18</sup> Therefore, unlike the competitive conditions that existed when the order became final, supermarket competition will expand outside the Mt. Carmel Township limits to include the Supercenter.

Further, Penn Traffic has responded to these anticipated competitive changes by initiating plans to expand (to about 40,000 square feet) and improve the larger of its Mt. Carmel supermarkets.<sup>19</sup> Accordingly, when the Wal-Mart Supercenter opens, it appears certain that it will be in direct competition with Penn Traffic's supermarkets in Mt. Carmel.

Given the sales volume that can reasonably be expected to be generated from the residents of Mt. Carmel,<sup>20</sup> the additional competition from a large competitor, such as Wal-Mart, is sufficient to remedy the competitive concerns that the order is designed to address.<sup>21</sup> Therefore, the imminent entry of the Wal-Mart Supercenter constitutes a change of fact that eliminates the need for Penn Traffic to divest a supermarket in Mt. Carmel and requires the reopening and modification of the order to set aside paragraph II.A.3 which requires such a divestiture.

Because the Commission has determined to grant Penn Traffic's Petition based on change of fact, we do not reach a determination with respect to Penn Traffic's public interest arguments.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph II.A.3, as of the effective date of this order.

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<sup>18</sup> In addition, Wal-Mart's general merchandise product selection further increases its potential drawing power from these areas.

<sup>19</sup> Coleman Affidavit at ¶¶ 27-28.

<sup>20</sup> Studies conducted by Penn Traffic estimate the total weekly potential food store sales from Mt. Carmel, Atlas, and Kulpmont boroughs, and Mt. Carmel Township in Pennsylvania to be \$361,000. Coleman Affidavit at ¶ 12.

<sup>21</sup> Penn Traffic estimates that the Supercenter may succeed in taking approximately \$150,000 in weekly sales, or about 41.5% of the total potential sales (of \$361,000) from the Mt. Carmel trade area identified in the Coleman Affidavit ¶ 12. Coleman Affidavit ¶ 19.

Complaint

123 F.T.C.

## IN THE MATTER OF

MONTANA ASSOCIATED PHYSICIANS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3704. Complaint, Jan. 13, 1997--Decision, Jan. 13, 1997*

This consent order prohibits, among other things, two Montana-based organizations from entering or attempting to enter into any agreement with physicians to: negotiate or refuse to deal with any third-party payer; determine the terms on which physicians deal with such payers; or fix the fees charged for any physician's services. In addition, the consent order prohibits the respondents from advising physicians to raise, maintain or adjust the fees charged for their medical services, or encouraging adherence to any fee schedule for physician's services.

*Appearances*

For the Commission: *Robert Leibenluft, Steve Osnowitz and William Baer.*

For the respondents: *James Kirkland, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, D.C. and James Sneed, McDermott, Will & Emery, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as respondents, have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

PAR. 2. There are approximately 115 shareholders of MAPI, all of whom are physicians, and they constitute the membership of MAPI. MAPI's members provide medical services in over 30 independent physician practices in Billings, Montana. MAPI's members constitute approximately 43 percent of all physicians in Billings, Montana, and primarily practice fee-for-service medicine. An approximately equal number of the other physicians in Billings are part of a single multispecialty physician practice. MAPI's members constitute over 80 percent of all "independent" Billings physicians, that is, those who are not part of the multispecialty physician practice or employed by a hospital. A significant portion of MAPI's activities furthers the pecuniary interests of its members.

PAR. 3. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

PAR. 4. BPHA is a physician-hospital organization, whose membership consists of Saint Vincent Hospital and Health Center ("Saint Vincent") of Billings, Montana, and a majority of the physicians on Saint Vincent's active medical staff. Almost all of MAPI's members are also physician members of BPHA. BPHA contracts with third-party payers on behalf of its members to provide services to third-party payers' subscribers and enrollees. There are approximately 126 physician members of BPHA, practicing in over 30 independent physician practices, located almost exclusively in Billings, Montana. Physician members of BPHA constitute approximately 45 percent of all physicians in Billings, Montana, and over 80 percent of all independent Billings physicians. The single multispecialty physician practice, referred to in paragraph two, was acquired by the only other hospital in Billings, and has approximately the same number of physicians as BPHA. A significant portion of BPHA's activities furthers the pecuniary interests of its members.

PAR. 5. The general business practices of MAPI, BPHA, and their members, including those herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Except to the extent that competition has been restrained as alleged herein, the physician members of MAPI and BPHA have been, and are now, in competition among themselves and with other providers of physician services in Billings, Montana.

PAR. 7. Physicians, including the physician members of MAPI and BPHA, are often paid directly or indirectly for their services by third-party payers. Third-party payers such as health insurance companies, preferred provider organizations ("PPOs"), and health maintenance organizations ("HMOs"), reimburse for, purchase, or pay for all or part of the health care services provided to their enrollees or subscribers. Third-party payers generally contract with physicians to become participating providers in plans such payers offer to consumers. These contracts establish the terms and conditions of the relationship between the physician and the third-party payer, including the fees to be paid the physician for treating subscribers or enrollees of the third-party payer. Through such contracts, third-party payers may obtain capitated payment systems or discounts from physicians' usual fees, and physicians may obtain access to additional patients.

PAR. 8. Third-party payers in Billings, Montana, compete with each other on the basis of price, coverage offered, physician and hospital quality and availability, and other factors that are important to consumers. Payments to physicians for services rendered to third-party payer subscribers are a large component of a third-party payer's costs, and, therefore, are significant to a third-party payer in determining the price to charge consumers for health care coverage.

PAR. 9. Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payers, competing physicians decide individually whether to enter into contracts with third-party payers to provide services to subscribers or enrollees, and what prices to charge pursuant to such contracts.

PAR. 10. In 1986, most of the independent physicians in Billings were members of an organization called Ultracare. At this time, there were no HMOs or PPOs operating in Billings. Ultracare concluded that such plans would soon attempt to contract with physicians in Billings, and that competitive pressure could force physicians to deal with such plans at reduced prices or on other than fee-for-service terms. Accordingly, in March 1987, physician members of Ultracare formed MAPI, in substantial part to be a vehicle for its members to deal collectively with managed care plans. The purpose of engaging in collective dealings was to obtain greater bargaining power with third-party payers by presenting a united front, and thereby to resist

competitive pressures to discount fees and to avoid accepting reimbursement on other than the traditional fee-for-service basis.

PAR. 11. Beginning in 1986, and continuing to the present, MAPI and MAPI's predecessor, Ultracare, have acted as a combination of their members, have combined with at least some of their members, and have acted to implement agreements among their members to restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to delay entry of HMOs and PPOs into Billings, to engage in collective negotiations over terms and conditions of dealing with third-party payers, to have MAPI members refrain from negotiating directly with third-party payers or contracting on terms other than those endorsed by MAPI, and to resist cost containment measures of third-party payers.

PAR. 12. During 1987 and continuing into 1993, MAPI acted to prevent and delay HMO Montana, an HMO owned and operated by Blue Cross/Blue Shield of Montana, from successfully contracting with physicians in Billings. Beginning in 1987, Blue Cross/Blue Shield of Montana sought to enter into agreements with MAPI's members to participate in HMO Montana. MAPI, on behalf of its members collectively, negotiated with HMO Montana concerning the terms of physicians' contracts with HMO Montana, including price terms, and rejected all contracts proposed by HMO Montana. Members of MAPI told Blue Cross/Blue Shield of Montana that they would negotiate with HMO Montana only through MAPI, and no member of MAPI entered into a contract with HMO Montana.

PAR. 13. Beginning in 1987, MAPI gathered detailed fee information from individual competing MAPI physicians and their physician practices, which enabled MAPI to determine for most physician services the prevailing fees and the maximum reimbursement allowed by Blue Cross/Blue Shield of Montana. After collecting and analyzing this fee information, MAPI advised certain physicians to raise their fees, and some fees were increased in accordance with these recommendations.

PAR. 14. Beginning in 1988, MAPI acted to obstruct efforts by a health plan seeking to establish the first PPO program in Billings. The health plan entered into a PPO contract with Saint Vincent in November 1988 and then sought to contract with physicians on the hospital's medical staff. Some members of MAPI indicated to the plan that they would follow MAPI's recommendations in regard to dealings with the plan. MAPI, on behalf of its members collectively, offered its own proposed physician contract to the plan that provided

for physicians to be paid their usual fees with no discounts, represented to the plan that this was what MAPI's members would accept, and objected to any discounts in fees to be paid by MAPI members. After negotiating with MAPI for a year without MAPI ever agreeing to MAPI physicians charging less than their usual fees, the plan contacted individual physicians about signing a PPO contract. When the plan sought to collect current fee information from MAPI members in order to devise a proposed fee schedule to offer to physicians, MAPI urged its members to submit prices higher than they were currently charging in order to inflate the fee schedule. By June 1990, the plan had contracts with only about 30 percent of MAPI's members.

PAR. 15. MAPI was actively involved in the formation of BPHA, which was created in 1991 by Saint Vincent and physicians on its medical staff. A substantial majority of BPHA's physician members are also members of MAPI. Through BPHA's Physician Agreements, MAPI is designated as the agent of almost all MAPI physician members of BPHA with respect to their membership in BPHA. As a result, MAPI has the authority to elect and remove physician members of BPHA's Board of Directors. Until 1993, MAPI's agency authority extended to the acceptance or rejection of any contract negotiated by BPHA with any third-party payer.

PAR. 16. The physician members of BPHA, most of whom are MAPI members, concertedly control BPHA's pricing and other terms of contracts for physician services. BPHA's Bylaws designate that its Contracting Committee shall negotiate the terms and conditions of contracts for physician services with third-party payers, including price terms of those contracts, and recommend acceptance or rejection of said contracts to the members of BPHA. BPHA's Contracting Committee consists almost entirely of physicians and their employees and agents, including for a significant period of time the Executive Director of MAPI. No action of BPHA's Contracting Committee or BPHA's Board of Directors can be taken without the support of a majority of physician representatives on each body. BPHA did not enter into any contract for physician services until nearly two years after its creation.

PAR. 17. MAPI has combined and is combining with its physician members, and has acted and is acting to implement an agreement among them, to restrain competition among physicians, through an agreement, express or implied, that BPHA would negotiate the terms and conditions of agreements between BPHA

physician members and others, including the prices to be paid for their services.

PAR. 18. The physician members of MAPI and the physician members of BPHA have not integrated their practices in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described in paragraphs ten through seventeen.

PAR. 19. By engaging in the acts or practices described above, both MAPI and BPHA have combined or conspired with their respective physician members to fix and/or increase the fees received from third-party payers for the provision of physician services, to conduct boycotts, or otherwise to restrain competition among physicians in Billings, Montana.

PAR. 20. The actions of the respondents described in this complaint have had and have the purpose, tendency, and capacity to result in the following effects, among others:

A. Restraining competition among physicians in Billings, Montana;

B. Fixing or increasing the prices that are paid for physician services in Billings, Montana; and

C. Depriving third-party payers, their subscribers, and patients of the benefits of competition among physicians in Billings, Montana.

PAR. 21. The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

#### DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order,

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

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

1. Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.

2. Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana.

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

## ORDER

### I.

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

A. "*Montana Associated Physicians, Inc.*" or "*MAPI*" means Montana Associated Physicians, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by MAPI; their directors, officers, representatives, agents, and employees; and their successors and assigns.

B. "*Billings Physician Hospital Alliance, Inc.*" or "*BPHA*" means Billings Physician Hospital Alliance, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by BPHA; their directors, officers, representatives, agents, and employees; and their successors and assigns.

C. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

D. "*Risk-sharing joint venture*" means a joint arrangement to provide health care services in which physicians who would otherwise be competitors share a substantial risk of loss from their participation in the venture.

E. "*Fees*" means any and all cash or non-cash charges, rates, prices, benefits, or other compensation received, to be received, or charged to a patient or third-party payer for the rendering of physician services.

## II.

*It is further ordered*, That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer, employer, hospital, or any other provider of health care services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of any other joint venture for which MAPI receives the prior approval of the Commission.

### III.

*It is further ordered,* That MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from:

A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any physician or physician's practice to fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services;

B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for physicians' services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, or recommended fees;

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order; and

## IV.

*It is further ordered,* That BPHA, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

A. Negotiate, deal, or refuse to deal with any third-party payer for physician services;

B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and

C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

Provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

Further provided that nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of any other joint venture for which BPHA receives the prior approval of the Commission.

Further provided that nothing in this order shall be construed to prohibit BPHA from implementing, attempting to implement, continuing, or attempting to continue, for the express term thereof, contracts with third-party payers that were in effect on September 30, 1994.

Further provided that nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital

organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:

(a) Saint Vincent Hospital and Health Center is the only hospital in Yellowstone County, Montana, that participates in BPHA;

(b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:

(i) Soliciting or receiving from an individual physician member of BPHA, and conveying to a third-party payer, information relating to fees or other aspects of reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications;

(ii) Conveying to a physician member of BPHA any contract offer made by a third-party payer;

(iii) Soliciting or receiving from a third-party payer, and conveying to a physician member of BPHA, clarifications of proposed contract terms;

(iv) Providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;

(v) Conveying to a physician member of BPHA any response made by a third-party payer to information conveyed, or clarifications sought, by BPHA;

(vi) Conveying, in individual or aggregate form, to a third-party payer, the acceptance or rejection by a physician member of BPHA of any contract offer made by such third-party payer; and

(vii) At the request of a third-party payer, providing the individual response, information, or views of each physician member of BPHA concerning any contract offer made by such third-party payer.

(c) Each physician member of BPHA makes an independent, unilateral decision to accept or reject each contract offer made by a third-party payer;

(d) BPHA does not: (i) disseminate to any physician another physician's fees, other aspects of reimbursement, or views or intentions as to possible terms of dealing with a third-party payer; (ii) act as an agent for the collective negotiation or agreement by the physician members of BPHA; or (iii) encourage or facilitate collusive behavior among physician members of BPHA; and

(e) Each physician member of BPHA remains free to deal individually with any third-party payer.

## V.

*It is further ordered*, That MAPI and BPHA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of their members, officers, directors, managers, and employees;

B. For a period of five (5) years after the date this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each new MAPI or BPHA member, officer, director, manager, and employee within thirty (30) days of their admission, election, appointment, or employment; and

C. For a period of five (5) years after the date this order becomes final, publish annually in an official annual report or newsletter sent to all members, a copy of this order and the accompanying complaint with such prominence therein as is given to regularly featured articles.

## VI.

*It is furthered ordered*, That MAPI and BPHA shall each file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order became final, and at such other times as the Commission or its staff may by written notice require, setting forth in detail the manner and form in which they have complied and are complying with the order.

## VII.

*It is further ordered*, That MAPI and BPHA shall:

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

B. For a period of five (5) years after the date this order becomes final, notify the Commission in writing forty-five (45) days prior to

forming or participating in the formation of, or joining or participating in, any risk-sharing joint venture.

### VIII.

*It is further ordered*, That, for the purpose of determining or securing compliance with this order, MAPI and BPHA shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to a respondent and without restraint or interference from it, to interview officers, directors, or employees of a respondent.

### IX.

*It is further ordered*, That this order shall terminate on January 13, 2017.

#### CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the complaint and order and write separately to emphasize two points. First, the complaint and order do not directly challenge the organization and conduct of the Billings Physician Hospital Alliance, Inc., as a physician hospital organization ("PHO"), and in my view, this order should cast no shadow on the activities of PHO's. Second, although I concur in the unusual and complicated fencing-in relief in the particular circumstances of this case, in my view, this negotiated order is not, and should not be read as, a guide for what a PHO can and cannot do.

## Complaint

## IN THE MATTER OF

## COMPUTER BUSINESS SERVICES, INC., ET AL.

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

*Docket C-3705. Complaint, Jan. 21, 1997--Decision, Jan. 21, 1997*

This consent order prohibits, among other things, an Indiana home-based computer business opportunity firm and three principals from misrepresenting the earnings or success rate of investors; the existence of a market for their products or services; the amount of time it would take investors to recoup their investments and from making any representation regarding the performance, benefits, efficacy or success rate of any product or service unless they possess reliable evidence to substantiate the claims. The consent order also prohibits the use of misleading testimonials or endorsements. In addition, the consent order requires that advertisements for automatic telephone dialing systems disclose federal restrictions on their use and requires the respondents to pay \$5 million in consumer redress.

*Appearances*

For the Commission: *C. Steven Baker, Catherine Fuller, Mary E. Tortorice and Evan Siegel.*

For the respondents: *Lewis Keiler, Sonnenschein, Nath & Rosenthal, Chicago, IL.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Computer Business Services, Inc. ("CBSI"); Andrew L. Douglass, individually and as an officer of CBSI; Matthew R. Douglass, individually; and Peter B. Douglass, individually ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CBSI is an Indiana Corporation with its principal place of business at CBSI Plaza, Sheridan, Indiana.
2. Respondent Andrew L. Douglass is an officer of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation,

including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

3. Respondent Matthew R. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

4. Respondent Peter B. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

5. Respondents have advertised, offered for sale, sold, and distributed to the public home-based business ventures. Prospective consumers who purchase home-based business ventures from CBSI come to be known by the company as "Center Owners." A "center" ordinarily consists of computer hardware, software, training manuals, marketing materials, and available technical assistance which, together, are represented to enable the owner to create products and services that can be resold profitably to the general public.

6. Beginning no later than April 1988, and continuing through the present, respondents have disseminated or have caused to be disseminated magazine, newspaper and postcard advertisements, including but not necessarily limited to the attached Exhibit A, to induce consumers nationwide to call a toll-free number to order a free information kit. Respondents represent through these advertisements that consumers can expect to earn \$4,000 per month using CBSI's "proven turnkey business." Exhibit A.

7. Respondents have also disseminated or have caused to be disseminated advertisements for their home-based business ventures through commercial online services, including, but not limited to, CompuServe and America Online. Respondents represent through these advertisements that consumers can expect to earn \$4,000 per month through CBSI's home-based business ventures. Exhibit B.

8. Respondents have disseminated or have caused to be disseminated several information packets containing brochures and an audio cassette tape recording by the co-founders of CBSI, George and Jeanette Douglass. These materials, which are sent to prospective purchasers of home-based business ventures, contain the following statements:

(a) In the last 13 years, we've identified over 30 needs and wants. Each one of them is easy to run, helps other people, and provides you a good profit. Computer Business Services has not only identified these 30 needs, but has developed the technology to perform these services easily and profitably. Along with the technology, we've developed all the strategies to perform these services, plus the ways to find the people that need these services, and you can do it all from your home.

(b) Most of the couples and individuals that we've helped start their business have been extremely successful. . . .

(c) Each one of the programs I'm about to explain to you provides a needed service to the people or organizations in your community. Each service adds value to the people's lives you serve, and you can be proud to provide these services. Each program is a proven money-maker, and is now being operated successfully by our present center owners.

(d) Once you start to advertise your CBSI center, people know about it immediately and start coming to you for your services. Every business or organization needs to contact people and you have the only way to contact people quickly, inexpensively and effectively. Once this word gets out, you'll have to expand your services very rapidly, just as we did.

(e) Now we've already helped thousands of couples and individuals turn into successful business people, and we believe we can help you, too.

(f) If you get our CBSI computer program and follow our proven strategies, I really don't believe that you can do it badly enough not to be successful. Once you get the word out that you've got these programs available, people will come to you.

(g) We right now have 30 services you can perform. We have thousands of center owners already earning good money, and I believe you can, too.

(h) Now you have 24 hours in a day. You work 8, sleep 8, and have 8 free hours. If you take 8 free hours times 7 days a week, you have 56 hours. Divide that by two, and you have 28 hours that you can use in this business. Now I realize I've not included weekends. If you use 28 hours per week to do this program, you will be extremely successful.

(i) I can't guarantee your success. I can't guarantee that you'll make \$4,000 to \$10,000 a month. I don't know what's inside of you. But I do know this. Our services are needed in every community in the United States. Our programs really work, and you can earn more money than you ever dreamed possible if you will work our programs.

(j) Most of the couples and individuals that we've helped start their business have been extremely successful and our relationship with them has been exhilarating.

(k) This is a business that you can build a few customers at a time and reap the profits for a long time to come. I call it stack up income. You set it up once and get paid for it every month. So after a few years, you have big money coming in every month, even if you take a month off.

(l) Each of these services is a proven money-maker in large cities, small towns and rural communities throughout the country.

(m) Now some of our center owners use the computer dialing equipment for telemarketing on the unattended mode. Some just don't like to use the computer for telemarketing at all, and in some states, there are regulations that limit the use in the unattended mode. . . . Again, you must make the decision how you use your

equipment. Some center owners do very well using their computer dialing equipment for finding people who want their products. Others use the unattended mode to find qualified prospects for insurance, real estate, chimney cleaning and so forth. If they call from 9:00 a.m. to 9:00 p.m., they usually can call around 1,000 people a day.

9. Respondents also have disseminated or have caused to be disseminated materials containing endorsements by and photographs of purported Center Owners who convey the impression that ordinary consumers can successfully start and operate one or a combination of respondents' home-based business ventures. These materials include but are not necessarily limited to the attached Exhibit C. For example, these materials contain the following statements and depictions:

(a) "LEE STOUT: I am a very satisfied CBSI Center Owner. Without my involvement with CBSI the opportunities that have become realities would not have been possible. The CBSI telecommunications program has enabled me to grow my business to the point where I can make \$100,000+ per year. . . . If I can be successful at this, anyone can!"

(b) "DOUG STROUD: I earned \$101,865 in one year with my own CBSI business. I am running Voice Mail and Computer Home Monitor. CBSI software is the best available."

(c) "CURTIS MAPP: I now have 258 subscribers to the CBSI Computerized Monitor Service program. Each subscriber is billed at \$30.00 per month, which means I'm earning over \$7,700 per month with this program alone."

10. Beginning no later than January 1991, and continuing through the present, respondents have sold their home-based business ventures to approximately 15,000 consumers. Center Owners ordinarily spent between \$3,000 and \$16,000 on respondents' products and services.

#### PROFITABILITY

11. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that CBSI Center Owners ordinarily operate profitable businesses out of their own homes.

12. In truth and in fact CBSI Center Owners do not ordinarily operate profitable businesses out of their own homes. Indeed, it is rare for CBSI Center Owners to recoup even their initial investments.

13. Therefore, the representation set forth in paragraph eleven was, and is, false or misleading.

## SUBSTANTIAL INCOME

14. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that:

- a. CBSI Center Owners ordinarily earn substantial income.
- b. CBSI Center Owners can reasonably expect to achieve a specific level of earnings, such as income of \$4,000 per month.

15. In truth and in fact:

- a. CBSI Center Owners do not ordinarily earn substantial income. Indeed, the vast majority of Center Owners never even recoup their initial average investments of approximately \$9,000.
- b. CBSI Center Owners can not reasonably expect to achieve a specific level of earnings, such as income of \$4,000 per month. Indeed, the vast majority of Center Owners not only never earn \$4,000 per month, but never earn \$4,000 over the duration of their businesses.

16. Therefore, the representations set forth in paragraph fourteen were, and are, false or misleading.

## ENDORSEMENTS: ACTUAL EXPERIENCES

17. Through the means described in paragraph nine, respondents have represented, expressly or by implication, that CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials reflect the actual experiences of those Center Owners.

18. In truth and in fact, in numerous instances, CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials do not reflect those Center Owners' actual experiences.

19. Therefore, the representation set forth in paragraph seventeen was, and is, false or misleading.

## ENDORSEMENTS: TYPICALITY AND ORDINARINESS

20. Through the means described in paragraph nine, respondents have represented, expressly or by implication, that CBSI Center

Owner endorsements appearing in respondents' advertisements and promotional materials reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

21. In truth and in fact, CBSI Center Owner endorsements appearing in respondents' advertisements and promotional materials do not reflect the typical or ordinary experiences of Center Owners who have attempted to use CBSI's products or services.

22. Therefore, the representation set forth in paragraph twenty was, and is, false or misleading.

#### SUBSTANTIATION FOR EARNINGS CLAIMS

23. Through the use of the statements and depictions contained in the respondents' advertisements and promotional materials referred to in paragraph fourteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph fourteen, at the time the representations were made.

24. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph fourteen, at the time the representations were made. Therefore, the representation set forth in paragraph twenty-three was, and is, false or misleading.

#### AUTOMATIC TELEPHONE DIALING SYSTEMS

25. Through the means described in paragraphs five through ten, respondents have represented, expressly or by implication, that consumers can successfully utilize automatic telephone dialing systems to market their businesses.

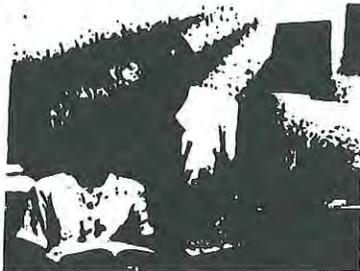
26. Respondents have failed to disclose in their advertisements and promotional materials for the outbound telemarketing programs that federal law prohibits the use of an automatic telephone dialing system in the unattended mode to initiate a telephone call to any residential telephone line to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party. This fact would be material to consumers in their purchase or use of respondents' home-based business ventures. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

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

Complaint

123 F.T.C.

## EXHIBIT A

**FREE CBSI 486 Computer**

## Earn \$4,000 Per Month From Your Home With A Computer!

Begin part-time and still retain the security of your present position. This is a proven turnkey business an individual or couple can run. If you purchase our software and business program, we will give you the computer and printer. If you already own a computer, you may receive a discount. You do not need to own, or know how to run, a computer—we will provide free, home office training. Financing available.

*Learn how other couples, and individuals like yourself, are building a lifetime income!*

To receive free cassettes and color literature, call toll-free: **1-800-343-8014, ext. 145**

(In Indiana: 317-758-4415) Or Write

COMPUTER BUSINESS SERVICES, INC., 250 PLAZA, STE. 145, SHERIDAN, INDIANA 46069

Complaint

EXHIBIT B

EXHIBIT B

EARN \$4,000 PER MONTH ON THE NEW INSTANT INFORMATION SUPERHIGHWAY

All you need is a kitchen table, computer, modem and a telephone

There is an exploding worldwide need for instant information. You can now be part of the start of a revolutionary new industry.

Computer Business Services Inc. the world leader in instant information immediately needs couples and individuals to provide these services from their homes. You may start part time and retain the security of your present job. Quit spending money on your computer and let it earn money for you. We provide a complete operation including everything you need to start plus the complete training to be a success.

If you purchase our software and training material you need a color monitor, modem, color monitor and printer at no extra cost. If you already own a computer we will give you a discount. Financing available.

Call 1-800-343-8014 ext. 2050

24 hours a day to receive FREE color literature and five cassette tapes that tell you how you can profit from and be a part of the new instant information superhighway.

EXHIBIT C

# WORLD'S LARGEST POSTCARD

## WARNING: Statistics show that reading this card can change your life!



**NICK ZICHICHI**  
"I earned \$1,000 in one week selling personalized children's books part time. I'm also running the Financial Aid for College program, and I sell a lot through high schools. I have started on Voice Mail and Voice Message Center. I now have 30 accounts, and I'm growing about 20 new accounts per week. I'm done with working hard for someone else. The sky's the limit for me."



**LEE STOULI**  
"I am a very satisfied CBSI Center Owner. Without my involvement with CBSI the opportunities that have become realities would not have been possible. The CBSI telecommunications program has enabled me to grow my business to the point I where I can make \$100,000 per year. Thanks to all at CBSI, from the tech support to customer service, marketing support and everyone in beta on it can be successful at this unique card."



**SHARON MALTAGLIATI**  
"George (Douglass), thank you for giving me the strength to "go out on a limb." It was because of the people that I came to know from listening to your tapes (at times I even) that I knew we had to drive to Sheridan, Indiana, to meet you. For years, just the you and Jeanie and so many other people, I have had the burning desire to start my own business. I had a full-time job making an excellent living, a beautiful home, cars, etc. However, I was not happy because my dream was getting further and further away from me. So here I am, working, working to build my dream. Please give my best to your entire staff. Everyone has been most helpful, and I look forward to working with all of you for many years to come."



**DAVID SMITH**  
"I purchased a CBSI 1000 Monogram & Embroidery machine and went into business. I now have more business than I can actually handle. I try to get at least \$30 per hour from my machine. Most days I gross \$400 and spend \$100 for parts, thread, etc. I can literally get my machine up anywhere and do lots of business, annual shows, malls, fairs, etc. The business is very exciting and very profitable."



**RHONDA SMITH**  
"Your company gave me the chance to do something I didn't think was possible. Without your company, I would be stuck in a 9-5 job fighting with a stupid boss about taking my children to the doctor for staying home when they are sick. With my CBSI home business I am able to provide for my family financially. I am also able to make a difference in the lives (and education) of the children in my community. Without your wonderful company, none of this would be possible."



**BOB ULLRICH**  
"I couldn't believe what I read in your tapes. It was just so good to be in it. But it is true. I saw the first Weather and Lottery program. I have 23 adorning slots and I sell them for \$60 to \$100 per slot. I paid for my initial/reservation really quick. I am also selling Personalized Children's Books. I have also sold \$10,000 worth of computer systems. I believe in fact and the truth. I wish the internet seem to get."



**MARK BLIZITI**  
"My name is Mark Uron and I'm running the CBSI video board program. I recently signed a major cable company for advertising. I have 10,000 coupons each month and plan to do much more. I also signed up three video stores as well. The concept is great and the business is great."



**DOUG STRICKLAND**  
"I earned \$10,000 in one year with my own CBSI business. I am running Voice Mail and Computer Home Monitor CBSI software in the United States. I believe CBSI software is the best available. I have written me a great business plan. I am looking for more people to invest in this business."



**SAFFIREE COOK**  
"My husband and I have been Center Owners for 4 months and we just want to say THANK YOU to all the folks at CBSI for their support and help. We could not have done this computer work without their help and we are appreciative that we look forward to what the future holds."



**GARY LEE**  
"Congratulations to everyone who has signed up for the great homebased work from home opportunity. I have not had the time to do this yet, but I have the opportunity to do this. I have signed up for a new Center Owners and will start my own business."



**LINDA KELLY**  
"I now have 200 subscribers to the CBSI software. Monitor Service program. Each subscriber pays \$70 per month, which means I am earning \$14,000 per month. I am also running the CBSI software at CBSI for your assistance, especially in Customer Service and Customer Service. My business is doing very well and I am looking for more people to invest in this business."



**ELEINE COX**  
"When you introduce the use of an opportunity, the most important thing is to get the people who are interested in the business. I have been able to do this and I am looking for more people to invest in this business. I have been able to do this and I am looking for more people to invest in this business."

Call your program advisor **TODAY** at 1-800-545-2274, ext. 347. A-11001195



## DECISION AND ORDER

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

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

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

1. Respondent CBSI is an Indiana Corporation with its principal place of business at CBSI Plaza, Sheridan, Indiana.

2. Respondent Andrew L. Douglass is an officer of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

3. Respondent Matthew R. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this

complaint. His principal office or place of business is the same as that of CBSI.

4. Respondent Peter B. Douglass is a supervisory employee of CBSI. Individually or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of CBSI.

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

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

## ORDER

### DEFINITIONS

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

1. "*Business venture*" means any written or oral business arrangement, however denominated, whether or not covered by the Federal Trade Commission's trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436, and which consists of payment of any consideration for:

A. The right to offer, sell, or distribute goods, or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

B. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business.

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

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and

comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

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

C. In a print or electronic advertisement, the disclosure shall be in a type size, and in a location, that is sufficiently noticeable for an ordinary consumer to see and read, in print that contrasts with the background against which it appears.

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

3. Unless otherwise specified, "*respondents*" shall mean Computer Business Services, Inc., a corporation, its successors and assigns and its officers; Andrew L. Douglass, individually and as an officer of the corporation; Matthew R. Douglass, individually; and Peter B. Douglass, individually; and each of the above's agents, representatives and employees.

4. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Automatic telephone dialing system*" shall mean as defined in the Telephone Consumer Protection Act, 47 U.S.C. 227(a)(1).

#### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not misrepresent, expressly or by implication:

A. That consumers who purchase or use such business ventures ordinarily succeed in operating profitable businesses out of their own homes;

B. That consumers who purchase or use such business ventures ordinarily earn substantial income;

C. The existence of a market for the products and services promoted by respondents;

D. The amount of earnings, income, or sales that a prospective purchaser could reasonably expect to attain by purchasing a business venture;

E. The amount of time within which the prospective purchaser could reasonably expect to recoup his or her investment; or

F. By use of hypothetical examples or otherwise, that consumers who purchase or use such business ventures earn or achieve from such participation any stated amount of profits, earnings, income, or sales. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondents from using hypothetical examples which do not contain any express or implied misrepresentations or from representing a suggested retail price for products or services.

## II.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture, shall not represent, expressly or by implication, the performance, benefits, efficacy or success rate of any product or service that is a part of such business venture, unless such representation is true and, at the time of making the representation, respondents possess and rely upon competent and reliable evidence that substantiates such representation. For purposes of this order, if such evidence consists of any test, analysis, research, study, or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if it has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## III.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any business venture or any product or service that is part of any business venture in or affecting commerce, shall not:

A. Use, publish, or refer to any user testimonial or endorsement unless respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained; or

B. Represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

1. The representation is true and, at the time it is made, respondents possess and rely upon competent and reliable evidence that substantiates the representation; or

2. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

a. What the generally expected results would be for users of the product, or

b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Provided, however, that when endorsements and user testimonials are used, published, or referred to in an audio cassette tape recording, such disclosure shall be deemed to be in close proximity to the endorsements or user testimonials when the disclosure appears at the beginning and end of each side of the audio cassette tape recording containing such endorsements or user testimonials. Provided further, however, that when both sides of an audio cassette tape recording contain such endorsements or user testimonials, the disclosure need only appear at the beginning and end of the first side and the end of the second side of the audio cassette tape recording.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

#### IV.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any business venture utilizing, employing or involving in any

manner, an automatic telephone dialing system, shall disclose, clearly and prominently, and in close proximity to any representation regarding the use or potential use of an automatic telephone dialing system to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party, that federal law prohibits the use of an automatic telephone dialing system to initiate a telephone call to any residential telephone line using an artificial or prerecorded voice to transmit an unsolicited advertisement for commercial purposes without the prior express consent of the called party unless a live operator introduces the message. Nothing in this paragraph or any other paragraph of this order shall be construed so as to prohibit respondents from making truthful statements or explanations regarding the laws and regulations regarding the use of automatic telephone dialing systems.

## V.

*It is further ordered,* That respondent Computer Business Services, Inc., directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product or service, shall not make any false or misleading statement or representation of fact, expressly or by implication, material to a consumer's decision to purchase respondents' products or services.

## VI.

*It is further ordered,* That:

A. Respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall pay to the Federal Trade Commission by electronic funds transfer the sum of five million dollars (\$5,000,000) no later than fifteen (15) days after the date of service of this order. In the event of any default on any obligation to make payment under this Part, interest, computed pursuant to 28 U.S.C. 1961(a) shall accrue from the date of default to the date of payment. In the event of default, respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall be jointly and severally liable.

B. Payment of the sum of five million dollars (\$5,000,000) in accordance with subpart A above shall extinguish any monetary claims the FTC has against Jeanette L. Douglass and George L. Douglass based on the allegations set forth in the complaint as of the date of entry of this order. Nothing in this paragraph or any other paragraph of this order shall be construed to prohibit the FTC from seeking administrative or injunctive relief against Jeanette L. Douglass or George L. Douglass.

C. The funds paid by respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, pursuant to subpart A above shall be paid into a redress fund administered by the FTC and shall be used to provide direct redress to purchasers of Computer Business Services, Inc. Payment to such persons represents redress and is intended to be compensatory in nature, and no portion of such payment shall be deemed a payment of any fine, penalty, or punitive assessment. If the FTC determines, in its sole discretion, that redress to purchasers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission. Customers of respondents, as a condition of their receiving payments from the Redress Fund, shall be required to execute releases waiving all claims against respondents, their officers, directors, employees, and agents, arising from the sale of Computer Business Services, Inc. business ventures by respondents prior to the date of issuance of this order. The Commission shall provide respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, with the originals of all such executed releases received from respondents' customers.

## VII.

*It is further ordered,* That respondents Computer Business Services, Inc., its successors and assigns, Andrew L. Douglass, Matthew R. Douglass, and Peter B. Douglass, shall for a period of five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

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

### VIII.

*It is further ordered,* That respondent Computer Business Services, Inc., and its successors and assigns, and respondent Andrew L. Douglass, for a period of five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

### IX.

*It is further ordered,* That respondent Computer Business Services, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn fewer than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is

practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

*It is further ordered,* That respondents Andrew L. Douglass, Matthew R. Douglass and Peter B. Douglass, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondents' new business addresses and telephone numbers and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

*It is further ordered,* That Computer Business Services Inc. and its successors and assigns, and respondents Andrew L. Douglass, Matthew R. Douglass and Peter B. Douglass shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on January 21, 2017, 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 fewer than twenty (20) years;

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

VICTORIA BIE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3708. Complaint, Jan. 22, 1997--Decision, Jan. 22, 1997*

This consent order prohibits, among other things, a California-based dietary supplement manufacturer, Victoria Bie d/b/a Body Gold, from making certain claims for dietary supplements, without competent and reliable scientific evidence to support them; from misrepresenting the results of any test, study or research; and from representing that any testimonial or endorsement is the typical experience of users of the advertised product, unless the claim is substantiated or the respondent discloses the generally expected results clearly and prominently.

### *Appearances*

For the Commission: *Janice Charter and Sohni Bendiks.*

For the respondent: *H. Patrick Noonan, Woodland Hills, CA.*

### COMPLAINT

The Federal Trade Commission, having reason to believe that Victoria Bie doing business as Body Gold ("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 Victoria Bie is the sole proprietor of Body Gold, a California company with its principal office or place of business located at 5930 La Jolla Hermosa, La Jolla, California. Respondent formulates, directs, and controls the acts and practices of Body Gold, including the acts and practices alleged in this complaint.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed nutritional supplements, including, but not limited to, Chromium Picolinate (200 and 400 mcg), 24K with Chromium Picolinate, Daily Energy Formula (with Chromium Picolinate), and CitriGold (with Chromium Picolinate and Hydroxycitric Acid), collectively referred to as "Chromium Picolinate," as weight loss, fat loss, muscle enhancing and/or muscle building aids. Respondent has

also advertised, offered for sale, sold and distributed the nutritional supplements L-Carnitine and Super Fat Burner Formula (containing L-Carnitine) as products that increase stamina or endurance, as well as aid in fat loss, weight loss and muscle toning. Each of respondent's nutritional supplements is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52, 55.

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, 15 U.S.C. 44.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for Chromium Picolinate, including but not necessarily limited to the attached Exhibits A-L. These advertisements and promotional materials contain the following statements:

1. "LOSE THE FAT BUT KEEP THE MUSCLE...Chromium Picolinate" (Exhibit A, pgs. 1 and 2)
2. "There is now excellent scientific evidence that Chromium Picolinate can accelerate fat loss while helping to preserve or even increase muscle." (Exhibit A, pg. 2)
3. "Another double blind-study [Evans'] was conducted in young off-season football players participating in a six-week weight-training program. The results were the same: more muscle, less fat with Chromium Picolinate. Chromium Picolinate more than doubled the net benefits of exercise alone." (Exhibit A, pg. 2, col. 2)
4. "Stimulates Metabolism" (Exhibit A, pg. 3, col. 1)
5. "Chromium Picolinate helps you to KEEP THE MUSCLE - and maintain or increase your metabolic rate - while LOSING THE FAT." (Exhibit B, pg. 2, col. 2)
6. "CHROMIUM PICOLINATE FOR LESS FAT AND MORE MUSCLE" (Exhibits F, I, J, and K)
7. "BODY GOLD will rev up your sluggish metabolism so that you'll 'burn' fat and calories the way Mother Nature intended." (Exhibit C, pg. 1, col. 2)
8. "In fact, because of the way BODY GOLD works, you may even find that your 'inch loss' is much more dramatic than your overall weight loss." (Exhibit C, pg. 1, col. 2)
9. "...[Chromium Picolinate] has been shown in numerous human and animal studies to reduce body fat while increasing muscle." (Exhibit B, pg. 2, col. 2)
10. "In the 1988-89 groundbreaking studies, people given 200 micrograms of Chromium Picolinate daily lost 22% of their body fat in six weeks!" (Exhibit D, pg. 2, col. 2)
11. "People given Chromium Picolinate lost 22% of their body fat in six weeks. Moderate exercise routines were followed: no dietary restrictions were imposed." (Exhibit F)

12. "22% LESS BODY FAT IN SIX WEEKS with Chromium Picolinate" (Exhibit G)

13. "22% LESS BODY FAT"

"In a breakthrough university study with Chromium Picolinate, fat loss was dramatic: [GRAPH] Unhealthy body fat decreased 17% in only 2 weeks and continued to an average 22% loss at the end of the 6-week study. In only six weeks, participants given Chromium Picolinate lost 22% of their body fat!" (Exhibit H)

14. "Numerous studies now show that supplemental CHROMIUM PICOLINATE promotes fat loss and increases lean muscle. 200 micrograms taken daily can offer dramatic fitness benefits." (Exhibits G, I, K)

15. "UNIVERSITY STUDIES IDENTIFY CHROMIUM PICOLINATE as a 'trigger' for fat loss and lean muscle development." (Exhibit F)

16. "People taking Chromium Picolinate lost 22% of their body fat in only six weeks in a 1989 university study. Since then, numerous studies and millions of people have confirmed the exciting benefits of this safe, essential nutrient. Men and women across the country are talking about: LESS BODY FAT \* WEIGHT LOSS \* 'INCH LOSS' \* MORE ENERGY \* MORE LEAN MUSCLE \* GREATER STAMINA \* APPETITE CONTROL \* LESS DESIRE FOR SWEETS" (Exhibits I, J, K)

17. "These and subsequent published studies show that Chromium Picolinate:

- \*increases body fat metabolism
- \*lowers elevated cholesterol levels
- \*builds stronger, leaner muscle
- \*regulates blood sugar
- \*promotes longer life span in laboratory rats" (Exhibit D, pg. 2, col. 2)

18. "Medical studies show that Chromium Picolinate can also:

- \*reduce cholesterol levels
- \*regulate blood sugar" (Exhibit C, pg. 1, col. 1)

19. "The Fitness Essential \* CHROMIUM PICOLINATE Less body fat \* More muscle \* Lower cholesterol \* Blood sugar control \* Weight loss" (Exhibit D, pg. 2)

20. "Recent clinical studies have used 400 micrograms of chromium to produce excellent weight-loss and fat-loss results. Your reward can be substantially greater fitness benefits when you DOUBLE THE CHROMIUM POWER. And Chromium Picolinate is perfectly safe at these reasonable, healthy amounts." (Exhibit E)

21. Testimonials from Exhibit L, Body Gold advertisement:

A. "Lost 13 pounds and feel great-thanks to Body Gold!" G.B., Mohrsville, PA

B. "Since I started Body Gold products I have lost a total of 36 inches and 64 pounds. I'm a proud Body Gold user." Karen Suleiman, Livonia, MI

C. "I've lost 20 pounds so far, and many, many inches!!...." Jennifer Papagno, Marlboro, MA

D. "Body Gold has become an important part of my daily life. I no longer crave chocolate or any sweets, and my appetite has decreased also. I've lost inches all over." Joan Decker, Troy, NY

E. "I saw inch loss in just a few days, and also a loss of appetite. I have more energy than ever." N.W., Wichita, TX

F. "Your product (Chromium Picolinate) is so great, in 2 weeks, I've lost inches already. I haven't eaten or craved sweets..." S.C., Buena Park, CA

G. "You have made me a believer. I could not get any of my dresses to fit when I needed to attend a special event. I started the 200 mcg chromium that day. One month later I can once again wear my clothes. I feel great! Thank you!" Marcy Baker, Bend, OR

H. "This is the best thing that I have ever tried and got results so fast! I have several friends as well as myself who have lost 20 pounds or more." M.G., Rocky Mtn., NC

I. "I lost lots of inches and 2 dress sizes!" G.H., Columbus, OH

J. "I feel great since starting Daily Energy Formula and I have lost 10 lbs. in the past month since starting Chromium Picolinate." M.S., Madison Hts., VA

K. "I tried your Dual Pak of Super Fat Burner Formula in combination with the Chromium Picolinate, and I AM HOOKED! I noticed immediate and dramatic fat loss, while I've noticed more muscle. I've finally managed to lose those impossible last 5 lbs. almost effortlessly." K.M., Edgewood, NM

L. "I lost 7-1/2 lbs. in 2 weeks with absolutely no change in diet -I feel better and want less food." Mary Guzy, Los Angeles, CA

M. "I've lost 10 pounds without trying to diet with this product. I feel great!" Sally Wymer, Friendswood, TX

## 22. Testimonials from Exhibit D, Body Gold flier:

### BODY GOLD Customers write...About Chromium Picolinate:

[A] "This is my second order. I've lost 5 pounds and almost 2 jeans sizes..." R.N., Bucyrus, NY

[B] "It has definitely decreased my interest in sugar, specifically chocolate. Thanks so much!" Bonnie Murphy, Central Point, OR

[C] "I can't believe how much more energy I have. I've lowered my cholesterol by about 30 points. I've lost weight." Anonymous (by request), River Falls, WI

[D] "Initially I lost 9 lbs. in 11 days. I am hypoglycemic - which has virtually been totally controlled, no headaches - no sugar highs & lows. I love BODY GOLD!" D.T., Flushing, NY

### About 24K with Chromium Picolinate:

[E] "I (lost) 10 lbs., and am able to maintain. BODY GOLD does make me feel better." Diane Wiles, Everett, WA

[F] "It makes me feel better. They (the tablets) are easy to take. I noticed I've lost inches." M.R.Y., Daytona Beach, FL

[G] "I am on a very strict diet, find it easier to stick with it. Also have control over hypoglycemia, never could get control before." L.P., Easley, SC

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A-L, respondent has represented, directly or by implication, that:

- A. Chromium Picolinate significantly reduces body fat.
- B. Chromium Picolinate causes significant weight loss.
- C. Chromium Picolinate causes rapid weight or fat loss.
- D. Chromium Picolinate significantly reduces serum cholesterol.
- E. Chromium Picolinate significantly increases human metabolism.
- F. Chromium Picolinate increases lean body mass and builds muscle.
- G. Chromium Picolinate causes weight loss without diet and/or strenuous exercise.
- H. Chromium Picolinate controls appetite and craving for sugar.
- I. Chromium Picolinate lowers or regulates blood sugar.
- J. Chromium Picolinate increases energy and/or stamina.
- K. Testimonials from consumers appearing in advertisements or promotional materials for Chromium Picolinate reflect the typical or ordinary experience of members of the public who have used the product.

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

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

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-L, respondent has represented, directly or by implication, that scientific studies demonstrate that Chromium Picolinate:

- A. Significantly reduces body fat;

- B. Causes rapid body fat loss;
- C. Increases lean body mass and builds muscle;
- D. Causes significant weight loss;
- E. Significantly reduces serum cholesterol;
- F. Lowers or regulates blood sugar; and
- G. Increases energy and/or stamina.

PAR. 9. In truth and in fact, scientific studies do not demonstrate that Chromium Picolinate:

- A. Significantly reduces body fat;
- B. Causes rapid body fat loss;
- C. Increases lean body mass and builds muscle;
- D. Causes significant weight loss;
- E. Significantly reduces serum cholesterol;
- F. Lowers or regulates blood sugar; or
- G. Increases energy and/or stamina.

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

PAR. 10. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for L-Carnitine and Super Fat Burner Formula, including but not necessarily limited to the attached Exhibits D and L. These advertisements and promotional materials contain the following statements:

1. "L-Carnitine - A powerful fat metabolizer praised by athletes for its ability to transport fatty acids more efficiently to the body's "fat burning energy centers"... By improving your fat metabolism, L-Carnitine can enhance your efforts at fat loss, weight loss, and muscle toning." (Exhibit D, pg. 1, col. 1)

2. "I have been particularly pleased with the Super Fat Burner Formula. I had a baby and within 2 months I have lost the 40 lbs. gained and have rebuilt the muscle definition I had lost during the pregnancy." Carol Lough Henderson, Stone Mtn., GA (Exhibit L)

3. "Adding the L-Carnitine has been really effective. It has dramatically improved my athletic performance and increased my overall stamina. Your products give me the fuel I need." Gail Smart, W. Medford, MA (Exhibit L)

PAR. 11. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits D and L, respondent has represented, directly or by implication, that:

- A. Taking L-Carnitine as a supplement reduces body fat.
- B. Taking L-Carnitine as a supplement causes weight loss.
- C. Taking L-Carnitine as a supplement tones muscles.
- D. Taking L-Carnitine as a supplement increases stamina and enhances athletic performance.
- E. Testimonials from consumers appearing in advertisements or promotional materials for L-Carnitine reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits D and L, respondent has represented, directly or by implication, that at the time she made the representations set forth in paragraph eleven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time she made the representations set forth in paragraph eleven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for CitriGold, including but not necessarily limited to, the attached Exhibit M. These advertisements and promotional materials contain the following statements:

1. "CitriGold is the weight-loss aid that combines the latest, most potent ingredients to help you:

\*Lose weight      \*Reduce Body Fat      \*Control your appetite"

2. "Add CitriGold to your weight loss and exercise program for a leaner, slimmer, sleeker body than you would have thought possible."

PAR. 15. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph

fourteen, including but not necessarily limited to the advertisement attached as Exhibit M, respondent has represented, directly or by implication, that:

- A. CitriGold causes weight loss.
- B. CitriGold reduces body fat.
- C. CitriGold controls appetite.

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

PAR. 17. In truth and in fact, at the time she made the representations set forth in paragraph fifteen, respondent 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.

PAR. 18. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

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## EXHIBIT A

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*Lose the Fat*

---

*but Keep the*

---

*Muscle . . .*

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# Chromium Picolinate

AT LAST THERE IS A SAFE  
NUTRITIONAL SUPPLEMENT  
THAT HELPS YOU LOSE  
UNWANTED FAT MORE EASILY  
AND QUICKLY, WHILE RETAIN-  
ING VITAL MUSCLE TISSUE.  
NOW YOU CAN HAVE A  
TRIMMER, FIRMER, LEANER  
BODY.

EXHIBIT A

**LOSE THE FAT BUT KEEP THE MUSCLE**

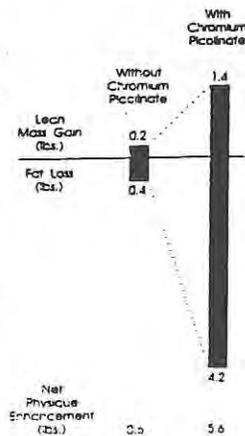
Most dieters who achieve significant weight loss lose far too much lean body mass (muscle and organ tissue). This not only diminishes strength and agility but also affects appearance. With less muscle, pleasing curves flatten, chests sink; arms and legs look spindly. *Even worse, this lessened lean body mass lowers your metabolic rate, making it that much harder to keep the fat off permanently — the yo-yo syndrome!*

There is now excellent scientific evidence that Chromium Picolinate can accelerate fat loss while helping to preserve or even increase muscle.

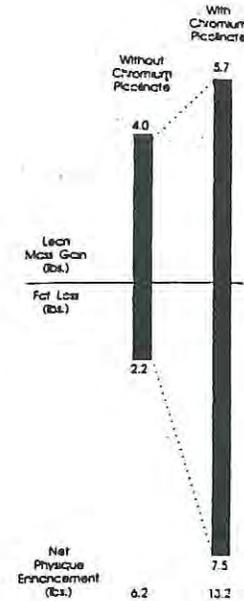
**CONVINCING NEW EVIDENCE**

Overweight adults were recruited by a prominent San Antonio weight loss clinic to participate in a weight loss study<sup>1</sup>. About half of the volunteers received supplemental Chromium Picolinate (200 or 400 micrograms of chromium daily), while the others received placebos. Neither the participants nor the doctors evaluating them knew who was getting the chromium (a "double blind" study). The volunteers were not placed on any specific diet or exercise regimen, although most of them were motivated to lose weight. After only 60 days, these were the impressive results:

The changes in the placebo group were negligible. But the Chromium Picolinate group, on average, lost over four pounds of fat while gaining nearly a pound and a half of lean muscle for a Net Physique Enhancement of 5.6 pounds.



The effect in men alone was even more striking, with an average fat loss of 7.7 pounds. Interestingly, the greatest enhancement of muscle mass was seen in the older subjects, those above age 46, who gained 2.1 pounds of muscle tissue while losing 4.4 pounds of fat. This is especially important since muscle tissue typically declines with age.



Another double-blind study was conducted in young off-season football players participating in a six-week weight-training program<sup>2</sup>. The results were much the same: more muscle, less fat with Chromium Picolinate. Chromium Picolinate more than doubled the net benefits of exercise alone.

These findings are also confirmed by animal studies. Scientists at Louisiana State University recently reported that young pigs receiving Chromium Picolinate achieved 7% more muscle with 21% less body fat as compared to pigs on an identical diet not receiving Chromium Picolinate.

**LEANER AND FIRMER**

Because many people gain muscle with Chromium Picolinate, their weight loss in pounds doesn't accurately reflect the benefits of chromium. Most users report that even a modest weight loss as shown on the bathroom scale is accompanied by

Complaint

123 F.T.C.

## EXHIBIT A

lost inches and smaller clothing sizes. They look and are leaner and firmer. Chromium Picolinate promotes fat loss, while enhancing the muscle that helps to assure a trim physique.

**WHAT IS CHROMIUM PICOLINATE?**

Chromium Picolinate is an exceptionally bioactive source of the essential mineral chromium. Chromium plays a vital role in "sensitizing" the body's tissues to the hormone insulin. Weight gain in the form of fat tends to impair sensitivity to insulin and thus, in turn, makes it harder to lose weight<sup>4</sup>.

**HOW DOES CHROMIUM PICOLINATE WORK?**

*Controls Hunger* — Many people report that Chromium Picolinate helps to control appetite, especially sugar cravings. It is believed that chromium sensitizes the "glucostat" in the brain that monitors blood sugar availability and "tells" you when you're hungry or not hungry.

*"Saves" Protein* — This is very important. Insulin directly stimulates protein synthesis and retards protein breakdown in muscles<sup>5,6</sup>. This "protein sparing" effect of insulin tends to decline during low calorie diets as insulin levels decline, which results in loss of muscle and organ tissue. By "sensitizing" muscle to insulin, Chromium Picolinate helps to preserve muscle in dieters so that they "burn" more fat and less muscle. Preservation of lean body mass has an important long-term positive effect on metabolic rate, helping dieters keep off the fat they've lost.

*Stimulates Metabolism* — Chromium Picolinate promotes efficient metabolism by aiding the thermogenic (heat producing) effects of insulin. Insulin levels serve as a rough index of the availability of food calories, so it's not at all surprising that insulin stimulates metabolism<sup>4,7,8</sup>.

**HOW MUCH CHROMIUM PICOLINATE SHOULD I TAKE FOR OPTIMAL WEIGHT LOSS?**

Clinical trials with 200 to 400 micrograms of chromium daily produced significant benefits. Larger individuals and those engaged in strenuous work or exercise may see better results with higher levels — up to a maximum of 400 micrograms daily.

**MORE IMPORTANT HEALTH BENEFITS OF CHROMIUM PICOLINATE**

Efficient insulin appears to be important for cardiovascular health. Poor insulin sensitivity is a risk factor for hardening of the arteries and heart disease and is associated with other risk factors such as high blood pressure and high triglycerides. By promoting efficient insulin function, Chromium Picolinate may protect the heart and circulatory system.

In controlled clinical studies at San Diego's Mercy Hospital, Chromium Picolinate has been shown to reduce elevated cholesterol, and to improve control of blood sugar in mature-onset diabetes.

**HERE'S A HEALTHFUL FOUR-STEP PROGRAM FOR WEIGHT CONTROL THAT REALLY WORKS:****STEP 1 REDUCE DIETARY FAT CONSUMPTION TO NO MORE THAN 20% OF CALORIES — EATING FAT MAKES YOU FAT!**

Dieticians traditionally have recommended overall calorie restriction for weight control, but it's now clear that fat calories should be specifically avoided<sup>9,10</sup>. Dietary fat is calorie dense and nutrient poor. Once absorbed, it does little to control hunger or stimulate metabolism. Much of it is deposited directly in your body's fat stores, and most of the fat in your body derives from dietary fat. Weight conscious people should therefore specifically avoid fatty foods, keeping fat calories to

## EXHIBIT A

20% or less of total calorie intake. (If you can achieve the 15% level provided by a traditional Japanese diet, all the better.) As noted by Dr. James Hill at the 1992 NIH-sponsored conference on obesity, "There are intriguing data suggesting that reducing fat without reducing calorie intake can reduce body fat levels." (Emphasis added.) To calculate the percentage of fat calories in a food, multiply grams of fat by 9 and divide by total calories.

Olives, avocados, nuts, vegetable oil, and margarine are all extremely high in fat. However most other foods not of animal origin are quite low in fat and are great for dieters. Among animal foods, skinless white meat poultry and fish (prepared without frying!) are good, as are non-fat and low-fat yogurt and cottage cheese, skim and 1% milk, and egg whites (not yolks). When you must use oil, use it very sparingly.

#### STEP 2 INCREASE DIETARY FIBER — LOW IN CALORIES; HIGH IN NUTRIENTS

High intakes of dietary fiber have a bulking effect that can help to control hunger. In addition, most high-fiber foods are low in fat, high in protective vitamins and minerals, and relatively low in caloric density. In your daily diet, emphasize fiber-rich foods such as whole-grain breads, cereals, and pastas, brown rice, beans, oatmeal, and fresh whole fruits and vegetables.

#### STEP 3 GET REGULAR AEROBIC EXERCISE AT LEAST THREE TIMES A WEEK — AND BURN CALORIES!

It's obvious that exercise burns calories. Equally important, there is strong evidence that regular aerobic training increases your metabolic rate while enhancing your body's capacity to burn fat<sup>11,12</sup>. For significant weight control benefits, you should exercise at least three times weekly for at least thirty minutes per session. Choose exercises that engage large muscle groups (legs, hips & back) in continuous motion such as jogging, cycling, stair climbing, swimming or brisk walking. Exercise is crucial for long-term success in weight control.

#### STEP 4 TAKE CHROMIUM PICOLINATE DAILY — LOSE THE FAT; KEEP THE MUSCLE

There are sound scientific reasons to believe that Chromium Picolinate will provide its greatest benefits in people who are eating low-fat foods and getting regular exercise. In other words, it should help you to get better results from "being good"!

Sporadic calorie-restricted dieting rarely achieves lasting results. Permanent weight loss requires a permanent commitment to a healthier lifestyle. Most people can lose significant amounts of fat and decisively improve their physiques without calorie counting by following this simple four-step plan.

#### PUTTING IT ALL TOGETHER

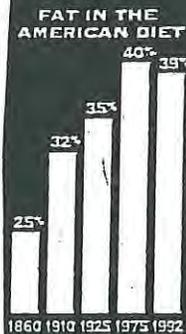
The best thing about Chromium Picolinate is that it makes other sensible weight control efforts more effective. Many people report that they have tried diet and exercise before, but say that they didn't get good results until they added Chromium Picolinate. Now they're enthusiastic about low-fat eating plus exercise and are ever-so-proud of their shapely new bodies! When your efforts are rewarded by good results, you're more likely to keep trying.

Chromium Picolinate, all by itself, isn't likely to make a fat person thin. But it can be the decisive component of an overall strategy for long-term weight control and, in the bargain, make an important contribution to good health.

There is now strong scientific evidence that good chromium nutrition is an essential (though not by itself sufficient) component of successful long-term weight control. According to U.S. Department of Agriculture studies, nine out of ten Americans get less than 50 micrograms of chromium daily as compared to the 50 to 200 micrograms recommended by the National Academy of Sciences. Supplementation with this important nutrient makes good sense.

## EXHIBIT B

## HIDDEN FAT IN THE AMERICAN DIET



The typical American diet is far too high in fat. In 1860, fat contributed 25% of calories consumed. Today this figure has reached 39%! It's no accident that average body weight and the incidence of obesity have risen concurrently.

Recent studies show that the nutrient Chromium Picolinate promotes a leaner, firmer physique — reducing body fat while helping to build and retain muscle. These remarkable benefits are optimized when dietary fat is kept to a minimum.

### CHOOSING A LOW-FAT DIET

An all-important key to achieving and maintaining a lean physique is to eliminate much of the fat from your daily diet. Most people find that they can lose a significant amount of weight without making a conscious effort to reduce calorie intake, simply by **AVOIDING FATTY FOODS**. People switching to a low-fat diet typically eat increased amounts of food while losing weight. For example, when women enrolled in a breast cancer prevention program reduced dietary fat, **THEY ACHIEVED AND MAINTAINED AN AVERAGE WEIGHT LOSS OF 7 POUNDS WITHOUT ADDED EXERCISE OR DIETING.**

For best results, you should keep your fat intake **BELOW 20% OF TOTAL CALORIES**. You can achieve this — without the inconvenience of counting calories — simply by choosing foods with less than 20% fat calories.

The tables on the reverse side show the percent of calories from fat in common foods. Foods rated at 20% or less are recommended for regular consumption. Food rated at 20-40% may be used in modest amounts provided that most of your diet comes from lower-fat foods. With the exception of fish (which protects your cardiovascular system), higher fat foods should be used sparingly or on rare occasions only. When oil is used for cooking or salads, use the minimum amount. Choose canola oil, soybean oil or olive oil.

Fat contains nine calories per gram — more than twice as many as carbohydrate or protein, each of which contain four calories per gram. The fat-calorie values given for prepared dishes are specific examples and may not reflect the fat content of similar supermarket foods. Read labels, and learn to calculate the percentage fat calories in foods:

The top line of the new Nutrition Facts label gives you the Total Calories as well as Calories from Fat in a single serving. **Divide Calories from Fat by Total Calories to determine Percentage Fat Calories.** For example, if a frozen dinner provides 300 calories, and 108 fat calories, the Percentage Fat Calories is:  $108 \div 300 = .36$  or 36%.

### MANY LOW FAT FOODS NOW AVAILABLE

Many innovative food companies now offer low-fat or non-fat analogs of foods that traditionally are high in fat. You can now obtain cookies, pastries, soups, dressings, and sauces that are virtually fat-free. Many supermarkets offer 1% milk (17% calories from fat), non-fat yogurts and low-fat dairy desserts. Baked tortilla chips and low-fat frozen dinners can also be found.

Many foods that we think of as high in protein are

## EXHIBIT B

actually higher in fat. Filet mignon, frankfurters, sausage, most lunch meats, and hamburger are examples of "high protein" foods that are 50 to 80% fat in terms of percentage of calories.

Significant sources of hidden fat are foods that purport to be low fat but are not. Two percent milk is a good example. Although only 2% of the volume of this milk is fat, 31% of "lowfat" milk's calories are fat calories! "Extra-lean" hamburger, 10% fat by weight, actually provides about 46% of its calories from fat. Don't be misled by claims that a product is a certain percentage fat-free. In foods with high water content (such as meats), "93% fat-free" may derive more than 30% of its calories from fat.

Fatty foods tend to be calorically dense, and thus are relatively low in most protective nutrients—vitamins, minerals, trace elements and fiber—on a per-calorie basis. Refined fats (e.g., butter, oils), and added sugars, are major sources of "empty calories" in the American diet. In effect, a high-fat, high-sugar diet robs you of many important nutrients.

Another major source of "empty calories" is alcohol. Alcohol may actually stimulate appetite in many people. Thus, alcohol calories are often excess calories and may lead to the well-known "beer belly". An ounce of pure alcohol contains nearly 200 calories. Therefore, moderation in alcohol consumption is crucial for weight control.

#### AN IMPORTANT BONUS: PROTECTION FROM HEART DISEASE AND CANCER

Another important benefit: a low-fat diet is likely to protect your heart and vascular system and reduce your risk for diabetes, hypertension, and cancers of the colon, breast, endometrium and ovary.

#### FOUR KEYS TO LIFE-LONG WEIGHT CONTROL

Avoiding fatty foods is crucial for weight control, but it's **only one** component of an overall strategy for maintaining a lean physique and vigorous good health:

##### 1 REDUCE DIETARY FAT TO LESS THAN 20% OF DAILY CALORIES.

Most ingested fat is stored directly in your body's adipose (fatty) tissues, and most of your body fat derives from dietary fat. Once absorbed, dietary fat does little to control hunger or activate metabolism. Most fatty foods are calorie dense, promoting excess consumption of calories. In clinical studies, overweight and weight gain correlate strongly with fat calorie consumption, but **not** with total calorie intake.

##### 2 EMPHASIZE HIGH-FIBER FOODS.

Whole grains, whole fruits, beans and most vegetables are good sources of dietary fiber, and are nutrient rich. Dietary fiber has a bulking effect that can aid appetite control. Fiber-rich foods are less calorie-dense and much more nutritious than refined flours, sugars, or juices. Soluble fiber supplements (e.g., psyllium) may also aid appetite control if consumed prior to meals.

##### 3 GET REGULAR AEROBIC EXERCISE.

Aside from the obvious benefit of calories burned during exercise, exercise boosts your metabolic rate and increases your body's capacity to burn fat as a metabolic fuel. To achieve this benefit, you need to exercise aerobically at least three times weekly for at least 30 minutes per session—more is better. Aerobic exercise involves vigorous rhythmic motion of major muscles—for example, jogging, cycling, stair climbing, or brisk walking. Resistance exercise (e.g., weight lifting) is also beneficial for weight control, since it helps to build and retain muscle, a chief determinant of metabolic rate.

##### 4 SUPPLEMENT YOUR DAILY DIET WITH THE ESSENTIAL MINERAL CHROMIUM PICOLINATE.

The essential trace mineral chromium, which is deficient in 9 out of 10 American diets, promotes efficient function of the hormone insulin. Good insulin activity is important for HUNGER CONTROL, for STIMULATING METABOLISM and for BUILDING AND RETAINING MUSCLE AND VITAL ORGAN TISSUE. Many people are poorly responsive to insulin, and scientists believe that this loss of sensitivity promotes overweight and obesity. Chromium is particularly beneficial for overweight people who typically have inefficient insulin function.

An exceptionally effective nutritional source of chromium, Chromium Picolinate, has been shown in numerous human and animal studies to reduce body fat while increasing muscle.

The ability of Chromium Picolinate to retain muscle is important to dieters, since up to 30% of the weight lost on most diets is muscle tissue. Loss of muscle reduces metabolic rate and thus promotes weight rebound—the "yo-yo" diet syndrome. Chromium Picolinate helps you to KEEP THE MUSCLE—and maintain or increase your metabolic rate—while LOSING THE FAT.

Used with a low-fat fiber-rich diet and regular exercise, Chromium Picolinate helps you to achieve a firmer, leaner physique. For optimal benefit, your daily supplementation program should provide 200 to 400 micrograms of chromium from Chromium Picolinate.

NUTRITION 21  
1010 TURQUOISE STREET, SAN DIEGO, CA 92109  
(619) 488-7423

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## EXHIBIT C

### CHROMIUM PICOLINATE: The Nutrient

This brochure explains how you can reduce body fat and increase muscle with BODY GOLD Chromium Picolinate. But the fitness benefits of this nutrient are only part of the story.

Medical studies<sup>1</sup> show that Chromium Picolinate can also:

- reduce cholesterol levels
- regulate blood sugar\*

Since nine out of ten people don't get even the minimum amount of chromium essential to good health<sup>2</sup>, supplemental chromium could be one of the most important additions you can make to your lifestyle.

#### References

1. Evans, G.W., "The effect of chromium picolinate on insulin controlled parameters in humans," INT. J. BIOSOCIAL MED. RESEARCH, Vol. 11(2): 163-180, 1989.
2. Anderson, R.A., Kozlovsky, A.S., "Chromium intake, absorption and excretion of subjects consuming self-selected diets, AM. J. CLIN. NUTR. 1985, 41:1177-1183.

NOTE: Although 200 micrograms of chromium was used in the cited studies, people taking 400 to 600 micrograms daily often report even greater noticeable benefit from the nutrient.

Chromium Picolinate has been shown to be an entirely safe and nontoxic supplement.

\* Diabetics: Consult your physician before first use of any product containing chromium picolinate.

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BODY GOLD  
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La Jolla, CA 92037  
(619) 459-2661

"The Midas Touch of good health.

== Body Gold™ ==

### CHROMIUM PICOLINATE

for a slimmer, trimmer you

#### What Is Chromium Picolinate?

Chromium Picolinate is a safe, essential nutrient, and it can greatly enhance the results of your weight loss or fitness program. You may have already heard about it on television or read the stories in USA TODAY, LADIES' HOME JOURNAL, COSMOPOLITAN and LONGEVITY, or in dozens of other magazines and newspapers across the country. Or you may well have heard about it through "word-of-mouth", since thousands of pleased users are trimming down and shaping up faster and more easily than ever. You can bet they're talking about it!

#### What Will BODY GOLD Chromium Picolinate Do For Me?

BODY GOLD will rev up your sluggish metabolism so that you'll "burn" fat and calories the way Mother Nature intended. By correcting the fat content in your body (burning off the stored up fat as well as what you've eaten) you'll discover "inch loss" as well as weight loss. In fact, because of the way BODY GOLD works, you may even find that your "inch loss" is much more dramatic than your overall weight loss.

Here's what's happening to so many people—people just like YOU—who have added BODY GOLD to sensible eating and exercising habits:

## EXHIBIT C

**WEIGHT LOSS**—People who haven't succeeded at permanent weight loss ever before are finding it much easier to drop, and keep off, those unwanted pounds. Unlike starvation diets and other dangerous programs, **BODY GOLD** simply restores an essential nutrient to your diet and brings your body's metabolism back to where it belongs. **BODY GOLD** promotes *healthy* weight loss!

**"INCH LOSS"**—"Redesigned" is how one woman described her new shape. Depending on how *your* body uses **BODY GOLD**, you may, at some point, lose a dress or belt size without seeing a corresponding weight loss. While the fat is being "burned" out of your body, lean muscle develops—toning and trimming you down. "Redesigned" shape is indeed an exciting (and very rewarding) benefit that many people report.

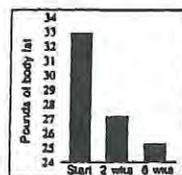
**FAT LOSS**—Not only does decreased body fat mean a slimmer, sleeker you—it's *healthier*, as well. Excess body fat has been tied to increased risk of certain cancers and heart disease. An active, "fat-free" life-style is the life-style of the '90s. And **BODY GOLD's** chromium has been described as the "nutrient of the '90s"!

**MORE LEAN MUSCLE**—While **BODY GOLD** works with your body's insulin to better "burn off" hidden body fat, it promotes the development of more lean muscle mass. Athletes and bodybuilders use Chromium Picolinate to enhance the results of their workouts. Whether you are male or female, you'll find that a firmer, leaner network of muscle strengthens both your physique and your sense of well-being.

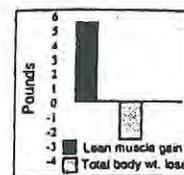
#### How Do I Know This Isn't A "Fad" Or Just "Sales Talk"?

Because two scientific studies discovered these exciting benefits before Chromium Picolinate was even available to the public. And since then it's been "tried and proved" by hundreds of thousands of enthusiastic people.

The studies were conducted at Bemidji State University in Minnesota. Young college athletes—in pretty good shape to start with!—experienced a *dramatic loss of body fat* when they were given only 200 micrograms of Chromium Picolinate daily. Although the muscle gain in these young men offset some of the "fat weight" loss, still overall weight loss occurred.



Fat loss was dramatic. Unhealthy body fat decreased by 17% in only 2 weeks and continued to an average 22% loss at the end of the 6-week study.



Weight loss occurred even as muscle was enhanced. Fat loss coupled with improved muscle tone and mass has caused significant "inch loss" in many people.

There's no reason you couldn't see similar dynamic results with **BODY GOLD** Chromium Picolinate. *In fact, if you've got some extra weight around your waist or hips, or more jiggle than yesteryear, you could see changes in yourself you've only dreamed of before now!*

#### I Want Results Like That! How Do I Know I'll Get The Same Product That Was Used In The Studies?

**BODY GOLD** Chromium Picolinate is made to the *exact specifications* of the capsules used in both of the university studies we've talked about—as well as in hospital studies which proved other exciting health benefits of this nutrient. Chromium Picolinate is patented by the United States Government (#Re.33,988), and is the form of chromium most recommended by health professionals.

**BODY GOLD** will refund the price of the first bottle purchased of any **BODY GOLD** product with which you are not entirely pleased. Subsequent purchase and/or further use of the same product implies satisfaction, however, and those purchases may not be refunded.

Complaint

EXHIBIT D

L-CARNITINE

A powerful fat metabolizer praised by athletes for its ability to transport fatty acids more efficiently to the body's "fat burning energy centers" (mitochondria), by improving your fat metabolism, L-Carnitine can enhance your efforts at fat loss, weight loss, and muscle toning.

Our Super Fat Burner Formula (see brochure cover) currently contains 50 milligrams of L-Carnitine. Nutritional experts recommend up to 1,500 milligrams daily, depending on your particular fitness goals.

L-Carnitine is frequently sold in 500 milligram capsules, and it can be costly. We are offering 250 milligram capsules for your convenience in determining your own personal needs without expensive, waste-fil over-supplementation.

Our suggested use is 1-4 capsules daily. For superior fat burning ability, combine with our suggested amounts of BODY GOLD Super Fat Burner Formula and Chromium Picolinate.

\* Product #J.C.100  
L-Carnitine, 250 mgs.  
100 capsules  
Price: \$27.95

"Fat Burner" Confusion??

Each of our "fat-burning" products is different from the other and each contributes to better fat metabolism. For maximum fat burning ability, therefore, we recommend all three products. Below is a quick reference guide to each:

CHROMIUM PICOLINATE: A proven fat-burner with many other general health benefits. An essential mineral which should be a lifelong supplement.

L-CARNITINE: An amino acid complex needed for converting fat into energy.

SUPER FAT BURNER FORMULA: A combination of nutrients and herbs effective in promoting fat metabolism and easing water retention.

Dear Friends:  
Some say good health is a gift. Taking care of yourself can make that gift last a lifetime. BODY GOLD products are like the "Midax Touch of Good Health" because of the many ways they can benefit you and your family.

The "gold" in "BODY GOLD" is Chromium Picolinate. So strongly do we believe in the importance of this amazing nutrient for good health, you will find it in many of our products. It can be an impressive addition to intelligent eating and exercise habits. And it can turn your life around with an array of astonishing benefits to your health and appearance.

BODY GOLD is an exclusive, carefully formulated line of safe, effective, quality products. We pride ourselves in fast, reliable service. There is no greater reward to us than our growing number of satisfied repeat customers. To all of you: thank you for your valued patronage. And to all of our new BODY GOLD friends, a hearty "welcome!"

Victoria Bie  
Owner

BODY GOLD  
5930 La Jolla Terrace Avenue  
La Jolla, CA 92037  
619-459-2661  
© Copyright 1993 BODY GOLD

MONEY-BACK  
GUARANTEE

BODY GOLD will refund the price of the first bottle purchased of any BODY GOLD product with which you are not entirely pleased. Subsequent purchase and/or further use of the same product implies satisfaction, and these purchases may not be returned.

EXHIBIT D

Body Gold  
"The Midax Touch of Good Health"

PRODUCT GUIDE

Nutritional Supplements for Weight Control, Strength and General Fitness Programs



FOR ACCELERATING FAT LOSS AND ENHANCING MUSCLE DEFINITION

Get enhanced results from your personal exercise or fitness program.

Originally formulated for weight-training programs, Super Fat Burner Formula provides a combination of effective lipotropic and ergogenic ingredients in capsule form to take before exercise or at bedtime. You'll firm down and tone up as you burn fat and keep vital muscle.

Suggested Use: 2 to 4 capsules daily.

Contains: Choline, Inositol, L-Carnitine, Beta-Sitosterol, Betaine HCl, L-Taurine, Methionine, Lecithin, Urea Urea, Vitamin B6.

LOOK INSIDE for special savings on our fat burner combination: Super Fat Burner Formula and Chromium Picolinate.)

\* Product #FB-120  
Super Fat Burner  
Formula  
120 capsules/bottle  
Price: \$16.95

\* SAVE \*  
ON QUANTITY  
PURCHASES  
WHEN YOU BUY FOUR  
OR MORE BOTTLES  
SEE OTHER NEWS

Complaint

EXHIBIT D



Our exclusive  
multivitamin/mineral  
formula created  
with pure and care for  
BODY GOLD customers

Rich in the vitamins and minerals important to the preservation of your good health, "24K" includes 200 micrograms of Chromium Picolinate.

"Supermarket vitamins" such as Centrum® and Theragram-M® seldom offer the complete spectrum of nutrients so essential to your good health, abundant energy, and overall well-being. Among the vital nutrients supplied by "24K" are:

- ✓ a rich supply of the all-important B vitamin complex—helping your body deal with day-to-day stress
- ✓ the protective anti-oxidants—natural defenses against harmful effects of air pollution, cigarette smoke, etc.
- ✓ calcium and magnesium in perfect balance for optimal effectiveness—protection for women from bone loss and osteoporosis.
- ✓ 200 micrograms of Chromium Picolinate—for efficient functioning of the hormone insulin.

Just four tablets a day fortify your diet with:

	% of USRDA
Vitamin A (beta Carotene)	15,000 IU 300
Vitamin B1 (Thiamine)	100 mg 200
Vitamin B2 (Riboflavin)	2 mg 400
Vitamin B3 (Niacin)	100 mg 200
Vitamin B5 (Pantoic Acid)	100 mg 200
Vitamin B6 (Pyridoxine HCl)	100 mg 200
Vitamin B12 (Cobalamin Concentrate)	100 mcg 100
Vitamin K (Folic Acid)	400 mcg 200
Niacin (Nicotinic Acid)	400 mg 200
Inositol	200 mg 200
Calcium (Calcium Pantothenate)	500 mg 500
Magnesium (Magnesium Oxide)	200 mg 50
Zinc (Zinc Oxide)	15 mg 30
Iron (Ferrous Fumarate)	5.5 mg 30
Manganese (Manganese Chlorate)	5 mg 150
Copper	3 mg 150
Selenium	200 mcg 200
Chromium (Chromium Picolinate)	200 mcg 50
Iodine (Potassium Iodide)	75 mcg 50
Methylsulfonylmethane (Sodium Methylsulfate)	150 mcg 50
Sodium	20 mg 50
Biotin	200 mcg 50

Product #K-180  
180 tablets/bottle  
Price: \$14.95

The Fitness Essential

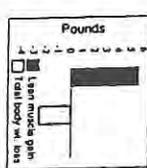
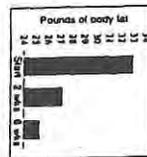


CHROMIUM PICOLINATE

Less body fat • More muscle • Lower cholesterol • Blood sugar control • Weight loss

The headline-making results of clinical and university studies with Chromium Picolinate have been reported in MUSCULAR DEVELOPMENT, USA TODAY, COSMOPOLITAN, LADIES HOME JOURNAL, LONGEVITY, MUSCLE & FITNESS, PREVENTION, and many other publications.

In the 1988-89 groundbreaking studies, people given 200 micrograms of Chromium Picolinate daily lost 22% of their body fat in six weeks! Moderate exercise was taken; no dietary restrictions were imposed.



Fat loss was dramatic. Unhealthy body fat decreased by 17% in only 2 weeks and continued to an average 22% loss at the end of the 8 week study.

Weight loss occurred even as muscle was enhanced. Fat loss coupled with improved muscle tone and mass causes significant "tightness" in many people.

These and subsequent published studies show that Chromium Picolinate:

- increases body fat metabolism
- lowers elevated cholesterol levels
- builds stronger, leaner muscle
- regulates blood sugar
- promotes longer life span in laboratory rats

Chromium is an essential trace mineral which functions as a cofactor for insulin. It is essential for efficient metabolism of sugar, fat, protein, and carbohydrate. Chromium Picolinate is the most bioactive form of chromium available today.

TWO POTENCIES  
QUANTITY SAVINGS

**BODY GOLD** 200-microgram Chromium Picolinate provides the amount of chromium used in the fat loss studies cited here. Subsequent studies show 400 micrograms daily enhance results in many people. Athletes and body-builders often obtain their greatest results from 400 micrograms, or more.

- 200 mcg CAPSULES ORIGINAL RESEARCH POTENCY
  - 400 mcg CAPSULES DOUBLE POTENCY QUANTITY SAVINGS
  - Product #CR-200 Price: \$10.95
  - Product #CR-400 Price: \$35.95
- SPECIAL OFFER ON 200 mcg CAPSULES BUY 5 BOTTLES, GET A 6TH ONE FREE
- Product #CR-5 60 capsule/bottle Price: 6 bottles, only \$54.75

Combined Fat Loss Partner  
At Special Savings

Super FAT BURNER + CHROMIUM PICOLINATE FORMULA (200 MCC.)

A dynamic combination of fat burners at special savings. Our fat-loss Dual-Pak provides the clinically proven fat loss benefits of Chromium Picolinate and the demonstrated effectiveness of Super Burner Formula.

DUAL-PAK SAVINGS: \$4.00  
Product #DP-300  
Dual-Pak: Super Fat Burner, 120 capsules Chromium Picolinate, fat capsules Price: \$23.90

Chromium Picolinate is an extremely safe and non-toxic nutritional supplement. Combining several BODY GOLD products containing Chromium Picolinate in the suggested amounts is entirely safe.

Complaint

123 F.T.C.

## EXHIBIT D

*Your Daily Energizer*

*A safe, natural energy formula to provide extra "zip" in your busy life.*

Whether you're facing long, hectic hours in the workplace, keeping pace on campus with your studies and school activities, tackling rush-hour traffic or energy draining chores-about-town, or keeping up with the toddler in the house, Daily

Daily  
**ENERGY**  
Formula

Energy Formula can give you the energy boost to see you through.

This is not a caffeine-loaded formula that will play havoc with your nervous system. Daily Energy Formula contains NO CAFFEINE and provides the "gentle" ingredients needed for efficient energy production.

Suggested use: 1 to 3 capsules daily for that extra dash of energy when you need it most!

Three capsules contain:

Siberian Ginseng	300 mg
Bee Pollen	200 mg
Royal Jelly	200 mg
Gota Kola	100 mg
Chromium Picolinate	100 mcg
Cayenne	75 mg
Vitamin B12	100 mcg
Niacin	50 mg
Folic Acid	100 mcg
Vitamin B5	100 mg

\* Product #EN-90  
Daily Energy Formula  
90 Capsules/bottle  
Price: \$9.95

**BODY GOLD**  
*Customers Write...*

**About Chromium Picolinate:**

"This is my second order. I've lost 5 pounds and almost 2 jeans sizes. I've got about 10 friends who will be sending orders! Great stuff."

*R.N., Bucyrus, NY*

"I've had incredible results with this product."

*M.C., Columbia, SC*

"It has definitely decreased my interest in sugar, specifically chocolate. Thanks so much!"

*Bonnie Murphy, Central Point, OR*

"I can't believe how much more energy I have. I've lowered my cholesterol by about 30 points. I've lost weight."

*Anonymous (by request),  
River Falls, WI*

"Initially I lost 9 lbs. in 11 days. I am hypoglycemic — which has virtually been totally controlled, no headaches — no sugar highs & lows. I love BODY GOLD!"

*D.T., Flushing, NY*

"Results are fantastic! I am very happy with it."

*V.L., Cape Coral, FL*

**About 24K with  
Chromium Picolinate:**

"I (lost) 10 lbs., and am able to maintain. BODY GOLD does make me feel better."

*Diane Wiles, Everett, WA*

"It makes me feel better. They (the tablets) are easy to take. I noticed I've lost inches."

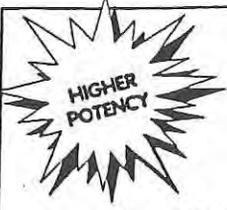
*M.R.Y., Daytona Beach, FL*

"I am on a very strict diet, find it easier to stick with it. Also have control over hypoglycemia, never could get control before."

*L.P., Easley, SC*

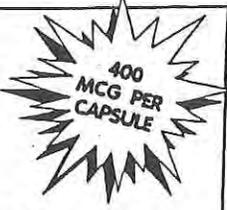
Complaint

EXHIBIT E



**HIGHER  
POTENCY**

**DOUBLE THE  
CHROMIUM  
POWER**



**400  
MCG PER  
CAPSULE**

**ECONOMICAL  
PRICING**

**QUANTITY  
SAVINGS**

**If you want 400 micrograms of chromium a day,  
you can SAVE DRAMATICALLY and enjoy  
one-a-day convenience.**

Recent clinical studies have used 400 micrograms of chromium to produce excellent weight-loss and fat-loss results. Your reward can be substantially greater fitness benefits when you **DOUBLE THE CHROMIUM POWER**. And Chromium Picolinate is perfectly safe at these reasonable, healthy amounts.

BODY GOLD Chromium Picolinate "400" provides a four-month supply (120 capsules) of 400 microgram capsules in one convenient bottle. You pay only \$35.95. That's...



**LESS THAN \$9.00 A MONTH  
for  
DOUBLE THE CHROMIUM POWER!**

**TO ORDER:**  
Please see Item #CR-400 on order form

BODY GOLD, 5930 La Jolla Hermosa, La Jolla, CA 92037

EXHIBIT F

**LONG-LIFE RESOURCES**

*Fitness 4 1/2 x 6 3/4*  
*20's + Fit 4 5/16 x 6 9/16*

on drugs, splints, surgery and diet, they offer a standard by which readers can gauge the quality of care given by their own physicians. In fact, if the book has a single Big Message, it is that a patient's active partnership and open communication with his or her doctor is critical to successful treatment. Pisetsky expressly encourages readers to discuss the book's perspective with their physician.

The book contains a thorough

chapter on the role that genetics may play in treatment and prevention and another on the future of research. A discussion of unproven, unconventional remedies is skeptical but fair-minded, pointing out that some non-standard treatments—such as gold injections for rheumatoid arthritis—were once dismissed as quackery. There is advice on how to decide if a new treatment is snake oil or a potential godsend your doctor just hasn't

heard about. Some tips on how to ferret out the unscrupulous: The treatment is not mentioned in conventional medical literature; the doctor wants cash; the cure is a "secret"; results will come overnight; the doctor has set up shop in the Bahamas or some other remote locale.

**Behaving around food.** In the real world, there is no secret formula that will whisk pounds away and keep us slim, fit and young-looking forever. Diet mogul Jenny Craig knows that. Although her weight-loss centers offer a nutritional, low-fat and low-cal diet plan, the trick, she says, is to alter your eating behavior. After nine years, 650 centers worldwide and with plans for another 500 or so in the future, Craig and her crew have a well-honed knack for coaching people in goal-setting and stick-to-itiveness. Now you don't have to join one of her centers to benefit from all that experience. Her weight-loss philosophy and detailed instructions for using it are available in *Jenny Craig's What Have You Got to Lose? A Personalized Weight-Management Program*, written in collaboration with Brenda L. Wolfe, Ph.D. (Villard Books, \$20).

More a workbook than a weight-loss tome, the manual does not focus on the "D" word. Rather, it emphasizes managing your weight before and after the pounds roll off. The book is sprinkled with inspiring testimonials from slimmed-down clients and includes easy-to-follow recipes for all the dishes included in the Jenny Craig meal plan.

Boosting self-esteem is at the core of Craig's method. She claims she went into the diet business to promote healthy life-styles, not to encourage obsessive concern with body image, and her earnestness shows on virtually every page. She emphasizes that there are no shortcuts if your goal is permanent weight loss; hence her program offers no "roads to the Fountain of Youth." But it can help you navigate your way to healthier eating—and a happier long-term relationship with the bathroom scale.

**You've heard about it. You've read about it.**

## CHROMIUM PICOLINATE for LESS FAT AND MORE MUSCLE

**THE NEWS:**  
UNIVERSITY STUDIES identify CHROMIUM PICOLINATE as a "trigger" for fat loss and lean muscle enhancement.

**THE FACTS:**  
People given Chromium Picolinate lost 22% of their body fat in six weeks. Moderate exercise routines were followed; no dietary restrictions were imposed.

**Fat loss was dramatic. Unhealthy body fat decreased by 17% (5.5 lbs. of fat) in only 2 weeks and continued to an average 22% loss at the end of the 6-week study.**

**Weight loss occurred even as muscle was enhanced. Fat loss, coupled with improved muscle tone and mass, causes significant "inch loss" in many people.**

**THE "TALK":**  
From radio and TV talk shows to "professional" dieters who have despaired of losing fat and inches, the talk is about Chromium Picolinate. About a smaller dress size or belt size. About how this amazing nutrient is building leaner, stronger bodies for people who have "tried it all" and failed.

**THE PRODUCT:**  
BODY GOLD™ Chromium Picolinate capsules are made to the exact specifications of those used in the studies (Bemidji State University, 1988/89). Each capsule contains 200 micrograms of biologically active chromium from Chromium Picolinate (U.S. patent 4,315,927). One capsule daily produced scientifically documented weight loss, fat loss and lean muscle enhancement. Your bottle of BODY GOLD contains 60 capsules. **USE BODY GOLD AS A COMPLEMENT TO ANY WEIGHT LOSS OR EXERCISE PROGRAM for a leaner, trimmer, healthier YOU!**

**Satisfaction Guaranteed!** Please send check or money order (no C.O.D.s) to: BODY GOLD, 5970 La Jolla Hermosa, Dept. LO-22, La Jolla, CA 92037

---

Please rush me \_\_\_\_\_ bottles of "BODY GOLD" @ \$10.95 ea = \$ \_\_\_\_\_  
 Name: \_\_\_\_\_ Shipping = \$ 2.50  
 Address: \_\_\_\_\_ TOTAL = \$ \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_



EXHIBIT H

HEALTHY GETAWAYS

**You're eating smarter and exercising more.**

**Now you need**  
*Body Gold™*

No more yo-yo dieting. You're getting smarter and your health is important to you.

You're changing your lifestyle and looking for the results. Now you need **BODY GOLD Chromium Picolinate.**

Join women and men across the country who are enjoying exceptional results from their fitness efforts with **BODY GOLD.** Mold yourself a sleek, new figure with the lasting benefits of this amazing nutrient!

**22% LESS BODY FAT**  
In a breakthrough university study with Chromium Picolinate, fat loss was dramatic:

**Fat loss was dramatic.**

Unhealthy body fat decreased 17% in only 2 weeks and continued to an average 22% loss at the end of the 6-week study.

In only six weeks, participants given Chromium Picolinate lost 22% of their body fat! Happy **BODY GOLD** customers enthusiastically confirm these exciting fat loss and weight control benefits.

Discover the final answer to getting and keeping a healthier, stronger, slimmer YOU. Add **BODY GOLD Chromium Picolinate** to sensible eating and exercising habits. Then...

**BE READY FOR SOME DYNAMITE RESULTS!**

**BODY GOLD** is made to the exact specifications of the capsules used in the studies cited above. Each bottle of 60 capsules is a 2-month supply.

**MONEY BACK GUARANTEE**

Please run 2 bottles of **BODY GOLD** @ \$19.95 each = \$39.90 total delivery. Check or money order only.

Name \_\_\_\_\_  
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City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

**BODY GOLD**  
1490 E. 12th St., Columbus, Ohio 43202-1212

NEAR HISTORIC CHARLESTON, SC

**SEABROOK & WILD DUNES FREE ISLAND RESORT GUIDES**

Featuring miles of beaches, eight championship golf courses, tennis, bike trails, boating, shopping and dining. All in a semi-tropical climate only minutes from Historic Charleston.

Site of the 1991 Ryder Cup Matches  
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**SEABROOK 1-800-845-2233**  
**WILD DUNES 1-800-346-0606**  
EXTENSION 274

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ADDRESS \_\_\_\_\_  
CITY, STATE, ZIP \_\_\_\_\_

**Ravenel Associates**  
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**HAWAII**

**REJUVENATE IN PARADISE!**

- spectacular tropical setting
- personalized exercise programs
- an array of fitness conditioning classes
- hikes to secluded waterfalls & lush valleys
- canoe trips up scenic rivers
- a variety of pampering body treatments
- delicious healthy cuisine
- health and fitness lectures & workshops
- graciously appointed guest rooms
- plus much more!

Chosen by *Condé Nast Traveler* magazine as one of the top 25 spas in America.

Selected by *Longevity* magazine as one of the best places to shed pounds, stress, and years.

**THE PLANTATION SPA**

A Hawaiian spa resort for body and mind.  
Call Toll Free (800) 422-0307 or 808-237-8865 or write to THE PLANTATION SPA 51-550 Kam Hwy, KAHALA HI 96730 for information and a free color brochure.

**hap-pe-tite**  
(hap'i'tit) n. 1. a desire or longing for a fun, humorous, healthy retreat where you can satisfy your craving for pleasure. 2. to hunger for contentment and understanding of your individual needs and goals.

**syz. Lake Austin Resort.**  
Call for more details!  
**1-800-847-5637 U.S.**  
**1-800-338-6651 (Canada)**

**Overcoming Overeating Workshop**  
with Jane Hirschman & Carol Muntzer  
**May 31 - June 7, 1992**

*Not for just an hour,  
Not for just a day,  
Not for just a year...*

The Heartland will teach you realistic ways to make your lifestyle kinder to your mental and physical health. We offer a wide range of exercise activities and pampering services. At our peaceful, country estate, we'll help you change for the better -

*for always.*

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EXHIBIT I

You've heard about it. You've read about it.

## CHROMIUM PICOLINATE

for

### LESS FAT AND MORE MUSCLE

The hottest topic in health and fitness is Chromium Picolinate! Numerous studies now show that supplemental Chromium Picolinate promotes fat loss and increases lean muscle. 200 micrograms taken daily can offer dramatic fitness benefits!

**1989, Benedict State University, Minnesota**

Pounds of body fat

Start 2 wks 6 wks

Fat loss was dramatic. Unhealthy body fat decreased by 17% in only 2 weeks and continued to an average 22% loss at the end of 6 weeks.

People taking Chromium Picolinate **lost 22% of their body fat in only six weeks** in a 1989 university study. Since then, numerous studies and millions of people have confirmed the exciting benefits of this safe, essential nutrient. Men and women across the country are talking about:

**LESS BODY FAT • WEIGHT LOSS • "INCH LOSS"**  
**MORE ENERGY • MORE LEAN MUSCLE**  
**GREATER STAMINA • APPETITE CONTROL**  
**LESS DESIRE FOR SWEETS**

**BODY GOLD™** Chromium Picolinate capsules are made to the exact specifications of those used in the study cited above. Each capsule contains 200 micrograms of chromium from USDA-patented Chromium Picolinate. One capsule daily produces scientifically documented weight loss, fat loss and increased lean muscle. Your bottle of **BODY GOLD** contains 60 capsules.

**ORDER TODAY • MONEY-BACK GUARANTEE**

For fast delivery, send check or money order today to: **BODY GOLD**, 5930 La Jolla Hermosa, Dept. CL-93, La Jolla, CA 92037

---

Please rush me \_\_\_\_\_ bottles of "BODY GOLD" @ \$10.95 ea = \$ \_\_\_\_\_

Name: \_\_\_\_\_ Shipping = \$ 2.50

Address: \_\_\_\_\_ TOTAL = \$ \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ No C.O.D.s. Canada: U.S. \$ B.A. only

CL-93

## Cuisinart

### ACCESSORY HEADQUARTERS

Parts and Accessories  
For Every Cuisinart -  
Current Or Past Models.

- Work Bowls
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- Juicers
- Whisks
- Covers

Replacement Parts Available For:

**KitchenAid**  
*Over* **BRUNN KRUPS**  
 NIKKO OFFICE

ORDERS SHIPPED WITHIN 24 HOURS.

## 800-543-7549

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A DIVISION OF CULINARY PARTS UNLIMITED  
 60 BENT DRIVE, PACIFIC, CA 94553

## The High-Tech Weight-Loss System.

There are weight-loss programs for the average individual. And then there's NordicSport™ ski from NordicTrack. The high-tech, world-class way to lose weight and keep it off!

Weight loss never felt so good. Our auto-white-out graphite composite construction allows the NordicSport™ ski to move and react to your body's motion for the most authentic sport simulation and the most efficient calorie workout. With the patented low-impact snow system, it's a workout so smooth, so real, so challenging — it'll make you love the snow all year!

And you'll burn up to 1,000 calories per hour, according to research. That's more than you would on regular exercise machines. And when you exercise on NordicSport™, you'll feel like you're on a real ski slope. You'll love it!

BEST OF ALL...IT'S FROM NORDICTRACK! 30-DAY IN-HOME TRIAL

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## Keep All Your Kitchen Knives Sharp with

### Crack Stick Sharpeners

**Restore and Revive Damaged Blades with a Lansky Multi-Angle Sharpening Kit**

Write for free catalog of the world's most complete sharpener line.

## LS LANSKY SHARPENERS

Lansky Sharpeners, P.O. Box 6, 1000  
 Dept. 20, 30400 New York, NY 10007-0020

EXHIBIT J



**SHED THOSE EXTRA HOLIDAY LBS!**

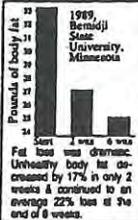
You've heard about it. You've read about it.

## CHROMIUM PICOLINATE

for

## LESS FAT AND MORE MUSCLE

The exciting news in weight loss and fitness is Chromium Picolinate! Numerous studies now show that supplemental Chromium Picolinate promotes fat loss and increases lean muscle. 200 micrograms taken daily can offer dramatic fitness benefits!



**1989, Bemidji State University, Minnesota**

Fat loss was dramatic. University body fat decreased by 17% in only 2 weeks & continued to an average 22% loss at the end of 6 weeks.

People taking Chromium Picolinate lost 22% of their body fat in only six weeks in a 1989 university study. Since then, numerous studies and millions of people have confirmed the exciting benefits of this safe, essential nutrient. Women across the country are talking about:

**LESS BODY FAT • WEIGHT LOSS • "TINCH LOSS"**  
**MORE ENERGY • MORE LEAN MUSCLE**  
**GREATER STAMINA • APPETITE CONTROL**  
**LESS DESIRE FOR SWEETS**

**BODY GOLD™** Chromium Picolinate capsules are made to the exact specifications of those used in the study cited above. Each capsule contains 200 micrograms of chromium from USDA-patented Chromium Picolinate. One capsule daily produced scientifically documented weight loss, fat loss and increased lean muscle. Your bottle of **BODY GOLD** contains 60 capsules.

**ORDER TODAY • MONEY-BACK GUARANTEE**

For fast delivery, send check or money order today to: **BODY GOLD**,  
 5930 La Jolla Hermosa, Dept. CO-14, La Jolla, CA 92037

Other fine **BODY GOLD** products:  
*L-Carnitine, Super Fat Burner Formula, Daily Energy Formula*

Please rush me \_\_\_\_\_ bottles of "BODY GOLD" @ \$10.95 ea. = \$ \_\_\_\_\_

Name: \_\_\_\_\_ Chromium Picolinate Shipping = \$ 2.50

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

TOTAL = \$ \_\_\_\_\_

No C.O.D.s. Canada: U.S. \$ m.o. only

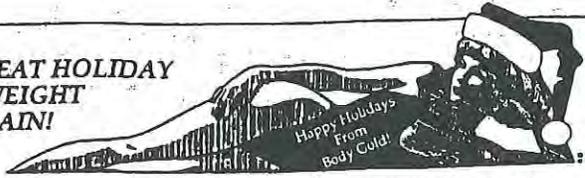
CO-14



Complaint

EXHIBIT K

**BEAT HOLIDAY  
WEIGHT  
GAIN!**



**CHROMIUM PICOLINATE  
for LESS FAT AND MORE MUSCLE**

The exciting news in health and fitness is Chromium Picolinate! Numerous studies now show that supplemental Chromium Picolinate promotes fat loss and increases lean muscle. 200 micrograms taken daily can offer dramatic fitness benefits!

People taking Chromium Picolinate lost 22% of their body fat in only six weeks in a 1989 university study. Since then, numerous studies and millions of people have confirmed the exciting benefits of this safe, essential nutrient. Men and women across the country are talking about:

**LESS BODY FAT • WEIGHT LOSS • "INCH LOSS"  
MORE ENERGY • MORE LEAN MUSCLE  
APPETITE CONTROL • LESS DESIRE FOR SWEETS**

**BODY GOLD™** Chromium Picolinate capsules are made to the exact specifications of those used in the study cited above. Each capsule contains 200 micrograms of chromium from USDA-patented Chromium Picolinate. One capsule daily produced scientifically documented weight loss, fat loss and increased lean muscle. Your bottle of **BODY GOLD** contains 60 capsules.

**ORDER TODAY • MONEY-BACK GUARANTEE**

*For fast delivery, send check or money order today to: BODY GOLD,  
5930 La Jolla Hermosa, Dept. CL-113, La Jolla, CA 92037*

---

Please rush me _____ bottles of "BODY GOLD" @ \$10.95 ea	= \$ _____
Name: _____	Shipping = \$ <u>2.50</u>
Address: _____	TOTAL = \$ _____
City: _____ State: _____ Zip: _____	No C.O.D.s. Canada: U.S. \$ mail only CL-113

Complaint

123 F.T.C.

EXHIBIT L

*New Women 8/94*



**Body Gold™**

Nutritional products for people **SERIOUS** about **WEIGHT LOSS** and **WEIGHT MANAGEMENT**

Lost 13 lbs. and feel great—thanks to Body Gold!

*G.B. Mohrsville, PA*

Since I started Body Gold products I have lost a total of 36 inches and 64 pounds. I'm a proud Body Gold user.

*Karen Suleman, Livonia, MI*

I've lost 20 pounds so far, and many, many inches!! I recently added "24K" to my regimen and it's even better. I feel terrific!

*Jennifer Papagno, Marlboro, MA*

Body Gold has become an important part of my daily life. I no longer crave chocolate or any sweets, and my appetite has decreased also. I've lost inches all over.

*Jan Decker, Troy, NY*

I saw inch loss in just a few days, and also a loss of appetite. I have more energy than ever.

*N.Y. Watata, TX*

Your product (Chromium Picolinate) is so great. In 2 weeks I've lost inches already. I haven't eaten or craved sweets. Thank you so much.

*S.C. Buena Park, CA*

You have made me a believer. I could not get any of my dresses to fit when I needed to attend a special event. I started the 200 mcg chromium that day. One month later I can once again wear my clothes. I feel great! Thank you!

*Marcy Baker, Bend, OR*

This is the best thing I have ever tried and got results so fast! I have several friends as well as myself who have lost 20 pounds or more.

*M.G. Rocky Mt., NC*

I've lost lots of inches and 2 dress sizes!

*G.H. Columbus, OH*

I feel great since starting Daily Energy Formula and I have lost 10 lbs. in the past month since starting Chromium Picolinate.

*M.S. Madison Hts., VA*

The products you are offering are fantastic. After using Body Gold there is no need to try anything else. I love it! It works!

*Bonnie Stokes, Charlottesville, VA*

I tried your Dual-Pak of Super Fat Burner Formula in combination with the Chromium Picolinate, and I AM HOOKED! I noticed immediate and dramatic fat loss, while I've noticed more muscle. I've finally managed to lose those impossible last 5 lbs. almost effortlessly.

*K.M. Edgewood, NM*

I have been particularly pleased with the Super Fat Burner Formula. I had a baby and within 2 months I have lost the 40 lbs. gained and have rebuilt the muscle definition I had lost during the pregnancy.

*Carol Leigh Henderson, Stone Mt., GA*

I lost 7-1/2 lbs. in 2 weeks with absolutely no change in diet—I feel better and want less food. I have found determination and excitement I haven't felt in years. Thanks!

*Mary Gutz, Los Angeles, CA*

I love your products! Adding the L-Carnitine has been really effective. It has dramatically improved my athletic performance and increased overall stamina. Your products give me the fuel I need.

*Gail Smart, W. Meaford, MA*

I've lost 10 pounds without trying to diet with this product. I feel great!

*Sally Warner, Friendswood, TX*

*Body Gold Customers Write:*



FOR FASTEST SHAPE-UP SUCCESS WE HIGHLY RECOMMEND COMBINING OUR: Fat Loss Dual Pak (#DP-30D) and L-Carnitine (#LC-100)

BODY GOLD, 3430 La Jolla Hermosa Avenue, Dept. NW-34, La Jolla, CA 92037

ORDER TODAY!

\*MONEY BACK GUARANTEE\*

ORDER TODAY!

PLEASE RUSH MY ORDER

- #CR-200 Chromium Picolinate \_\_\_\_\_ x \$14.95 ea = \$ \_\_\_\_\_
- #CR-400 Chromium Picolinate \_\_\_\_\_ x \$29.95 ea = \$ \_\_\_\_\_
- #FB-120 Super Fat Burner Formula \_\_\_\_\_ x \$19.95 ea = \$ \_\_\_\_\_
- #DP-30D Fat Loss Dual-Pak (save \$4.00!) \_\_\_\_\_ x \$27.95 ea = \$ \_\_\_\_\_
- #SE-300 Daily Energy Formula \_\_\_\_\_ x \$19.95 ea = \$ \_\_\_\_\_
- #LC-100 L-Carnitine \_\_\_\_\_ x \$19.95 ea = \$ \_\_\_\_\_
- #K-24K "24K" Multi-Vitamin/Mineral Formula \_\_\_\_\_ x \$19.95 ea = \$ \_\_\_\_\_

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_  
 State \_\_\_\_\_ Zip \_\_\_\_\_

Check or money order only. **NO CASH.** **NO MONEY ORDER.** **NO CHECKS, PLEASE!**

**VISA & MASTERCARD**  
**1-800-308-8448**  
 orders only, please # order by item #

For more information, call 1-800-308-8448. Questions? Call 1-800-308-8448.

EXHIBIT M

troubled by frizzy hair?

Ouidad has been named by Vogue one of the top stylists in America and the one best at caring for frizzy hair. She works wonders in the quiet confines of her NYC brownstone penthouse salon; which also offers luxurious facials, manicures, pedicures and waxing. Ouidad's Deep Treatment conditioner, a lotion for frizzy hair (seen on Sally Jessy Raphael), has been featured by beauty editors in Allure, Elle, T&C, Harper's Bazaar, and dozens of others, making the salon a haven for those with frizzy, curly hair. The Deep Treatment can be ordered by mail. For a free brochure, call (800) 677-HAIR or write/visit the salon at 846 Seventh Ave., NY, NY 10019.



1 oz. bottle, \$22.50 ppd.

Fresh Start, Clean Finish

Make BreathAssure a permanent addition to your daily beauty regimen. BreathAssure, an all-natural blend of sunflower and parsley seed oils, works with your digestive system to give you clean breath. Just swallow 2-3 capsules with liquid; BreathAssure is guaranteed to tackle even the spiciest foods. So eat whatever you want, whenever you want to. Just use BreathAssure and you won't need to worry about your breath—morning, noon or night! Credit card orders call 1-800-603-1500. Or send check/mo to BreathAssure, Dept. 673, 18034 Ventura Blvd., Encino, CA 91316. Only \$19. for 4 packs (200 capsules) plus \$3 s/h. CA residents add \$1.65 tax. 30c money back guarantee. In Canada, call 1-800-668-8968.



The Shape You're In

Championship Blocking

A sports sunblock needs to absorb quickly into your skin so it won't interfere with your grip or run into your eyes. It has to be waterproof and sweatproof for up to eight hours so there's no hassle with reapplying. Hawaiian Tropic Sport Sunblock delivers all this and more in its 15, 30 or 45 SPF formulas.



**SCALED DOWN BEAUTIFULLY**  
 A powerful weight loss combination with a special bonus!

CitriGold™ is the weight-loss aid that combines the latest, most potent ingredients to help you:

- Lose weight
- Reduce body fat
- Control your appetite

CitriGold contains Garcinia cambogia (HCA) from Citrin® and Chromium Picolinate, two breakthrough ingredients in weight control. Add CitriGold to your weight loss and exercise program for a leaner, slimmer, sleeker body than you would have thought possible. One-month supply only \$24.95. Money Back Guarantee.

**Special Offer:** Daily Energy Formula, an \$11.95 value, only \$9.95 with CitriGold purchase from this ad.

Credit card orders:  
 1-800-808-3448 (24 hrs.)  
 or send order form with payment to: Body Gold™, 5930 La Jolla Hermosa Ave., Dept. S-55, La Jolla, CA 92037.




PLEASE RUSH	bottled CITRIGOLD™ @ \$24.95 ea.	= 3
OR	CITRIGOLD - Daily Energy Combo @ \$24.95 ea.	= 3
	Shipping	= 3
	<b>TOTAL</b>	<b>= 9</b>

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

SHIPPING 1 30: \$2.50  
 2-4 30: \$3.50  
 5 or more: \$4.00  
 TWO-DAY SERVICE: \$4.00

your master plan for success in life

Are you tired of wondering or worrying about Love? Career? Family? Friends? Wealth? Or even Health? Then, join the crowd—the crowd calling the Psychic Friends Network™, that is! Where a certified Master Psychic can reveal your "Master Plan for Success in Life"! The Master Psychic Master Plan is unlike any other psychic reading ever offered. Most psychic readings capture a moment in time at best. But, with a Master Psychic Master Plan, you get comprehensive, in-depth guidance about any—or every—area of your life. In fact, your Master Psychic Master Plan actually advises you step by step on the correct course to take to help you achieve the lasting happiness you desire. And deserve! So stop dreading dead ends and start living the life of your dreams. Call now for your Master Plan for Success in Life. Because with a Master Psychic Master Plan, you, at last, can know tomorrow, today!

Call now for your very own Master Psychic Master Plan! 1-900-454-4330. (Only \$3.99 per minute. Must be at least 18 years of age.)

**Note:**...there's a fragrance for all your moods: Vanilla Fields from Coty, Classic Gardenia by Dana, or Chantilly... from Sebastian, everything you need in haircare... slim down with CitriGold and CitriMax.

## DECISION AND ORDER

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

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

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

1. Respondent Victoria Bie d/b/a Body Gold is a sole proprietor doing business under and by virtue of the laws of the State of California, with her office and principal place of business located at 5930 La Jolla Hermosa Ave., La Jolla, California.

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

## ORDER

## DEFINITIONS

For the purposes of this order:

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

2. "*Clearly and prominently*" as used herein shall mean as follows:

(a) In a television or videotape advertisement: (1) an audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it; and (2) a video disclosure shall be of a size and shade, and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.

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

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

## I.

*It is ordered*, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of Chromium Picolinate, 24K with Chromium Picolinate, Daily Energy Formula, CitriGold, or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product causes, aids, facilitates or contributes to reducing body fat;

B. Such product causes, aids, facilitates or contributes to causing weight loss;

C. Such product causes, aids, facilitates or contributes to causing rapid weight or body fat loss;

D. Such product causes or assists in causing weight or fat loss without dieting or strenuous exercise;

E. Such product reduces serum cholesterol levels;

F. Such product increases human metabolism;

G. Such product increases lean body mass and builds muscle;

H. Such product increases energy or stamina;

I. Such product controls appetite and/or craving for sugar; or

J. Such product regulates or controls blood sugar;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

## II.

*It is ordered*, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of L-Carnitine, Super Fat Burner Formula, or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product improves fat metabolism, which causes loss of body fat;

B. Such product causes, aids, facilitates or contributes to achieving fat loss;

C. Such product causes, aids, facilitates or contributes to achieving weight loss;

D. Such product causes, aids, facilitates or contributes to muscle toning; or

E. Such product enhances athletic performance and/or stamina;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

### III.

*It is further ordered*, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from making, in any manner, directly or by implication, any representation regarding the performance, benefits, efficacy, or safety of such product, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

### IV.

*It is further ordered*, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

### V.

*It is further ordered*, That respondent Victoria Bie, doing business as Body Gold or under any other name, and respondent's agents, representatives, and employees, directly or through any partnership,

corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, or offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, do forthwith cease and desist from representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of a product or program represents the typical or ordinary experience of members of the public, who use the product or program, unless at the time of making such a representation, the representation is true, and respondent possessed and relied upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

Provided, however, respondent may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondent discloses clearly and prominently and in close proximity to the endorsement:

- a. What the generally expected performance would be in the depicted circumstances; or
- b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, *i.e.*, that consumers should not expect to experience similar results.

## VI.

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

## VII.

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

## VIII.

*It is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondent 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 her possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## IX.

*It is further ordered,* That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the company, such as dissolution, assignment, or sale resulting in the emergence of a successor entity, the creation or dissolution of subsidiaries or affiliates, or any other change in the company that may affect compliance obligations arising under this order.

## X.

*It is further ordered,* That the respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to all agents, representatives, or employees engaged in the preparation or placement of advertisements, promotional materials, product labels or other sales materials covered by this order, and shall obtain from each such agent, representative or employee a signed statement acknowledging receipt of the order.

## XI.

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

## XII.

This order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

IN THE MATTER OF

CONOPCO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3706. Complaint, Jan. 23, 1997--Decision, Jan. 23, 1997*

This consent order prohibits, among other things, Conopco, Inc., a New York-based manufacturer of margarine and spreads, doing business as Van Den Bergh Foods Company, from misrepresenting the amount of fat, saturated fat, cholesterol or calories in any spread or margarine; and requires the respondent to have adequate scientific substantiation for claims that any margarine or spread reduces the risk of heart disease, or causes or contributes to a risk factor for any disease or health-related condition. In addition, the consent order requires, for three years, that advertisements for Promise margarine or spreads must include the total fat disclosure and must disclose either the percentage of calories derived from fat or the fact that the product is not low in fat.

### *Appearances*

For the Commission: *Anne V. Maher, Rosemary Rosso, Maureen Enright and Jill Samuels.*

For the respondent: *Nancy Schnell, New York, N.Y.*

### COMPLAINT

The Federal Trade Commission, having reason to believe that Conopco, Inc., doing business as Van Den Bergh Foods Company ("respondent"), has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a New York corporation with its office and principal place of business located at 390 Park Avenue, New York, New York. Van Den Bergh Foods Company is an unincorporated operating division of Conopco, Inc. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc., a Delaware corporation with its office and principal place of business also located at 390 Park Avenue, New York, New York.

PAR. 2. Respondent, through its operating division known as Van Den Bergh Foods Company, has manufactured, advertised, labeled, offered for sale, sold and distributed margarines and spreads, including Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread (hereinafter sometimes collectively referred to as "Promise margarines and spreads") and other foods to consumers. Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Promise margarines and spreads, including but not necessarily limited to the advertisements attached as Exhibits A through E. These advertisements contain the following statements and depictions:

A. "HEART DISEASE: NATION'S #1 KILLER" [Depiction of Newspaper Headline] [SFX: Dramatic Tone]

MUSIC: YOU MAKE ME FEEL SO YOUNG. YOU MAKE ME FEEL THERE ARE SONGS TO BE SUNG.

[Depiction of an adult male with two young children, one child male and the other female]

[Depiction of a plate of pancakes with two heart-shaped pats of margarine on the pancakes; behind the plate is a package of Promise spread (stick form), with the following statements on the package label: "Low in Saturated Fat" and "NO CHOLESTEROL"]

[Depiction of adult male smiling and looking down, moving to depiction of the young girl smiling and looking up]

"HEALTH TODAY Serum Cholesterol: the warning is real." [Depiction of Newspaper Headline] [SFX: Dramatic Tone] MUSIC: AND EVERY TIME I SEE YOU GRIN ...

[Depictions of the adult male with the two children] "FIT -OR- FAT"

[Depiction of Newspaper Headline, shown several times] [SFX: Printing Press Sounds]

VOICEOVER: "Promise spread has no cholesterol" [Depiction of the adult male with the two children; a super at the bottom of the screen states: "Include Promise as part of a low saturated fat, low cholesterol diet."]

VOICEOVER: "...and is lower in saturated fat than leading margarines." [Depiction of a knife spreading margarine on pancakes with a package of Promise spread (stick form) behind the plate; the Promise package label states "Low in Saturated Fat" and "NO CHOLESTEROL" and a super at the bottom of the screen continues to state: "Include Promise as part of a low saturated fat, low cholesterol diet."]

MUSIC: YOU MAKE ME FEEL SO YOUNG [Depiction of the adult male with two children at a table moving to screen depicting the female child eating and then to a depiction of the male child eating and then to the adult male eating]

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Complaint

VOICEOVER: "Promise. Get Heart Smart."

[Depiction of packages of Promise spread (tub form), Promise spread (stick form) and Promise Extra Light margarine in top third of screen] A super in large caps in the center of screen reads: "PROMISE. GET HEART SMART" [Depiction of the male adult with the two children in the bottom of the screen] (Exhibit A).

B. "GET HEART SMART." (Exhibits A through E).

C. Depiction of Heart-Shaped Pat[s] of Margarine in conjunction with depictions of packages of Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread. (Exhibits A through E).

D. "Low in Saturated Fat." [Depiction of package of Promise spread (stick form)] (Exhibit B).

E. "ZERO FAT BREAKTHROUGH" [Depiction of Headline] [SFX MUSICAL/ELECTRONIC]

\* \* \* \* \*

"EXCLUSIVE THE FIRST Fat Free MARGARINE" [Depiction of Headline] SFX COMPUTER PRINTER

\* \* \* \* \*

VOICEOVER: "Discover Fat Free Promise Ultra." [Depiction of plate with two muffin halves with heart-shaped pats of margarine on the muffins; behind the plate is a package of Promise Ultra Fat Free spread]

"Zero Fat with ...just five delicious calories a serving." [Depiction of young girl with three adults, moving to depiction of a knife spreading margarine on a muffin half]; a super at the bottom of the screen states: "Include Promise Ultra as part of a low saturated fat, low cholesterol diet."

[Depiction of adults and young girl at a table; a super at the bottom of the screen states: "Include Promise Ultra as part of a low saturated fat, low cholesterol diet."]

\* \* \* \* \*

VOICEOVER: It's the first fat free...margarine. Definitely one of a kind." [Depiction of people at table moving to male adult eating muffin with margarine on it]

"SPREAD THE FAT FREE NEWS" SFX ELECTRONIC

\* \* \* \* \*

VOICEOVER: "Regular or Fat Free Promise Ultra ... " [Depiction of packages of Promise Ultra (26%) spread and Promise Ultra Fat Free spread in top third of screen]

VOICEOVER: "Get Heart Smart." [Depiction of packages of Promise Ultra (26%) spread and Promise Ultra Fat Free spread in top third of screen; a super in large caps in the center of screen reads: "GET HEART SMART"] (Exhibit D).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondent has represented, directly or by implication, that eating Promise spread, Promise Extra Light margarine or Promise Ultra (26%) spread helps reduce the risk of heart disease.

PAR. 6. Through the use of the statements and depictions set forth in the advertisements referred to in paragraph four, including

but not necessarily limited to the advertisements attached as Exhibits A through E, 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. 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 D, respondent has represented, directly or by implication, that Promise spread and Promise Extra Light margarine [Exhibit A] and Promise Ultra (26%) spread [Exhibit D] are low in total fat.

PAR. 9. In truth and in fact, Promise spread, Promise Extra Light margarine and Promise Ultra (26%) spread are not low in total fat. At the time respondent made the representation, Promise spread contained 9.5 grams of fat per 14 gram serving and 34 grams of fat per 50 grams; Promise Extra Light margarine contained 5.6 grams of fat per 14 gram serving and 20 grams of fat per 50 grams; and Promise Ultra (26%) spread contained 3.64 grams of fat per 14 gram serving and 13 grams of fat per 50 grams. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication; that Promise spread is low in saturated fat.

PAR. 11. In truth and in fact, Promise spread is not low in saturated fat. At the time respondent made the representation, Promise spread contained 1.6 grams of saturated fat per 14 gram serving with 17 percent of calories derived from saturated fat. Therefore, the representation set forth in paragraph ten was and is false and misleading.

PAR. 12. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not limited to the advertisement attached as Exhibit A,

respondent has represented, directly or by implication, that Promise spread and Promise Extra Light margarine have no dietary cholesterol. Respondent has failed to adequately disclose that Promise spread and Promise Extra Light margarine contain a significant amount of total fat. In light of respondent's representation that Promise spread and Promise Extra Light margarine have no dietary cholesterol, the significant total fat content of the products would be material to consumers and the failure to adequately disclose this fact is deceptive.

PAR. 13. The acts or practices of respondent, as alleged in this complaint, constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

123 F.T.C.

EXHIBIT A-1



Promise.  
"HEADLINES"



SFX: Dramatic Tone.



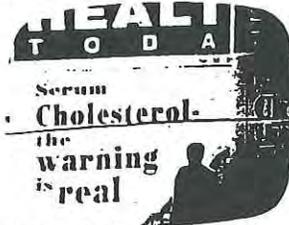
MUSIC: YOU MAKE ME FEEL SO YOUNG.



YOU MAKE ME FEEL THERE ARE



SONGS TO BE SUNG.



SFX: Dramatic Tone.



MUSIC: AND EVERY TIME I SEE YOU GRIN...



SFX: Printing press sounds.



VO: Promise Spread has no cholesterol



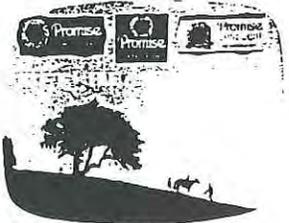
and is lower in saturated fat than leading margarines.



MUSIC: YOU MAKE ME



FEEL SO YOUNG.



VO: Promise. Get heart smart.

EXHIBIT A-1

**"HEADLINES" AD**  
**(VIDEOCASSETTE)**

Complaint

123 F.T.C.

EXHIBIT B

**PROMISE: FOR ALL THE LOVES OF YOUR LIFE.**



**GET HEART SMART.**  
Be good to yourself and the ones you love. Include great tasting Promise in a well-balanced, nutritious diet. Eating right—it's one good way to show you care.



© 1994 Van den Bergh Foods, Inc.

MANUFACTURER'S COUPON EXPIRES 3/31/95

**SAVE 35¢** on any Promise stick product



44698



1111541035

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MANUFACTURER'S COUPON EXPIRES 3/31/95

**SAVE 50¢** on any Promise soft product



44668



1111542050

EXHIBIT C-1

McCANN-ERICKSON

TITLE \_\_\_\_\_ PAGE \_\_\_\_\_

1994 PROMO ID

Open on Product shot.  
Camera pans....

(New Footage)



Announcer VO:

Promise Ultra

...from right  
to left...

(New footage)

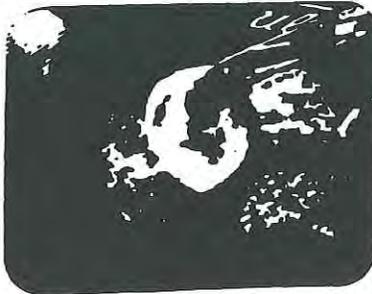


65% less fat and calories  
than margarine.

Super: Include Promise as part of a low  
cholesterol, low saturated fat di:

Knife spreads  
margarine on muffin.

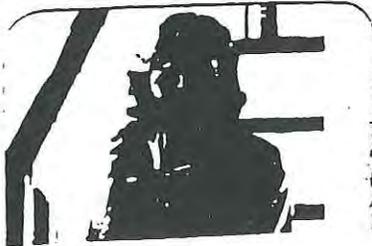
(Pick-up footage)



And a light delicate taste:

Woman in kitchen  
with muffin.

(Pick-up footage)



(Bite/eating enjoyment:

Exhibit C-1

Complaint

123 F.T.C.

EXHIBIT C-2

**MCCANN-ERICKSON**  
 TITLE \_\_\_\_\_ PAGE \_\_\_\_\_

Product shot.  
(New footage)



Promise Ultra  
Get Heart Smart.

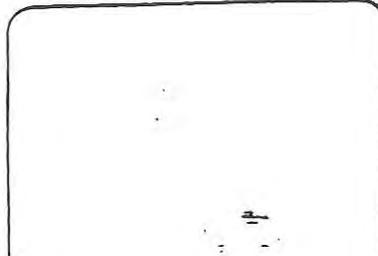
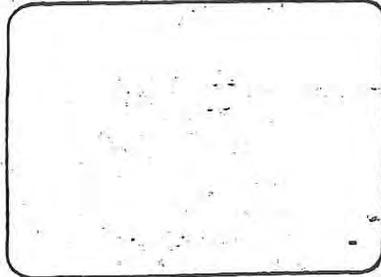
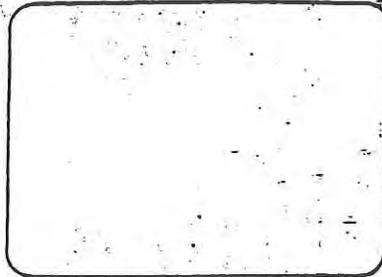


Exhibit C-2

Complaint

EXHIBIT D

*Ultra*  
FAT FREE

Title: "The News/ Non-New"



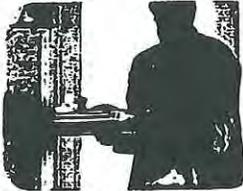
SFX MUSICAL/ ELECTRONIC



SONG: YOU MAKE ME FEEL SO YOUNG



SFX COMPUTER PRINTER



SONG: YOU MAKE ME FEEL THERE ARE SONGS TO BE SUNG



ANNCR V/O: Discover Fat Free Promise Ultra.



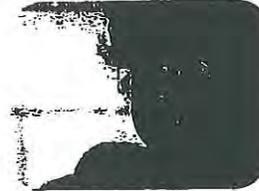
Zero fat with



just five delicious calories a serving.



SONG: AND EVERYTIME I SEE



YOU GAIN



ANNCR V/O: It's the first fat free



margarine. Definitely one of a kind.



SFX ELECTRONIC



SONG: YOU MAKE ME FEEL SO YOUNG



ANNCR V/O: Regular or Fat Free Promise Ultra.



Get Heart Smart.

Exhibit D

EXHIBIT E

The lowest in fat and calories of margarines or spreads.

**Promise**  
**FAT FREE**

**Ultra**  
65% LESS FAT

Great taste, half the saturated fat and calories of margarine.

**Promise Extra**  
Light Margarine

Always the smart choice for cooking and baking.

**Promise**

THERE'S A  
**Promise.**  
THAT'S RIGHT  
FOR YOU.

*Promise® offers you more choices for smart eating than ever before. Enjoy great tasting Promise as part of a well-balanced, nutritious diet. Whatever your lifestyle, there's a Promise that's right for you.*

**GET HEART SMART.™**



*Just drop your Promise® tub inside!*

**SAVE 40¢**

on any  
**Promise**  
product



Van den Bergh Foods Co., Dept. 11115, 1 Fremont Drive, Old Palo, TX 75066 will reimburse your sales price of Promise if submitted in conjunction with Van den Bergh Foods Co. (VDF) Promotional Policy regarding this Coupon. Coupon has no cash value. Not redeemable for cash. Void where prohibited or restricted. Good only on products as indicated. Void where prohibited or restricted. Expires 2/28/95.

44634



**FREE PROMISE TUB CANISTER**

**BUY:** Any TWO Promise® products  
**SEND:** This completed certificate, plus TWO proofs-of-purchase (UPC symbols) and your cash register receipt(s) with the purchase price(s) circled to:  
Promise® Canister Offer, P.O. Box 6235  
Douglas, AZ 85635-6235

**RECEIVE:** One Promise® Decorative Tub Canister

Name \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

This offer is good from 10/15/94 to 12/31/94. Two proofs of purchase of Promise tub canisters must be submitted. The amount of the purchase price of the tub canister is limited to the amount of the purchase price of the Promise products. Proof of purchase must be submitted in conjunction with this certificate. Void where prohibited or restricted. Expires 12/31/94.

EXHIBIT E

## DECISION AND ORDER

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

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

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

1. Respondent Conopco, Inc. is a New York corporation with its office and principal place of business located at 390 Park Avenue, New York, New York. Van Den Bergh Foods Company is an unincorporated operating division of Conopco, Inc. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc., a Delaware corporation with its office and principal place of business also located at 390 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 proceeding is in the public interest.

## ORDER

## I.

*It is ordered*, That Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Eating Promise spread, Promise Extra Light margarine or Promise Ultra (26%) spread or any other margarine or spread will help to reduce the risk of heart disease; or

B. Any margarine or spread has the relative or absolute ability to cause or contribute to any risk factor for a disease or any health-related condition;

unless at the time of making such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation; provided however, that any such representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to have a reasonable basis as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## II.

*It is further ordered,* That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

## III.

*It is further ordered,* That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, or any other margarine or spread that contains a total fat disclosure amount as defined in Part V of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol in such food:

- A. The total number of grams of fat per serving; and
- B. For three (3) years from the effective date of this order, any advertising or promotion of any margarine or spread advertised,

promoted, offered for sale, sold or distributed under the Promise brand name that contains a total fat disclosure amount as defined in Part V of this order shall also disclose the percentage of calories derived from fat or a statement that the margarine or spread is not a "low fat" food.

#### IV.

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

#### V.

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

A. The term "spread" shall mean any spread that has organoleptic properties similar to butter or margarine;

B. The term "margarine" or "spread" shall not include:

1. Any foodservice margarine or spread sold in bulk sizes for use by restaurants or foodservice establishments or sold in individual portion packs for table service use by restaurants or foodservice operators, provided that said products bear no nutrient content or health benefit claims in any context on any such product package and provided further that respondent, its successors or assigns, does not advertise, promote, offer for sale, sell or distribute any such product to consumers; or

2. Any margarine or spread sold or distributed to consumers by third parties under private labeling agreements with respondent, its successors or assigns, provided respondent, its successors or assigns, does not participate in the funding, preparation or dissemination of any advertising of said products to consumers; and

C. For purposes of Part III of this order, the term "total fat disclosure amount" shall mean the disclosure level of fat as set forth in final regulations concerning cholesterol content claims as

promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

## VI.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## VII.

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

## VIII.

*It is further ordered,* That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of this order to its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, to each of its managerial employees in its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order.

## IX.

*It is further ordered,* That this order will terminate on January 23, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

## X.

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

## IN THE MATTER OF

## UNIVERSAL MERCHANTS, INC., ET AL.

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

*Docket C-3707. Complaint, Jan. 23, 1997--Decision, Jan. 23, 1997*

This consent order prohibits, among other things, a California-based dietary supplement manufacturer and its president from claiming, without competent and reliable scientific substantiation, that any food, dietary supplement or drug reduces body fat, causes weight loss, increase lean body mass, or controls appetite or craving for sugar; from misrepresenting the results of any test, study or research; and from representing that any testimonial or endorsement is the typical experience of users of the advertised product, unless the claim is substantiated or the respondent discloses the generally expected results clearly and prominently.

*Appearances*

For the Commission: *Rosemary Rosso, Maureen Enright, Anne V. Maher and Jill Samuels.*

For the respondents: *Ed Glynn and Gary Hailey, Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

## COMPLAINT

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

1. Respondent Universal Merchants, Inc. is a Delaware corporation with its principal office or place of business at 4727 Wilshire Blvd., Suite 510, Los Angeles, CA.

2. Respondent Steven Oscherowitz is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal

office or place of business is the same as that of Universal Merchants, Inc.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including ChromaTrim and ChromaTrim-100 ("ChromaTrim"), chewing gums containing chromium picolinate. ChromaTrim is a "drug," and/or "food," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

5. Respondents have disseminated or have caused to be disseminated advertisements for ChromaTrim, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A. "100% natural, ChromaTrim™ is the sugar-free, fat-reducing chewing gum that is proven to reduce body fat and decrease your appetite (especially sugar cravings). ChromaTrim works fast and is extremely safe. ChromaTrim's active ingredient Chromium Picolinate is so unique, it's patented by the U.S.D.A."

"No special diets, no tiring exercise, and no harmful chemicals, ChromaTrim is simply the secret to successful fat loss. Guaranteed. The fact is, thousands of formerly over-weight men and women have successfully changed their lives."

"I lost 40 pounds with ChromaTrim-100." [The advertisement depicts a slender woman with the caption Belinda Woodruff.]

"I lost 35 pounds using ChromaTrim." [The advertisement depicts a woman in a two-piece bathing suit with the caption Nicky Peters.] (Exhibit A)

B. Susan Ruttan: "This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate, a very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your body's insulin, helping it to burn fat, preserve and build muscle, and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen." (Exhibit B, p. 2)

Veronica Hall: "I lost 80 pounds. And I went down from a size 28, to a size 18." (Exhibit B, p. 2)

Donna Allison: "I've lost 36 pounds and I still have 20 or so more to lose." (Exhibit B, p. 2)

Susan Ruttan: "So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet....And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should." (Exhibit B, p. 3)

Susan Ruttan: "And with this system you don't have to starve yourself, or sweat buckets to see a real change." (Exhibit B, p. 3)

Susan Ruttan: "The real goal is to keep and even build muscle, and burn off that fat. And that's where ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does." (Exhibit B, p. 4)

Susan Ruttan: "ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy." (Exhibit B, p. 4)

Rick Gordon: "In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that." (Exhibit B, pp. 4-5)

Wendy Wilburn: "I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever." (Exhibit B, p. 5)

Susan Ruttan: "Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day." (Exhibit B, p. 5)

Female Announcer Wearing Lab Coat: "Nine out of ten of us don't get enough chromium from our daily diet. And chromium . . . is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now." (Exhibit B, pp. 5-6)

Announcer in Lab Coat: "In a double blind study of 150 people conducted in conjunction with the University of Texas, . . . people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat . . . [a]nd gained 1.2 pounds of muscle mass. . . . Now you can get the chromium advantage with ChromaTrim. . . . You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings." (Exhibit B, p. 11)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

- A. ChromaTrim significantly reduces body fat.
- B. ChromaTrim causes significant weight loss.
- C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
- D. ChromaTrim increases lean body mass and builds muscle.
- E. ChromaTrim controls appetite and craving for sugar.
- F. Testimonials from consumers appearing in the advertisements for ChromaTrim reflect the typical or ordinary experience of members of the public who use the product.

G. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that scientific studies demonstrate that:

- A. ChromaTrim significantly reduces body fat.
- B. ChromaTrim causes significant weight loss.
- C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
- D. ChromaTrim increases lean body mass and builds muscle.
- E. ChromaTrim controls appetite and craving for sugar.

10. In truth and in fact, scientific studies do not demonstrate that:

- A. ChromaTrim significantly reduces body fat.
- B. ChromaTrim causes significant weight loss.
- C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
- D. ChromaTrim increases lean body mass and builds muscle.
- E. ChromaTrim controls appetite and craving for sugar.

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

11. 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

**The Ultimate Fat Loss System.**



# Speed Your Way To A Leaner Body.

100% natural. ChromaTrim™ is the sugar-free, fat-reducing chewing gum that is proven to reduce body fat and decrease your appetite (especially sugar cravings). ChromaTrim works fast and is extremely safe. ChromaTrim's active ingredient Chromium Picolinate is so unique, it's patented by the U.S.D.A.

No special diets, no tiring exercise, and no harmful chemicals. ChromaTrim is simply the secret to successful fat loss. Guaranteed. The fact is, thousands of formerly over-weight men and women have successfully changed their lives.

And if you are involved in a diet or weight control program, ChromaTrim will immeasurably increase your results. If you don't see results with ChromaTrim, just mail it back within 30 days for a refund.

Order now and get a 2 month supply for only \$39.95 plus \$5.95 s&h.

Credit card orders call toll free 24 hrs.

**1-800-446-4771**

Send check or money order to: U.M. Gum Offer Dept. #1026 302 North La Brea Avenue Suite 304 Los Angeles California 90006 30-day money back guarantee. California res. cents and 8.25% sales tax.

**Everything you need to successfully speed your way to a leaner body is supplied in this all-inclusive ChromaTrim 100™ fat loss system...**

**"I lost 40 pounds with ChromaTrim-100."**  
—Becca Woodruff

**"I lost 35 pounds using ChromaTrim."**  
—Theresa Peters

Complaint

123 F.T.C.

## EXHIBIT B

VOICE OVER: The following is a paid advertisement for ChromaTrim presented by Universal Merchants.

RICK GORDON: I'm probably in better shape now than I was in high school or college.

["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Gordon testimonial.]

ROSEANNE WALKEY: That day that I put some pants on and they fell off, then I thought ooooh, that's a clue.

["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Walkey testimonial.]

KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's. ["Individual results will vary based on personal commitment and other factors," displayed on screen for approximately two seconds during Deems testimonial.]

MELISSA LINDSAY: People ask me all the time what do you use? How did you do it?

DONNA ALISON: Every time I get on the scale I can see it go down another pound or two.

VERONICA HALL: I haven't worn jeans in over 13 years.

ROSEANNE BRADSHAW: The last time my body looked this good was back when I was married.

ADRIENNE ANTOINE: I looked in the mirror, and I'm like, oh my God! Can I get over how slim I am now.

DAVID ALVARADO: If someone would have told me a year ago that hey, you could chew this gum and it's going to help you lose weight, I would have said yeah, right.

VOICE OVER: Coming up next, discover how you can lose fat and get fit the smart way, with ChromaTrim. The breakthrough chewing gum and fat loss system with chromium picolinate.

DR. GARY EVANS: Americans have reduced their fat intake. And what's happened? We continued to find that more and more are overweight. So something else is wrong. The something else is probably a lack of chromium in the diet.

DR. GIL KAATS: And here's a product that can potentially help the burning of excess fat without depleting any muscle. And may even be adding muscle mass.

SUSAN RUTTAN: Hi, I'm Susan Ruttan. Now when you hear the word struggle and weight, do you say that's me? Well, a recent poll showed that almost three out of four people are overweight. Look, diets don't work. We've all lived through them. Exercise fads and machines come and go. And fat grams have become an obsession. Are you depressed yet? Well here's something that's very new and very exciting. The ChromaTrim system. Over the next half hour you're going to learn how to finally get control of your body, and your weight with this. Keep your hands off that clicker. This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate. A very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your body's insulin, helping it to burn fat, preserve and build muscle,

and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen.

RICK GORDON: I had to get all my suits altered now. That's the biggest thing. Going down from 34 down to 31 and a half inch waist.

["Weight loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during Gordon testimonial.]

VERONICA HALL: I lost 80 pounds. And I went down from a size 28, to a size 18. And that's a new person.

DONNA ALLISON: I've lost 36 pounds and I still have 20 or so more to lose. But it's not like I've got to get to the top of the mountain. I just go along and it just keeps happening.

ROSEANNE WALKEY: I have a cat and the litter box comes in eight things, eight pound things. And I carried all three of them in and I thought that's what I used to carry around with me.

MELISSA LINDSAY: Well I was wearing like a 24-W, and now I'm only down to size 14 and my goal was a size 13, 14, because that's what I wore in high school.

WENDY WILBURN: I was a size 9. And I'm a size one to three right now. There's a big difference between a nine and a three.

ADRIENNE ANTOINE: I had plateaued at 195, and I stayed right there and wasn't budging, wasn't going anywhere. So I started using the gum and it was just a gradual weight loss.

DAVID ALVARADO: Some where between 10 to 15 pounds overall weight loss. But in the body changes I've noticed there's definitely been here in what they call the "love handles."

BELINDA WOODRUFF: You're getting people saying, you know you're looking better. What are you doing? And I have to say, well, I'm chewing gum. You know? They go, what are you doing? I'm chewing gum. And it's just that simple.

SUSAN RUTTAN: ChromaTrim really works. Have you noticed I can't stop talking about it? And neither can magazines like Newsweek, Prevention, The Los Angeles Times, Longevity and many more. So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet. You get chromium from foods like brewers yeast, broccoli, lobster, calves liver, oysters and wheat germ. And surprise, we just don't eat enough of these foods. And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should. Are you starting to get the picture? So here's what you do. You follow the ChromaTrim system and every day you chew a few pieces of ChromaTrim. The chromium is in the gum. And with this system you don't have to starve yourself, of sweat buckets to see a real change.

["Individual results vary," displayed on screen for approximately three seconds while Susan Ruttan is speaking.]

JOYCE CURZON: The skin just sort of sagged off of me. And I never had the muscle tone that I do now. Never. Not even in my 20's.

ROSEANNE BRADSHAW: I just saw muscle developing all over my body. And the fat was disappearing. And I couldn't believe it.

KATHLEEN DEEMS: I know I have the muscle, but I think I lost the cellulite, the fat that dimpled. The look that you sometimes get when you get heavier.

RUSS MANNEX: I'm not Adonis, but I'm on my way. I don't have a six pack, but I definitely have more definition than I have before. Definitely.

ADRIENNE ANTOINE: I just really started to see definition in my arms, my body, my waist, my thighs and everything. I just -- I was being sculpted. Gum was sculpting my body.

DONA HEIDER: There's not that sense of I'm on a diet. I have to deprive myself. I have to watch everything I eat. It was working. It all came together. And I was eating better because I felt better.

SUSAN RUTTAN: When you use the ChromaTrim system, you choose to lose the smart way. And fat loss, not scale weight, is the key. With ordinary dieting you may lose pounds, but pounds of what? Low calorie diets often cause your body to lose muscle, but muscle gives your body shape and burns calories. You don't want to lose it. But that's what you lose on the dieting roller coaster. The real goal is to keep and even build muscle, and burn off that fat. And that's where ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does. One of the largest and most dramatic ones was conducted by Dr. Gil Kaats of the Health and Medical Research Foundation, along with the University of Texas. It was double blind, which means that nobody knew who was getting chromium in their diet, and who was getting nothing, a placebo, until the end of the study.

DR. GIL KAATS: What we did in the beginning was we measured how much fat and how much lean they had using underwater technology -- the displacement method, the most accurate measurement we could get. Then we had them use this supplement over a sixty day period of time and they followed whatever program they wanted. Then we measured them again. And when we measured them again, then we compared how much change occurred in the body fat they had, and how much change occurred in the lean that they had. And then we sent the statistics over to the medical school and said now, here's the statistics of what happened. Call this third party and break the code and so forth. And we'll find out whether or not this stuff really works. And what we found was when we compared the two groups, those who didn't get any chromium at all, what happened was that they stayed pretty much the same. But the people who took the chromium had some dramatic losses over a two month period -- we see them as dramatic in body fat they lost. They lost over four pounds of body fat and gained over a pound of lean. Even more importantly to us, is we went out then and measured a variety of different products over the past four years containing chromium picolinate and again and again we find out those products containing the chromium typically produce results very similar to what we found here.

SUSAN RUTTAN: ChromaTrim isn't a magic pill or gum. but it can become your secret weapon to finally help you lose fat and get fit. Remember, diets starve your body and can end of [sic] doing more harm than good. ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy.

["Individual results vary," appears at bottom of screen for approximately 2 seconds while Susan Ruttan is speaking.]

RICK GORDON: In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that.

WENDY WILBURN: I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever.

DONNA ALISON: I just realized one day after I had been on the gum for about three weeks that I wasn't having that bowl of ice cream at 10:00 at night any more.

BELINDA WOODRUFF: You don't notice you have lost those cravings until you're sitting down and you're eating a piece of pie, not the whole pie.

RUSS MANNEX: The gum was a great idea because I tend to be very hard to mouth. When I'm just sitting there in my office I've got a bag of chips or something. It's a easy thing to do. And grabbing for the gum was a lot easier and it did the trick.

ADRIENNE ANTOINE: Well, I would just pop in a piece of gum whenever I felt this urge to have a piece of chocolate. Instead of the chocolate I substituted the gum.

SUSAN RUTTAN: Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day. It would kind of defeat the purpose. And by the way, doctors agree that taking chromium to supplement your diet is extremely safe. So here's how the system works. You chew a few pieces of ChromaTrim a day. Many people chew before or after meals, or when they get cravings for sweets or just when they want fresh breath. It's mint flavored and tastes great. By chewing ChromaTrim you know your body can get the chromium it needs. You'll also get the ChromaTrim no diet nutritional program that tells you how to figure out your optimum calorie intake for maximum fat loss. And the smart exercise program that shows you how to tone those areas of your body, your hips, thighs, stomach, where fat loss is key. Now you can help your body do what it's supposed to do. Take control. Win the battle of the bulge. And lose the fat the smart way. With ChromaTrim.

FEMALE ANNOUNCER WEARING LAB COAT: Hi. You've heard the facts. Nine out of ten of us don't get enough chromium from our daily diet. And chromium, like iron or zinc, is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now. That's where ChromaTrim comes in. It seems almost too simple. You chew a few pieces of ChromaTrim every day. The gum contains a very special type of chromium, called chromium picolinate that gets released when you chew. You follow a simple diet and exercise program you create. And you're done. No starvation, no sweat. It seems almost too good to be true, but it works.

RICK GORDON: I'm probably in better shape now than I was in high school or college.

["Lost 25 pounds with ChromaTrim," displayed on screen during Gordon testimonial.]

KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's.

ROSEANNE WALKEY: Having the weight off I feel younger.

["Weight Loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during testimonials of Kathleen Deems and Roseanne Walkey.]

VERONICAL HALL: You don't have to mix any powders or you know anything like that. And that's what makes it so good. Just pop some gum and go.

["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial.]

DONNA ALISON: Every time I get on the scale I can put down another pound or two.

["Lost 36 pounds with ChromaTrim," displayed on screen during Alison testimonial.]

WENDY WILBURN: From a size nine to a size three in three to four months is pretty drastic.

["Lost 15 pound with ChromaTrim," displayed on screen during Wilburn testimonial.]

ADRIENNE ANTOINE: And this skirt is a size -- ye gads -- it's 26, 28. And now I'm a size 8.

LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas, people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a sixty day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just \$39.95. And when you call right now you'll also get this ChromaTrim travel case so you'll never be without ChromaTrim when you are on the go. And it all comes with ChromaTrim's choose to lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Welcome back. I'm Susan Ruttan. You know we've all struggled with our weight at some time. And for many it's a constant battle. For me, the weight always came back when I went off a diet or got busy with work or taking care of my son. The problem with diets is that you often feel hungry and deprived. ChromaTrim takes a different approach. And that's what is so exciting. It explains why it's been so hard for so many people to get rid of excess weight. And it offers a solution too. When you get enough chromium in your diet, your body's natural mechanism to burn fat and preserve muscle works better. The way it's supposed to. And when it works better, you can win the battle and see a real change. ChromaTrim was recently given to a group of people who were tired of

RUSS MANNEX: I'm not Adonis, but I'm on my way. I don't have a six pack, but I definitely have more definition than I have before. Definitely.

ADRIENNE ANTOINE: I just really started to see definition in my arms, my body, my waist, my thighs and everything. I just -- I was being sculpted. Gum was sculpting my body.

DONA HEIDER: There's not that sense of I'm on a diet. I have to deprive myself. I have to watch everything I eat. It was working. It all came together. And I was eating better because I felt better.

SUSAN RUTTAN: When you use the ChromaTrim system, you choose to lose the smart way. And fat loss, not scale weight, is the key. With ordinary dieting you may lose pounds, but pounds of what? Low calorie diets often cause your body to lose muscle, but muscle gives your body shape and burns calories. You don't want to lose it. But that's what you lose on the dieting roller coaster. The real goal is to keep and even build muscle, and burn off that fat. And that's where ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does. One of the largest and most dramatic ones was conducted by Dr. Gil Kaats of the Health and Medical Research Foundation, along with the University of Texas. It was double blind, which means that nobody knew who was getting chromium in their diet, and who was getting nothing, a placebo, until the end of the study.

DR. GIL KAATS: What we did in the beginning was we measured how much fat and how much lean they had using underwater technology -- the displacement method, the most accurate measurement we could get. Then we had them use this supplement over a sixty day period of time and they followed whatever program they wanted. Then we measured them again. And when we measured them again, then we compared how much change occurred in the body fat they had, and how much change occurred in the lean that they had. And then we sent the statistics over to the medical school and said now, here's the statistics of what happened. Call this third party and break the code and so forth. And we'll find out whether or not this stuff really works. And what we found was when we compared the two groups, those who didn't get any chromium at all, what happened was that they stayed pretty much the same. But the people who took the chromium had some dramatic losses over a two month period -- we see them as dramatic in body fat they lost. They lost over four pounds of body fat and gained over a pound of lean. Even more importantly to us, is we went out then and measured a variety of different products over the past four years containing chromium picolinate and again and again we find out those products containing the chromium typically produce results very similar to what we found here.

SUSAN RUTTAN: ChromaTrim isn't a magic pill or gum. but it can become your secret weapon to finally help you lose fat and get fit. Remember, diets starve your body and can end of [sic] doing more harm than good. ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy.

["Individual results vary," appears at bottom of screen for approximately 2 seconds while Susan Ruttan is speaking.]

RICK GORDON: In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that.

type of chromium that's found in ChromaTrim. Dr. Evans has continued his research at the university level. He's a professor whose discovery and research has given new hope to millions of us.

DR. GARY EVANS: When insulin is not working right two bad things happen. One, more fat goes into the fat cells and far less comes out. Insulin does not work 100 percent efficiently without chromium. And I think that that's why people often times think that this is too good to be true because they don't realize that all of a sudden insulin is working right and the body metabolism is now doing what it's supposed to, so the body is working the way Mother Nature intended. Americans have reduced their fat intake. And what's happened? We continue to find that more and more are overweight. So something else is wrong. The something else is probably the lack of chromium in the diet.

SUSAN RUTTAN: What I love most about ChromaTrim is that it takes something that has been so hard and so negative for so many people, losing fat, and makes it much easier. And when you finally start seeing results and start feeling good about your body, you want to eat right. And you want to exercise and you start feeling better. Your clothes fit. It's really exciting.

["Individual results vary," displayed on screen for approximately two seconds while Susan Ruttan is speaking.]

ROSEANNE WALKEY: I got rid of things that had elastic waste lines. Now I have pants that you can fasten.

["Lost 25 pounds with ChromaTrim," displayed on screen during Walkey testimonial.]

VERONICA HALL: I'm trying on clothes. I like looking at myself now. I used to just walk by a mirror and not even look.

["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial.]

DONNA ALISON: I don't even look at the tent dresses any more. I just walk right by them. Over to the skirts and blouses and slacks and things.

["Lost 36 pounds with ChromaTrim," displayed on screen displayed on screen during Alison testimonial.]

MELISSA LINDSAY: While we say outfits are cute, but you can never get back in to them usually. And I am able to get back in to them.

["Lost 40 pounds with ChromaTrim," displayed on screen during Lindsay testimonial.]

ADRIENNE ANTOINE: Now it's a breeze, it's a joy to get dressed and look in the mirror and say, wow, I look really great.

["Lost 65 pounds with ChromaTrim," displayed on screen during Antoine testimonial.]

DONA HEIDER: I remember putting on a leotard and going wow. This is great. I can wear one of those thong things. And taking it off immediately. Because I didn't want to go out in public with it.

["Lost 18 pounds with ChromaTrim," displayed on screen displayed on screen during Heider testimonial.]

RUSS MANNEX: The jeans had about an extra two inches in the waist. And I knew that jeans don't normally gain size. You can't add to the size of jeans. You can only shrink them by washing them. So I thought well, it's got to be the ChromaTrim.

LAB COAT ANNOUNCER: Now you can make the decision to lose fat the smart way. Once and for all with ChromaTrim. The chewing gum with chromium picolinate. Discovered and patented by the U.S. Department of Agriculture, chromium picolinate is a highly bioavailable source of chromium. In simple terms, that means your body absorbs and uses it better than ordinary chromium found in foods and other supplements. Chromium is an essential mineral that makes your body's insulin work better. And when your insulin works better, you lose fat and preserve muscle. Insulin is also know as the hunger hormons. And when it works better people report that those cravings for sweets disappear. So all you have to do is chew a few pieces of chromatrim everyday. It's so easy and so safe. And when you see what the entire system can do for you, you'll say good-bye to yo-yo dieting once and for all.

["Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds while spokesperson is speaking.]

KATHLEEN DEEMS: ChromaTrim definitely helped me take off the weight and take off the fat.

TESTIMONIALIST #A: I was completely impressed with the fact that it worked, and it worked so quickly.

MELISSA LINDSAY: Dave asks me all the time, what do you use? How did you do it? God you know, you're a new person.

VERONICA HALL: It's a new me now. It's a different me. It's a happier me. It's the same me I could have had years ago.

TESTIMONIALIST #B: You kind of get into a mind set where you don't think anything is going to happen. And then suddenly you take something that works and it's wonderful.

ADRIENNE ANTOINE: You just chew the gum and that's it. It's that simple.

LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But, people who were given a chromium picolinate supplement, lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again, in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a 60 day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just \$39.95. And when you call right now you'll also get this ChromaTrim travel case, so you'll never be without ChromaTrim when you're on the go. And it all comes with ChromaTrim's choose-to-lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Hi. Welcome back. I'm Susan Ruttan. It seems too easy doesn't it? After years of struggling with your weight, here we are telling you that chewing some gum can help you get control? Yeah, I had the same reaction when I heard about ChromaTrim. It's so simple. But, by understanding how our bodies work, it offers a whole new way to approach losing fat. No, you can't go out and eat a whole box of cookies. You can't be a couch potato and expect to see dramatic results. But once you start seeing results with ChromaTrim, you realize that you've been trying to force your body to lose weight. Rather than working with it. And wait until you see what happens when the people in your life start noticing the new you.

MELISSA LINDSAY: Everybody likes to have someone tell them they look good. But when you actually hear it from people who have seen you big and reduced to little, and they've actually seen your progress on a day-to-day basis, it feels really good.

WENDY WILBURN: A girlfriend was looking at my pictures and she didn't know it was me. She was like who is this? That was me. I was that big.

BELINDA WOODRUFF: Not to have to want to get dressed in another room, you know, to be able to have him appreciate how I look. Those are wonderful experiences. And those are things you don't ever, ever, ever forget.

VERONICA HALL: And there are days sometimes when for people -- man, you look so great. What are you doing? How do you feel? You know? And everybody wants to know how much weight I lost. I don't really mind telling them because it's an encouragement for other people.

TESTIMONIALIST #A: I think they think that I spend a lot more time than I really do. And that's the best part. Because it's kind of like my secret.

SUSAN RUTTAN: You've heard the stories over and over on this program. When you follow the ChromaTrim system and your body gets what it needs, the chromium, you start seeing results. And you'll want to eat healthy. You'll start getting those cravings under control. And you'll look forward to exercise, and with that you'll see that you can feel young again.

RICK GORDON: I feel great. I mean every day when I watch myself on the rebroadcast of the newscast and stuff, I personally can see the results.

ROSEANNE WALKEY: Yeah, I used to be very active. And then there was a period of just kind of giving up. And now it's like I'm getting going.

VERONICA HALL: Sometimes when you have these people act like you're not even in the room, you know. But now, not only am I in the room, they are looking at me and wanting to know what's her secret.

KATHLEEN DEEMS: I have a new boy friend. And I attribute it to the weight loss. I like how I look.

DONNA ALISON: I'm back in the mainstream. I'm doing things that I hadn't done for years. I go dancing. I go out. I go to the movies. I go to plays. I literally stayed in my house when I was carrying all that weight.

WENDY WILBURN: Back when I was a little heavy it was harder for me. It was harder for me to look in the mirror and like myself. To the point where I wanted to get out of bed and motivate myself. Now it's easier. I can motivate myself and get my job done and motivate others.

ADRIENNE ANTONIE: It's really just made me come out of this shell. I was hiding inside this big person.

SUSAN RUTTAN: I want you to know how proud I am to have the opportunity to bring ChromaTrim to you. I know you're sitting out there wondering if it can really work for you. I had the same feeling. But all the people you've seen on the show today are real. The ChromaTrim system worked, really worked for them. And with ChromaTrim's money back guarantee you've got nothing to lose. Remember, order ChromaTrim right now. Try it out for a full 30 days. And if you don't start feeling better and start losing the fat and keeping and even building muscle, you'll get your money back. No questions asked. And please take before pictures of yourself so you can show the world your results too. Here's to losing fat the smart way with ChromaTrim.

BELINDA WOODRUFF: I see again the person full of hope that I was when I was in my 20's. I see that same person. I don't see a person now who is 40 some years old. I mean I just don't see that. And losing the weight has done that for me. The ChromaTrim has helped me get that back.

RUSS MANNEX: Now when I come in in the morning and take a shower, I look in the mirror. Whereas before it might have been a little scary. Now I can look in the mirror and see how I'm doing and say hey, this is working. We're on our way down now.

LAB COAT ANNOUNCER: ChromaTrim. It really is exciting isn't it? You've heard all of the stories and heard what the scientists have discovered too. And now finally you can get control of your body and lose fat the smart way. Doctors agree that taking a chromium picolinate supplement is extremely safe. And with our money back guarantee all you have to lose is unwanted and unhealthy fat. Our ChromaTrim operators are standing by right now to take your order. Just have your credit card ready, and call the toll free number that appears on your screen. If the lines are busy, please try back in a few minutes. Here's to looking and feeling great with ChromaTrim. Bye-bye.

VOICE OVER: This has been a paid advertisement for ChromaTrim. Presented by Universal Merchants.

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DISCLOSURES:

- 1) Testimonial participants have been remunerated for their appearances.
- 2) David Alvarado and Belinda Woodruff are employees of a company affiliated with the producer of this advertisement.

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## DECISION AND ORDER

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

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

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

1. Respondent Universal Merchants, Inc. is a corporation organized, existing and doing business under by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4727 Wilshire Blvd., Suite 510, in the City of Los Angeles, State of California.

Respondent Steven Oscherowitz is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

## ORDER

## DEFINITIONS

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

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

2. Unless otherwise specified, "*respondents*" shall mean Universal Merchants, Inc., a corporation, its successors and assigns and its officers; Steven Oscherowitz, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

3. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or ChromaTrim-100 ("ChromaTrim") or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. ChromaTrim significantly reduces body fat;
- B. ChromaTrim causes significant weight loss;
- C. ChromaTrim significantly reduces body fat or causes weight loss without dieting or exercise;
- D. ChromaTrim increases lean body mass or builds muscle;
- E. ChromaTrim controls appetite or craving for sugar; or
- F. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings,

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

## II.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, efficacy, or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

## III.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

## IV.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that any endorsement of the product represents the typical or ordinary experience of members of the public who use the product or program, unless:

A. At the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation, or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

#### V.

Nothing in this order shall prohibit respondents 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.

#### VI.

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

#### VII.

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

A. All advertisements and promotional materials containing the representation;

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

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

### VIII.

*It is further ordered*, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

### IX.

*It is further ordered*, That respondent Universal Merchants, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified

mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

*It is further ordered*, That respondent Steven Oscherowitz, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

*It is further ordered*, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on January 23, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

## IN THE MATTER OF

## TIME WARNER INC., ET AL.

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

*Docket C-3709. Complaint, Feb. 3, 1997--Decision, Feb. 3, 1997*

This consent order requires the restructuring of the acquisition by Time Warner of Turner Broadcasting Systems, Inc. by, among other things, requiring Tele-Communications, Inc. ("TCI") to divest its interest in Time Warner to a separate company, requiring TCI, Turner and Time Warner to cancel long-term carriage agreements, barring Time Warner's programming interests from discriminating in carriage decisions against rival programmers, and requiring Time Warner's cable interests to carry a rival to CNN.

*Appearances*

For the Commission: *William Baer, George Cary, James Fishkin, Thomas Dahdouh and Phillip Broyles.*

For the respondents: *Christopher Bogart, Cravath, Swaine & Moore, New York, N.Y. Kathryn Fenton, Jones, Day, Reavis & Pogue, New York, N.Y. and Neal Stoll, Skaddens, Arps, Slate, Meagher & Flom, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondents Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation, all subject to the jurisdiction of the Commission, have entered into various agreements in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that if the terms of such agreements were to be consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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. For the purposes of this complaint, the following definitions shall apply:

a. *"Cable Television Programming Service"* means satellite-delivered video programming that is offered, alone or with other services, to Multichannel Video Programming Distributors ("MVPDs") in the United States.

b. *"Fully Diluted Equity of Time Warner"* means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

c. *"Multichannel Video Programming Distributor" or "MVPD"* means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as buying groups or purchasing agents of all such persons.

d. *"Turner Cable Television Programming Service"* means each Cable Television Programming Service, whether or not satellite-delivered, that is currently owned, controlled by, or affiliated with Turner.

## II. RESPONDENT TIME WARNER INC.

2. Respondent Time Warner Inc. ("Time Warner") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters office and principal place of business located at 75 Rockefeller Plaza, New York, New York. Time Warner had sales of approximately \$8 billion in 1995.

3. Respondent Time Warner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Time Warner's primary Cable Television Programming Services include Home Box Office ("HBO") and Cinemax, and their multiplexed versions. Other Cable Television Programming Services that are controlled by or affiliated with Time Warner include E! Entertainment Television, Comedy Central, and Court TV. Time Warner also owns approximately 20 percent of the outstanding stock of Turner. Time Warner is the nation's largest producer of Cable Television Programming Services sold to MVPDs, measured on the basis of subscription revenues. Time Warner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately \$1.5 billion, and its total revenues from Cable Television Programming Services in 1995 were approximately \$1.6 billion.

4. Respondent Time Warner's HBO, the largest Cable Television Programming Service measured on the basis of subscription revenues, is viewed by MVPDs as a "marquee" or "crown jewel" service, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

5. Respondent Time Warner is, and at all times relevant herein has been, an MVPD. Time Warner currently serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States. These 11.5 million households are approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services from MVPDs. Time Warner is the nation's second largest MVPD. Time Warner's total revenues in 1995 from serving as an MVPD were approximately \$3.25 billion.

6. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C.4.

## III. RESPONDENT TURNER BROADCASTING SYSTEM, INC.

7. Respondent Turner Broadcasting System, Inc. ("Turner") is a corporation existing and doing business under and by virtue of the laws of the State of Georgia with its headquarters and principal place of business located at One CNN Center, Atlanta, Georgia. Turner had sales of approximately \$3.4 billion in 1995.

8. Respondent Turner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Turner's Cable Television Programming Services include Cable News Network ("CNN"), Headline News ("HLN"), Turner Network Television ("TNT"), TBS Superstation ("WTBS"), Cartoon Network, Turner Classic Movies ("TCM"), CNN International USA ("CNNI USA"), CNN Financial Network ("CNNfn"), and services emphasizing regional sports programming. Turner is one of the nation's largest producers of Cable Television Programming Services sold to MVPDs as measured by subscription revenue. Turner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately \$700 million, and its total revenues from Cable Television Programming Services in 1995 were approximately \$2 billion. As a programmer that does not own its own distribution systems, Turner had no incentive to, and generally did not, charge significantly higher prices for the same Cable Television Programming Services to new MVPD entrants compared to the prices offered to established MVPDs.

9. Respondent Turner's CNN, TNT, and WTBS are viewed by MVPDs as "marquee" or "crown jewel" services, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

10. Respondent Turner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## IV. RESPONDENT TELE-COMMUNICATIONS, INC.

11. Respondent Tele-Communications, Inc. ("TCI") is a corporation existing and doing business under and by virtue of the

laws of the State of Delaware, with its headquarters and principal place of business located at 5619 DTC Parkway, Englewood, Colorado. TCI had sales of approximately \$6.85 billion in 1995.

12. Respondent TCI is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Some of the larger Cable Television Programming Services that are controlled by or affiliated with TCI include Starz!, Encore, Discovery Channel, The Learning Channel, Court TV, E! Entertainment Television, BET, The Family Channel, Home Shopping Network, and services emphasizing regional sports programming. TCI also owns, directly or indirectly, approximately 24 percent of the outstanding stock of Turner. TCI's subscription revenues from the sale of Cable Television Programming Services controlled by TCI to MVPDs in 1995 were approximately \$300 million. TCI's total revenues, excluding home shopping retail sales, from Cable Television Programming Services that are controlled by or affiliated with TCI in 1995 were approximately \$520 million.

13. Respondent TCI is, and at all times relevant herein has been, an MVPD. TCI currently serves approximately 14 million households in selected areas in the United States. TCI also has either direct or indirect interests in cable television systems that distribute Cable Television Programming Services to an additional approximately 4 million households in the United States. These 18 million households are approximately 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services from MVPDs. TCI is the nation's largest MVPD. TCI's total revenues in 1995 from serving as an MVPD were approximately \$5 billion.

14. Respondent TCI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### V. RESPONDENT LIBERTY MEDIA CORPORATION

15. Respondent Liberty Media Corporation ("LMC") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal

place of business located at 8101 East Prentice Avenue, Englewood, Colorado. LMC is a wholly-owned subsidiary of respondent TCI.

16. Respondent LMC is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States.

17. Respondent LMC is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## VI. THE AGREEMENTS

18. This matter comprises three related principal agreements: (a) the acquisition by Time Warner of Turner; (b) the acquisition by TCI and LMC of an interest in Time Warner; and (c) the long-term mandatory carriage agreements between TCI, Turner, and Time Warner requiring TCI to carry Turner's CNN, Headline News, TNT, and WTBS at a discounted price based on the industry average price.

### *A. The Time Warner-Turner Acquisition*

19. On or about September 22, 1995, respondent Time Warner and respondent Turner entered into an agreement for Time Warner to acquire the approximately 80 percent of the outstanding shares in Turner that it does not already own.

20. The value of the Time Warner-Turner acquisition as of the date the Time Warner-Turner agreement was entered into was approximately \$7.5 billion. As initially structured, the transaction called for each share of Turner Class A Common Stock and Turner Class B Common Stock to be converted into the right to receive .75 of a share of New Time Warner Common Stock. In addition, each share of Turner Class C Convertible Preferred Stock was to be converted into the right to receive 4.8 shares of New Time Warner Common Stock.

### *B. The TCI-Time Warner Acquisition*

21. Respondents TCI and LMC have, directly or indirectly, an approximately 24 percent existing interest in respondent Turner. By

trading their interest in Turner for an interest in Time Warner, TCI and LMC would have acquired approximately a 7.5 percent interest in the Fully Diluted Equity of Time Warner, or approximately 10 percent of the outstanding shares of Time Warner, valued at approximately \$2 billion as of the date the respondents signed the proposed consent agreement.

22. Respondent TCI also would acquire a right of first refusal on the approximately 7.4 percent interest in the Fully Diluted Equity of Time Warner that R. E. Turner, III, chairman of Turner, would receive as result of trading his interest in Turner for an interest in respondent Time Warner. Although Time Warner has a "poison pill" that would prevent TCI from acquiring more than a certain amount of stock without triggering adverse consequences, that poison pill would still allow TCI to acquire approximately 15 percent of the Fully Diluted Equity of Time Warner, and if the poison pill were to be altered or waived, TCI could acquire more than 15 percent of the Fully Diluted Equity of Time Warner.

### *C. The Long-Term Mandatory Carriage Agreements*

23. On or about September 14, 1995, and September 15, 1995, in anticipation of and contingent upon the Time Warner-Turner and TCI-Time Warner acquisitions, TCI, Turner, and Time Warner entered into two long-term mandatory carriage agreements formally referred to as the Programming Services Agreements ("PSAs"). Under the terms of these PSAs, TCI would be required, on virtually all of its cable television systems, to carry CNN, Headline News, TNT, and WTBS for a 20-year period. The price to TCI would be 85 percent of the average price paid by the rest of the industry for these services.

## VII. TRADE AND COMMERCE

24. One relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to MVPDs.

25. Another relevant line of commerce in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to households.

26. Cable Television Programming Services are a relevant line of commerce because over-the-air broadcast television, video cassette

rentals, and other forms of news and entertainment do not have a sufficient price-constraining effect on the sales of Cable Television Programming Services to MVPDs, or the resale of Cable Television Programming Services by MVPDs to households so as to prevent the exercise of market power.

27. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the sale of Cable Television Programming Services to MVPDs is the entire United States.

28. The entire United States is the relevant section of the country in which to analyze the effects of the proposed transactions in the sale of Cable Television Programming Services to MVPDs because most Cable Television Programming Services are distributed throughout the United States.

29. The relevant sections of the country in which to analyze the effects of the sale of Cable Television Programming Services by MVPDs to households are each of the local areas in which either respondent Time Warner or Respondent TCI operate as MVPDs.

#### VIII. MARKET STRUCTURE

30. The sale of Cable Television Programming Services to MVPDs in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

31. The post-acquisition HHI for the sale of Cable Television Programming Services to MVPDs in the United States measured on the basis of subscription revenues would increase by approximately 663 points, from 1,549 to 2,212, and will increase further if Time Warner converts WTBS from a "superstation" to a cable network charging subscriber fees. Post-acquisition Time Warner will be the largest provider of Cable Television Programming Services to MVPDs in the United States and its market share will be in excess of 40 percent.

32. The post-acquisition HHI in the sale of Cable Television Programming Services by MVPDs to households in each of the local areas in which respondent Time Warner and respondent TCI sell Cable Television Programming Services is unchanged from the proposed acquisitions and remains highly-concentrated. Time Warner, as an MVPD, serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States that represent approximately 17 percent of all of the

households in the United States that purchase Cable Television Programming Services. TCI, as an MVPD, serves, either directly or indirectly, approximately 18 million households that represent 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services.

#### IX. ENTRY CONDITIONS

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

34. Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant market impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner and Turner "marquee" or "crown jewel" services throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.

35. Entry into the sale of Cable Television Programming Services to households in each of the local areas in which respondent Time Warner and respondent TCI operate as MVPDs is dependent upon access to a substantial majority of the high quality, "marquee" or "crown jewel" programming that MVPD subscribers deem important to their decision to subscribe, and that such access is threatened by increasing concentration at the programming level, combined with vertical integration of such programming into the MVPD level.

#### X. COMPETITION AFFECTED

36. Respondent Time Warner and respondent Turner are actual competitors with each other and with other sellers in the sale of Cable Television Programming Services to MVPDs, and Time Warner's HBO, and Turner's CNN, TNT, and WTBS, are a large percentage of the limited number of "marquee" or "crown jewel" Cable Television Programming Services which disproportionately attract subscribers to MVPDs.

37. Respondent Time Warner faces actual and potential competition from other MVPDs and potential MVPD entrants in the sale of Cable Television Programming Services to households in each of the local areas in which it serves as an MVPD.

38. The effects of the agreements, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (*e.g.*, by requiring the purchase of unwanted programming), through its increased negotiating leverage with MVPDs, including through conditioning purchase of one or more "marquee" or "crown jewel" channels on purchase of other channels;

b. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

(1) Respondent Time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services; and

(2) Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner's CNN, Headline News, TNT, and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming Services; and

c. Denying rival MVPDs and any potential rival MVPDs of respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming Services.

## XI. VIOLATIONS CHARGED

39. The agreement entered into between Time Warner and Turner for Time Warner to acquire Turner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

40. The agreement entered into between TCI, LMC, and Time Warner for TCI and LMC to acquire an equity interest in Time Warner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

41. The PSAs entered into between TCI, Turner, and Time Warner violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga and Commissioner Starek dissenting.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Turner Broadcasting System, Inc. ("Turner") by Time Warner Inc. ("Time Warner"), and Tele-Communications, Inc.'s ("TCI") and Liberty Media Corporation's ("LMC") proposed acquisitions of interests in Time Warner, and it now appearing that Time Warner, Turner, TCI, and LMC (collectively, "respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York.

2. Respondent Turner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at One CNN Center, Atlanta, Georgia.

3. Respondent TCI is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 5619 DTC Parkway, Englewood, Colorado.

4. Respondent LMC is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 8101 East Prentice Avenue, Englewood, Colorado.

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

#### ORDER

##### I.

As used in this order, the following definitions shall apply:

A) "*Acquisition*" means Time Warner's acquisition of Turner and TCI's and LMC's acquisition of interest in Time Warner.

B) "*Affiliated*" means having an Attributable Interest in a person.

C) "*Agent*" or "*representative*" means a person that is acting in a fiduciary capacity on behalf of a principal with respect to the specific conduct or action under review or consideration.

D) "*Attributable Interest*" means an interest as defined in 47 CFR 76.501 (and accompanying notes), as that rule read on July 1, 1996.

E) "*Basic Service Tier*" means the Tier of video programming as defined in 47 CFR 76.901(a), as that rule read on July 1, 1996.

F) "*Buying Group*" or "*Purchasing Agent*" means any person representing the interests of more than one person distributing multichannel video programming that: (1) agrees to be financially liable for any fees due pursuant to a Programming Service Agreement which it signs as a contracting party as a representative of its members, or each of whose members, as contracting parties, agrees to be liable for its portion of the fees due pursuant to the programming service agreement; (2) agrees to uniform billing and standardized contract provisions for individual members; and (3) agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

G) "*Carriage Terms*" means all terms and conditions for sale, licensing or delivery to an MVPD for a Video Programming Service and includes, but is not limited to, all discounts (such as for volume, channel position and Penetration Rate), local advertising availabilities, marketing, and promotional support, and other terms and conditions.

H) "*CATV*" means a cable system, or multiple cable systems controlled by the same person, located in the United States.

I) "*Closing date*" means the date of the closing of the Acquisition.

J) "*CNN*" means the Video Programming Service Cable News Network.

K) "*Commission*" means the Federal Trade Commission.

L) "*Competing MVPD*" means an Unaffiliated MVPD whose proposed or actual service area overlaps with the actual service area of an Time Warner CATV.

M) "*Control*," "*controlled*" or "*controlled by*" has the meaning set forth in 16 CFR 801.1 as that regulation read on July 1, 1996, except that Time Warner's 50% interest in Comedy Central (as of the closing date) and TCI's 50% interests in Bresnan Communications,

Intermedia Partnerships and Lenfest Communications (all as of the closing date) shall not be deemed sufficient standing alone to confer control over that person.

N) "*Converted WTBS*" means WTBS once converted to a Video Programming Service.

O) "*Fully Diluted Equity of Time Warner*" means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

P) "*HBO*" means the Video Programming Service Home Box Office, including multiplexed versions.

Q) "*Independent Advertising-Supported News and Information Video Programming Service*" means a National Video Programming Service (1) that is not owned, controlled by, or affiliated with Time Warner; (2) that is a 24-hour per day service consisting of current national, international, sports, financial and weather news and/or information, and other similar programming; and (3) that has national significance so that, as of February 1, 1997, it has contractual commitments to supply its service to 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, it has total contractual commitments to supply its service to 15 million subscribers. If no such service has such contractual commitments, then Time Warner may choose from among the two services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

R) "*Independent Third Party*" means (1) a person that does not own, control, and is not affiliated with or has a share of voting power, or an ownership interest in, greater than 1% of any of the following: TCI, LMC, or the Kearns-Tribune Corporation; or (2) a person which none of TCI, LMC, or the TCI control shareholders owns, controls, is affiliated with, or in which any of them has a share of voting power, or an Ownership Interest in, greater than 1%. Provided, however, that an Independent Third Party shall not lose such status if, as a result of a transaction between an Independent Third Party and The Separate Company, such Independent Third Party becomes a successor to The Separate Company and the TCI control shareholders

collectively hold an Ownership Interest of 5% or less and collectively hold a share of voting power of 1% or less in that successor company.

S) "*LMC*" means Liberty Media Corporation, all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Liberty Media Corporation controls, directly or indirectly.

T) "*The Liberty Tracking Stock*" means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock.

U) "*Multichannel Video Programming Distributor*" or "*MVPD*" means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as Buying Groups or Purchasing Agents of all such persons.

V) "*National Video Programming Service*" means a Video Programming Service that is intended for distribution in all or substantially all of the United States.

W) "*Ownership Interest*" means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of a person.

X) "*Penetration Rate*" means the percentage of total subscribers on an MVPD who receives a particular Video Programming Service.

Y) "*Person*" includes any natural person, corporate entity, partnership, association, joint venture, government entity or trust.

Z) "*Programming Service Agreement*" means any agreement between a Video Programming Vendor and an MVPD by which a Video Programming Vendor agrees to permit carriage of a Video Programming Service on that MVPD.

AA) "*The Separate Company*" means a separately incorporated person, either existing or to be created, to take the actions provided by paragraph II and includes without limitation all of The Separate Company's subsidiaries, divisions, and affiliates controlled, directly or indirectly, all of their respective directors, officers, employees,

agents, and representatives, and the respective successors and assigns of any of the foregoing, other than any Independent Third Party.

BB) "*Service Area Overlap*" means the geographic area in which a Competing MVPD's proposed or actual service area overlaps with the actual service area of a Time Warner CATV.

CC) "*Similarly Situated MVPDs*" means MVPDs with the same or similar number of total subscribers as the Competing MVPD has nationally and the same or similar Penetration Rate(s) as the Competing MVPD makes available nationally.

DD) "*TCI*" means Tele-Communications, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Tele-Communications, Inc. controls, directly or indirectly. TCI acknowledges that the obligations of subparagraphs (C)(6), (8)-(9), (D)(1)-(2) of paragraph II and of paragraph III of this order extend to actions by Bob Magness and John C. Malone, taken in an individual capacity as well as in a capacity as an officer or director, and agrees to be liable for such actions.

EE) "*TCI Control Shareholders*" means the following persons, individually as well as collectively: Bob Magness, John C. Malone, and the Kearns-Tribune Corporation, its agents and representatives, and the respective successors and assigns of any of the foregoing.

FF) "*TCI's and LMC's Interest in Time Warner*" means all the Ownership Interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R. E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement.

GG) "*TCI's and LMC's Turner-Related Businesses*" means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs.

HH) "*Tier*" means a grouping of Video Programming Services offered by an MVPD to subscribers for one package price.

II) "*Time Warner*" means Time Warner Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, including, but not limited to, Turner after the closing date, all of their

respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Time Warner Inc. controls, directly or indirectly. Time Warner shall, except for the purposes of definitions OO and PP, include Time Warner Entertainment Company, L.P., so long as it falls within this definition.

JJ) "*Time Warner CATV*" means a CATV which is owned or controlled by Time Warner. "*Non-Time Warner CATV*" means a CATV which is not owned or controlled by Time Warner. Obligations in this order applicable to Time Warner CATVs shall not survive the disposition of Time Warner's control over them.

KK) "*Time Warner National Video Programming Vendor*" means a Video Programming Vendor providing a National Video Programming Service which is owned or controlled by Time Warner. Likewise, "*Non-Time Warner National Video Programming Vendor*" means a Video Programming Vendor providing a National Video Programming Service which is not owned or controlled by Time Warner.

LL) "*TNT*" means the Video Programming Service Turner Network Television.

MM) "*Total subscribers*" means the total number of subscribers to an MVPD other than subscribers only to the Basic Service Tier.

NN) "*Turner*" means Turner Broadcasting System, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors (except Time Warner), assigns (except Time Warner), subsidiaries, and divisions; and (2) partnerships, joint ventures, and affiliates that Turner Broadcasting System, Inc., controls, directly or indirectly.

OO) "*Turner Video Programming Services*" means each Video Programming Service owned or controlled by Turner on the closing date, and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns or controls that is not owned or controlled by TWE, for so long as the Video Programming Service remains owned or controlled by Time Warner.

PP) "*Turner-Affiliated Video Programming Services*" means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with Turner on the closing date,

and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns, controls or is affiliated with that is not owned, controlled by, or affiliated with TWE, for so long as the Video Programming Service remains owned, controlled by, or affiliated with Time Warner.

QQ) "*TWE*" means Time Warner Entertainment Company, L.P., all of its officers, employees, agents, representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, divisions, including, but not limited to, Time Warner Cable, and the respective successors and assigns of any of the foregoing, but excluding Turner; and (2) partnerships, joint ventures, and affiliates that Time Warner Entertainment Company, L.P., controls, directly or indirectly.

RR) "*TWE's Management Committee*" means the Management Committee established in Section 8 of the Admission Agreement dated May 16, 1993, between TWE and U S West, Inc., and any successor thereof, and includes any management committee in any successor agreement that provides for membership on the management committee for non-Time Warner individuals.

SS) "*TWE Video Programming Services*" means each Video Programming Service owned or controlled by TWE on the closing date, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, for so long as the Video Programming Service remains owned or controlled by TWE.

TT) "*TWE-Affiliated Video Programming Services*" means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with TWE, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, or is affiliated with, for so long as the Video Programming Service remains owned, controlled by, or affiliated with TWE.

[sic]

VV) "*Unaffiliated MVPD*" means an MVPD which is not owned, controlled by, or affiliated with Time Warner.

WW) "*United States*" means the fifty states, the District of Columbia, and all territories, dependencies, or possessions of the United States of America.

XX) "*Video Programming Service*" means a satellite-delivered video programming service that is offered, alone or with other services, to MVPDs in the United States. It does not include pay-per-view programming service(s), interactive programming service(s), over-the-air television broadcasting, or satellite broadcast programming as defined in 47 CFR 76.1000(f) as that rule read on July 1, 1996.

YY) "*Video Programming Vendor*" means a person engaged in the production, creation, or wholesale distribution to MVPDs of Video Programming Services for sale in the United States.

ZZ) "*WTBS*" means the television broadcast station popularly known as TBS Superstation, and includes any Video Programming Service that may be a successor to WTBS, including Converted WTBS.

## II.

*It is ordered, That:*

(A) TCI and LMC shall divest TCI's and LMC's Interest in Time Warner and TCI's and LMC's Turner-Related Businesses to The Separate Company by:

(1) Combining TCI's and LMC's Interest in Time Warner Inc. and TCI's and LMC's Turner-Related Businesses in The Separate Company;

(2) Distributing The Separate Company stock to the holders of Liberty Tracking Stock ("Distribution"); and

(3) Using their best efforts to ensure that The Separate Company's stock is registered or listed for trading on the Nasdaq Stock Market or the New York Stock Exchange or the American Stock Exchange.

(B) TCI and LMC shall make all regulatory filings, including, but not limited to, filings with the Federal Communications Commission and the Securities and Exchange Commission that are necessary to accomplish the requirements of paragraph II(A).

(C) TCI, LMC, and The Separate Company shall ensure that:

(1) The Separate Company's by-laws obligate The Separate Company to be bound by this order and contain provisions ensuring compliance with this order;

(2) The Separate Company's board of directors at the time of the Distribution are subject to the prior approval of the Commission;

(3) The Separate Company shall, within six (6) months of the Distribution, call a shareholder's meeting for the purpose of electing directors;

(4) No member of the board of directors of The Separate Company, both at the time of the Distribution and pursuant to any election now or at any time in the future, shall, at the time of his or her election or while serving as a director of The Separate Company, be an officer, director, or employee of TCI or LMC or shall hold, or have under his or her direction or control, greater than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI or greater than one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC;

(5) No officer, director or employee of TCI or LMC shall concurrently serve as an officer or employee of The Separate Company. Provided further, that TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation may provide to The Separate Company services contemplated by the attached Transition Services Agreement;

(6) The TCI Control Shareholders shall promptly exchange the shares of stock received by them in the Distribution for shares of one or more classes or series of convertible preferred stock of The Separate Company that shall be entitled to vote only on the following issues on which a vote of the shareholders of The Separate Company is required: a proposed merger; consolidation or stock exchange involving The Separate Company; the sale, lease, exchange or other disposition of all or substantially all of The Separate Company's assets; the dissolution or winding up of The Separate Company; proposed amendments to the corporate charter or bylaws of The Separate Company; proposed changes in the terms of such classes or series; or any other matters on which their vote is required as a matter of law (except that, for such other matters, The Separate Company and the TCI Control Shareholders shall ensure that the TCI Control Shareholders' votes are apportioned in the exact ratio as the votes of the rest of the shareholders);

(7) No vote on any of the proposals listed in subparagraph (6) shall be successful unless a majority of shareholders other than the TCI Control Shareholders vote in favor of such proposal;

(8) After the Distribution, the TCI Control Shareholders shall not seek to influence, or attempt to control by proxy or otherwise, any other person's vote of The Separate Company stock;

(9) After the Distribution, no officer, director or employee of TCI or LMC, or any of the TCI Control Shareholders shall communicate, directly or indirectly, with any officer, director, or employee of The Separate Company. Provided, however, that the TCI Control Shareholders may communicate with an officer, director or employee of The Separate Company when the subject is one of the issues listed in subparagraph 6 on which TCI Control Shareholders are permitted to vote, except that, when a TCI Control Shareholder seeks to initiate action on a subject listed in subparagraph six on which the TCI Control Shareholders are permitted to vote, the initial proposal for such action shall be made in writing. Provided further, that this provision does not apply to communications by TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation in the context of providing to The Separate Company services contemplated by the attached Transition Services Agreement or to communications relating to the possible purchase of services from TCI's and LMC's Turner-Related Businesses;

(10) The Separate Company shall not acquire or hold greater than 14.99% of the Fully Diluted Equity of Time Warner. Provided, however, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC, then The Separate Company shall not be prohibited by this order from increasing its holding of Time Warner stock beyond that figure; and

(11) The Separate Company shall not acquire or hold, directly or indirectly, any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100)

of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of The Separate Company's stock in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner. Provided, further, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in both TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC, The Separate Company's Time Warner stock may be converted into voting stock of Time Warner.

(D) TCI and LMC shall use their best efforts to obtain a private letter ruling from the Internal Revenue Service to the effect that the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling"). Upon receipt of the IRS Ruling, TCI and LMC shall have thirty (30) days (excluding time needed to comply with the requirements of any federal securities and communications laws and regulations, provided that TCI and LMC shall use their best efforts to comply with all such laws and regulations) to carry out the requirements of paragraph II(A) and (B). Pending the IRS Ruling, or in the event that TCI and LMC are unable to obtain the IRS Ruling,

(1) TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, an Ownership Interest that is more than the lesser of 9.2% of the Fully Diluted Equity of Time Warner or 12.4% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles. Provided, however, that day-to-day market price changes that cause any such holding to

exceed the latter threshold shall not be deemed to cause the parties to be in violation of this subparagraph; and

(2) TCI, LMC and the TCI Control Shareholders shall not acquire or hold any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of TCI's and LMC's Interest in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner.

In the event that TCI and LMC are unable to obtain the IRS Ruling, TCI and LMC shall be relieved of the obligations set forth in subparagraphs (A), (B) and (C).

### III.

*It is further ordered*, That, after the Distribution, TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, any voting power of, or other Ownership Interest in, Time Warner that is more than the lesser of 1% of the Fully Diluted Equity of Time Warner or 1.35% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles (provided, however, that such interest shall not vote except as provided in paragraph II(D)(2)), without the prior approval of the Commission. Provided, further, that day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this paragraph.

### IV.

*It is further ordered*, That:

(A) For six months after the closing date, TCI and Time Warner shall not enter into any new Programming Service Agreement that

requires carriage of any Turner Video Programming Service on any analog Tier of TCI's CATVs.

(B) Any Programming Service Agreement entered into thereafter that requires carriage of any Turner Video Programming Service on TCI's CATVs on an analog Tier shall be limited in effective duration to five (5) years, except that such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

(C) Notwithstanding the foregoing, Time Warner, Turner and TCI may enter into, prior to the closing date, agreements that require carriage on an analog Tier by TCI for no more than five years for each of WTBS (with the five year period to commence at the time of WTBS' conversion to Converted WTBS) and Headline News, and such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

## V.

*It is further ordered*, That Time Warner shall not, expressly or impliedly:

(A) Refuse to make available or condition the availability of HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(B) Condition any Carriage Terms for HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(C) Refuse to make available or condition the availability of each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service; or

(D) Condition any Carriage Terms for each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service.

## VI.

*It is further ordered*, That:

(A) For subscribers that a Competing MVPD services in the Service Area Overlap, Time Warner shall provide, upon request, any

Turner Video Programming Service to that Competing MVPD at Carriage Terms no less favorable, relative to the Carriage Terms then offered by Time Warner for that Service to the three MVPDs with the greatest number of subscribers, than the Carriage Terms offered by Turner to Similarly Situated MVPDs relative to the Carriage Terms offered by Turner to the three MVPDs with the greatest number of subscribers for that Service on July 30, 1996. For Turner Video Programming Services not in existence on July 30, 1996, the pre-closing date comparison will be to relative Carriage Terms offered with respect to any Turner Video Programming Service existing as of July 30, 1996.

(B) Time Warner shall be in violation of this paragraph if the Carriage Terms it offers to the Competing MVPD for those subscribers outside the Service Area Overlap are set at a higher level compared to Similarly Situated MVPDs so as to avoid the restrictions set forth in subparagraph (A).

## VII.

*It is further ordered, That:*

(A) Time Warner shall not require a financial interest in any National Video Programming Service as a condition for carriage on one or more Time Warner CATVs.

(B) Time Warner shall not coerce<sup>6</sup> any National Video Programming Vendor to provide, or retaliate against such a Vendor for failing to provide exclusive rights against any other MVPD as a condition for carriage on one or more Time Warner CATVs.

(C) Time Warner shall not engage in conduct the effect of which is to unreasonably restrain the ability of a Non-Time Warner National Video Programming Vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of Vendors in the selection, terms, or conditions for carriage of video programming provided by such Vendors.

## VIII.

*It is further ordered, That:*

(A) Time Warner shall collect the following information, on a quarterly basis:

(1) For any and all offers made to Time Warner's corporate office by a Non-Time Warner National Video Programming Vendor to enter into or to modify any Programming Service Agreement for carriage on an Time Warner CATV, in that quarter:

(a) The identity of the National Video Programming Vendor;

(b) A description of the type of programming;

(c) Any and all Carriage Terms as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;

(d) Any and all commitment(s) to a roll-out schedule, if applicable, as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;

(e) A copy of any and all Programming Service Agreement(s) as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side; and

(2) On an annual basis for each National Video Programming Service on Time Warner CATVs, the actual carriage rates on Time Warner CATVs and

(a) The average carriage rates on all Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived; and

(b) The carriage rates on each of the fifty (50) largest (in total number of subscribers) Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived.

(B) The information collected pursuant to subparagraph (A) shall be provided to each member of TWE's Management Committee on the last day of March, June, September and December of each year. Provided, however, that, in the event TWE's Management Committee ceases to exist, the disclosures required in this paragraph shall be made to any and all partners in TWE; or, if there are no partners in TWE, then the disclosures required in this paragraph shall be made to the Audit Committee of Time Warner.

(C) The General Counsel within TWE who is responsible for CATV shall annually certify to the Commission that it believes that Time Warner is in compliance with paragraph VII of this order.

(D) Time Warner shall retain all of the information collected as required by subparagraph (A), including information on when and to whom such information was communicated as required herein in subparagraph (B), for a period of five (5) years.

## IX.

*It is further ordered, That:*

(A) By February 1, 1997, Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable.

(B) If all the requirements of either subparagraph (A) or (C) are met, Time Warner shall carry an Independent Advertising-Supported News and Information Video Programming Service on Time Warner CATVs at Penetration Rates no less than the following:

(1) If the Service is carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(b) By July 30, 1999, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(2) If the Service is not carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 10% of the Total Subscribers of all Time Warner CATVs at that time;

(b) By July 30, 1999, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(c) By July 30, 2001, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(C) If, for any reason, the Independent Advertising-Supported News and Information National Video Programming Service chosen by Time Warner ceases operating or is in material breach of its Programming Service Agreement with Time Warner at any time before July 30, 2001, Time Warner shall, within six months of the date that such Service ceased operation or the date of termination of the Agreement because of the material breach, enter into a replacement Programming Service Agreement with a replacement Independent Advertising-Supported News and Information National Video Programming Service so that replacement Service is available pursuant to subparagraph (B) within three months of the execution of the replacement Programming Service Agreement, unless the Commission determines, upon a showing by Time Warner, that none of the Carriage Terms offered are commercially reasonable. Such replacement Service shall have, six months after the date the first Service ceased operation or the date of termination of the first Agreement because of the material breach, contractual commitments to supply its Service to at least 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, total contractual commitments to supply its Service to 15 million subscribers; if no such Service has such contractual commitments, then Time Warner may choose from among the two Services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

X.

*It is further ordered, That:*

(A) Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs IV(A) and IX(A) of this order and, with respect to paragraph II, until the Distribution, respondents shall submit jointly or individually to the Commission a verified written report or reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, IV(A) and IX(A) of this order.

(B) One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file jointly or individually a verified written report

or reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with each paragraph of this order.

### XI.

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

### XII.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, respondents shall permit any duly authorized representative of the Commission:

1. Access, during regular business hours upon reasonable notice and in the presence of counsel for respondents, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and
2. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents, who may have counsel present, regarding such matters.

### XIII.

*It is further ordered,* That this order shall terminate on February 3, 2007.

Commissioner Azcuenaga and Commissioner Starek dissenting.

## APPENDIX I

## INTERIM AGREEMENT

This Interim Agreement is by and between Time Warner Inc. ("Time Warner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business at New York, New York; Turner Broadcasting System, Inc. ("Turner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Georgia with its office and principal place of business at Atlanta, Georgia; Tele-Communications, Inc. ("TCI"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; Liberty Media Corp. ("LMC"), a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado, and the Federal Trade Commission ("Commission"), and independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.*

*Whereas*, Time Warner entered into an agreement with Turner for Time Warner to acquire the outstanding voting securities of Turner, and TCI and LMC proposed to acquire stock in Time Warner thereafter "the Acquisition");

*Whereas*, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

*Whereas*, TCI and LMC are willing to enter into an Agreement Containing Consent Order (hereafter "Consent Order") requiring them, *inter alia*, to divest TCI's and LMC's interest in Time Warner and TCI's and LMC's Turner-Related Businesses," by contributing those interests to a separate corporation, The Separate Company, the stock of which will be distributed to the holders of Liberty Tracking Stock ("the Distribution"), but, in order to fulfill paragraph II(D) of that Consent Order, TCI and LMC must apply now to receive an Internal Revenue Service ruling as to whether the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling");

*Whereas*, "TCI's and LMC's Interest in Time Warner" means all of the economic interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R.E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement;

*Whereas*, "TCI's and LMC's Turner-Related Businesses" means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs;

*Whereas*, "Liberty Tracking Stock" means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock;

*Whereas*, Time Warner, Turner, TCI, and LMC are willing to enter into a Consent Order requiring them, *inter alia*, to forego entering into certain new programming service agreements for a period of six months from the date that the parties close this Acquisition ("Closing Date"), but, in order to comply more fully with that requirement, they must cancel now the two agreements that were negotiated as part of this Acquisition: namely, (1) the September 15, 1995, program service agreement between TCI's subsidiary, Satellite Services, Inc. ("SSI"), and Turner and (2) the September 14, 1995, cable carriage agreement between SSI and Time Warner for WTBS (hereafter "Two Programming Service Agreements");

*Whereas*, if the Commission accepts the attached Consent Order, the Commission is required to place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

*Whereas*, the Commission is concerned that if the parties do not, before this order is made final, apply to the IRS for the IRS Ruling and cancel the Two Programming Service Agreements, compliance with the operative provisions of the Consent Order might not be possible or might produce a less than effective remedy;

*Whereas*, Time Warner, Turner, TCI, and LMC's entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

*Whereas*, Time Warner, Turner, TCI, and LMC understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws

of the Federal Trade Commission Act by reason of anything contained in this Agreement;

*Now, therefore,* upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Time Warner, Turner, TCI, and LMC with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which this Agreement is annexed and made a part thereof, the parties agree as follows:

1. Withing thirty (30) days of the date the Commission accepts the attached Consent Order for public comment, TCI and LMC shall apply to the IRS for the IRS Ruling.

2. On or before the Closing Date, Time Warner, Turner and TCI shall cancel the Two Programming Service Agreements.

3. This Agreement shall be binding when approved by the Commission.

## APPENDIX II

NOTE: THIS AGREEMENT WILL BE ENTERED INTO IMMEDIATELY PRIOR TO THE DISTRIBUTION AND SPEAKS AS OF THAT DATE.

### TRANSITION SERVICES AGREEMENT

Transition Services Agreement (this "Agreement"), dated as of \_\_\_\_\_, 1996, between Tele-Communications, Inc., a Delaware corporation ("TCI"), and TCI Turner Preferred, Inc., a Colorado corporation (the "Company").

### RECITALS

A. TCI owns all the issued and outstanding capital stock of the Company (the "Company Stock").

B. TCI intends to distribute (the "Distribution") the Company Stock to the holders of its Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock. As a result of the Distribution, the Company will cease to be a subsidiary of TCI, and TCI and the Company will be separate public companies.

C. This Agreement sets forth the general terms upon which, for a period following the Distribution, TCI will continue to provide to the Company certain services currently being provided to the Company by TCI.

Now, therefore, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, TCI and the Company hereby agree as follows:

### Section 1. Services.

(a) *Agreement to Provide Services.* At the request of the Company, TCI shall provide services to the Company for the administration and operation of the businesses of the Company and its subsidiaries and affiliates and shall devote thereto such time as may be necessary for the proper and efficient administration and operation of such businesses. The services to be provided by TCI to the Company pursuant to this Agreement (collectively, the "Services") shall include such of the following services as the Company may request from time to time:

(i) Tax reporting, financial reporting, payroll, employee benefit administration, workers' compensation administration, general liability and risk management, and advance information technology services;

(ii) Other services typically performed by TCI's accounting, finance, treasury, corporate, legal, tax and insurance department personnel; and

(iii) Use of telecommunications and data facilities and of systems and software developed, acquired or licensed by TCI from time to time for financial forecasting, budgeting and similar purposes, including without limitation any such software for use on personal computers, in any case to the extent available under copyright law or any applicable third-party contract.

TCI shall also, upon the request of the Company, lease office space and other property to the Company pursuant to terms to be agreed upon between TCI and the Company.

(b) *Compensation for Services.* As compensation for Services rendered to the Company pursuant to this Agreement, the Company shall reimburse TCI for: (i) all direct expenses incurred by TCI in

providing such Services, provided that the incurrence of such expenses is consistent with practices generally followed by TCI in managing or operating its own business and the businesses of its subsidiaries and affiliates and (ii) the Company's pro rata share of TCI's indirect expenses attributable to the provision of Services hereunder, based on a determination by TCI management of the usage by the Company of such Services during the relevant period. Such indirect expenses shall include a pro rata share of (A) the salaries and other compensation of TCI's officers and employees who perform Services for the Company, (B) general and administrative overhead expenses, and (C) the costs and expenses of TCI's physical facilities that are utilized by TCI's employees and contractors for the benefit of the Company. TCI shall keep true, complete and accurate books of account containing such particulars as may be necessary for the purpose of calculating the above costs. Reimbursement amounts shall be billed quarterly by TCI and shall be due and payable in full within \_\_ days after receipt of invoice.

#### Section 2. Term.

(a) *Commencement.* This Agreement shall become effective immediately upon the effectiveness of the Distribution.

(b) *Termination.* The obligations of TCI to provide Services to the Company as provided in Section 1 hereof shall remain in effect until terminated:

(i) By the Company at any time on not less than 60 days' prior written notice to TCI;

(ii) By TCI at any time after [five years] from the effective date of the Distribution on not less than 60 days' prior written notice to the Company; or

(iii) By either party, upon written notice to the other party, if such other party shall file a petition in bankruptcy or insolvency, or a petition for reorganization or adjustment of debts or for the appointment of a receiver or trustee of all or a substantial portion of its property, or shall make an assignment for the benefit of creditors, or if a petition in bankruptcy or other petition described in this paragraph shall be filed against such other party and shall not be discharged within 120 days thereafter.

In the event of any termination of this Agreement, each party shall remain liable for all obligations of such party accrued hereunder prior to the date of such termination, including, without limitation, all obligations of the Company to reimburse TCI for services provided hereunder, as provided in Section 1(b) hereof. The provisions of Section 3 of this Agreement shall survive indefinitely, notwithstanding any termination hereof.

### Section 3. Limitation of Liability.

TCI, its affiliates, directors, officers, employees, agents and permitted assigns (each, a "TCI Party" and, together, the "TCI Parties") shall not be liable (whether such liability is direct or indirect, in contract or tort or otherwise) to the Company or any of the Company's affiliates, directors, officers, employees, agents, securityholders, auditors or permitted assigns, for any liabilities, claims, damages, losses or expenses (including, without limitation, any special, indirect, incidental or consequential damages) ("Losses") arising out of, related to, or in connection with the Services or this Agreement, except to the extent that such Losses result from the gross negligence or willful misconduct of TCI, in which case TCI's liability shall be limited to a refund of that portion of the amounts actually paid by the Company hereunder which, as determined by TCI, represented the cost to the Company of the Services in question. The Company hereby agrees to indemnify and hold harmless the TCI Parties from and against any and all Losses (including, without limitation, reasonable fees and expenses of counsel) incurred by any TCI Party arising out of or in connection with or by reason of this Agreement or any Services provided by TCI hereunder, other than any liability of TCI to refund amounts paid by the Company as contemplated by the preceding sentence.

### Section 4. Miscellaneous.

(a) *Entire Agreement.* This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all previous agreements, negotiations, understandings and commitments with respect to such subject matter, whether or not in writing.

(b) *Governing Law.* This Agreement and the legal relations between the parties hereto shall be governed by and construed in

accordance with the laws of the State of Colorado, without regard to conflicts of laws rules thereof.

(c) *Notices.* All notices, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given: (i) on the day of transmission if sent via facsimile transmission to the facsimile number given below, and telephonic confirmation of receipt is obtained promptly after completion of transmission; (iii) on the day of delivery by Federal Express or similar overnight courier; or (iv) on the third day after mailing, if mailed to the party to whom notice is to be given, by United States first class mail, registered or certified, postage prepaid and properly addressed, to the party as follows:

If to TCI: Tele-Communications, Inc.  
5619 DTC Parkway  
Englewood, Colorado 80111  
Attention: General Counsel  
Facsimile: (303) 488-3245

If to the Company: TCI Turner Preferred, Inc.  
[Address]

Attention: President  
Facsimile:

with a separate copy to the Company's Corporate Counsel at the same address.

Any party may change its address for the purpose of this Section by giving the other party written notice of its new address in the manner set forth above.

(d) *Amendment.* This Agreement may not be amended or modified in any respect except by a written agreement signed by the parties hereto.

(e) *Successors and Assigns: No Third-Party Beneficiaries.* This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests and obligations hereunder shall be assigned by either party hereto, by operation of law or otherwise, without the prior written consent of the other party. Nothing contained in this

Agreement, except as expressly set forth, is intended to confer upon any other persons other than the parties hereto and their respective successors and permitted assigns, and rights or remedies.

(f) *Counterparts*. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(g) *No Waiver*. No waiver by either party hereto of any term or condition of this Agreement, in any one or more instances, shall operate as a waiver of such term or condition at any other time.

(h) *Relations Between the Parties*. The parties are independent contractors. Nothing in this Agreement shall constitute either party, or any of such party's officers, directors, agents or employees, a partner, agent or employee of, or joint venturer with, the other party.

(i) *Severability*. If any provision of this Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not render the entire Agreement invalid. Rather, the Agreement shall be construed as if not containing the particular invalid or unenforceable provisions, and the rights and obligations of each party shall be construed and enforced accordingly.

STATEMENT OF CHAIRMAN PITOFSKY, AND  
COMMISSIONERS STEIGER AND VARNEY

The merger and related transactions among Time Warner, Turner, and TCI involve three of the largest firms in cable programming and delivery -- firms that are actual or potential competitors in many aspects of their businesses. The transaction merges the first and third largest cable programmers (Time Warner and Turner). At the same time, absent the relief in our consent order, the transaction would have further aligned the interests of TCI and Time Warner, the two largest cable distributors. Finally, the transaction greatly increases the level of vertical integration in an industry in which the threat of foreclosure is both real and substantial.<sup>1</sup> While the transaction posed

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<sup>1</sup> Both Congress and the regulators have identified problems with the effects of vertical foreclosure in this industry. See generally James W. Olson and Lawrence J. Spiwak, Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?, 13 *Cardozo Arts & Entertainment Law Journal* 283 (1995). Enforcement action in this case is wholly consistent with the goals of Congress in enacting the 1992 Cable Act: providing greater access to programming and promoting competition in local cable markets.

complicated and close questions of antitrust enforcement, the conclusion of the dissenters that there was no competitive problem at all is difficult to understand, especially since none of the public comments received suggested that relief was unnecessary.

Many of the concerns raised in the dissenting Commissioners statements are carefully addressed in the analysis to aid public comment, which we append to this statement. We write to clarify our views on certain specific issues raised in the dissents.

*Product market.* The dissenting Commissioners suggest that the product market alleged, "the sale of Cable Television Programming Services to MVPDs (Multichannel Video Programming Distributors)," cannot be sustained. The facts suggest otherwise. Substantial evidence, confirmed in the parties' documents and testimony, as well as documents and sworn statements from third-parties, indicated the existence of an all cable television market. Indeed, there was significant evidence of competitive interaction in terms of carriage, promotions and marketing support, subscriber fees, and channel position between different segments of cable programming, including basic and premium channel programming. Cable operators look to all types of cable programming to determine the proper mix of diverse content and format to attract a wide range of subscribers.

Although a market that includes both CNN and HBO may appear somewhat unusual on its face, the Commission was presented here with substantial evidence that MVPDs require access to certain "marquee" channels, such as HBO and CNN, to retain existing subscribers or expand their subscriber base. Moreover, we can not concur that evidence in the record supports Commissioner Azcuenaga's proposed market definition, which would segregate offerings into basic and premium cable programming markets.

*Entry.* Although we agree that entry is an important factor, we cannot concur with Commissioner Azcuenaga's overly generous view of entry conditions in this market. While new program channels have entered in the past few years, these channels have not become competitively significant. None of the channels that has entered since 1991 has acquired more than a 1% market share.

Moreover, the anticompetitive effects of this acquisition would have resulted from one firm's control of several marquee channels. In that aspect of the market, entry has proven slow and costly. The potential for new entry in basic services cannot guarantee against

competitive harm. To state the matter simply, the launch of a new "Billiards Channel," "Ballet Channel," or the like will barely make a ripple on the shores of the marquee channels through which Time Warner can exercise market power.

*Technology.* Commissioner Azcuenaga also seems to suggest that the Commission has failed to recognize the impact of significant technological changes in the market, such as the emergence of new delivery systems such as direct broadcast satellite networks ("DBS").<sup>2</sup> We agree that these alternative technologies may someday become a significant competitive force in the market. Indeed, that prospect is one of the reasons the Commission has acted to prevent Time Warner from being able to disadvantage these competitors by discriminating in access to programming.

But to suggest that these technologies one day may become more widespread does not mean they currently are, or in the near future will be, important enough to defeat anticompetitive conduct. Alternative technologies such as DBS have only a small foothold in the market, perhaps a 3% share of total subscribers. Moreover, DBS is more costly and lacks the carriage of local stations. It seems rather unlikely that the emerging DBS technology is sufficient to prevent the competitive harm that would have arisen from this transaction.

*Horizontal competitive effects.* Although Commissioner Starek presents a lengthy argument on why we need not worry about the horizontal effects of the acquisition, the record developed in this investigation strongly suggests anticompetitive effects would have resulted without remedial action. This merger would combine the first and third largest providers of cable programming, resulting in a merged firm controlling over 40% of the market, and several of the key marquee channels including HBO and CNN. The horizontal concerns are strengthened by the fact that Time Warner and TCI are the two largest MVPDs in the country. The Commission staff received an unprecedented level of concern from participants in all segments of the market about the potential anticompetitive effects of this merger.

One of the most frequent concerns expressed was that the merger heightens the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrant of sufficient distribution outlets to achieve the necessary economies of scale. The order addresses the impact on

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<sup>2</sup> DBS providers are included as participants in the relevant product market.

entry barriers as follows. First, the prohibition on bundling would deter Time Warner from using the practice to compel MVPDs to accept unwanted channels which would further limit available channel capacity to non-Time Warner programmers. Second, the conduct and reporting requirements in paragraphs VII and VIII provide a mechanism for the Commission to become aware of situations where Time Warner discriminates in handling carriage requests from programming rivals.

Third, the order reduces entry barriers by eliminating the programming service agreements (PSAs), which would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85% of the industry average price or the lowest price given to any other MVPD. The PSAs would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Channel space on cable systems is scarce. If the PSAs effectively locked up significant channel space on TCI, the ability of rival programmers to enter would have been harmed. This effect would have been exacerbated by the unusually long duration of the agreement and the fact that TCI would have received a 15% discount over the most favorable price given to any other MVPD. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner will restore TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

We believe that his remedy carefully restricts potential anticompetitive practices arising from this acquisition that would have heightened entry barriers.

*Vertical foreclosure.* The complaint alleges that post-acquisition Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing MVPDs, by engaging in price discrimination. Commissioner Azcuenaga contends that Time Warner and TCI lack the incentives and the ability to engage in either type of foreclosure. We disagree.

First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone controls more than 40% of the programming assets (as measured by subscriber revenue obtained by MVPDs). Time Warner and TCI, the nation's two largest MVPDs,

control access to about 44% of all cable subscribers. The case law have found that these levels of concentration can be problematic.<sup>3</sup>

Second, the Commission received evidence that these foreclosure threats were real and substantial. There was clearly reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.

Commissioner Starek suggests that we need not worry about foreclosure because there are sufficient numbers of unaffiliated programmers and MVPDs so that each can survive by entering into contracts. With all due respect, this view ignores the competitive realities of the marketplace. TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 27% and 17% respectively.<sup>4</sup> Carriage on one or both systems is critical for new programming to achieve competitive viability. Attempting to replicate the coverage of these systems by lacing together agreements with the larger number of much smaller MVPDs is costly and time consuming.<sup>5</sup> The Commission was presented with evidence that denial of coverage on the Time Warner and TCI systems could further delay entry of potential marquee channels for several years.

*TCI ownership of Time Warner.* Commissioner Azcuenaga suggests that TCI's acquisition of a 15% interest in Time Warner, with the prospect of acquiring up to 25% without further antitrust review, does not pose any competitive problem. We disagree. Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and high entry barriers, poses significant competitive concerns.<sup>6</sup> In

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<sup>3</sup> See *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978); *Mississippi River Corp. v. FTC*, 454 F.2d 1083 (8th Cir. 1972); *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970); See generally Herbert Hovenkamp, Federal Antitrust Policy Section 9.4 (1994).

<sup>4</sup> They are substantially larger than the next largest MVPD, Continental, which has an approximately 6% market share.

<sup>5</sup> See U.S. Department of Justice Horizontal Merger Guidelines, ¶13,103 Trade Cas. (CCH) at 20,565-66, Sections 4.2, 4.21 (June 14, 1984), incorporated in U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, ¶13,104 Trade Cas. (CCH) (April 7, 1992).

<sup>6</sup> See *United States v. Dupont de Nemours & Co.*, 353 U.S. 586 (1957); *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.* 597 F.2d 814, 818-19 (2d Cir. 1979); *Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973).

particular, the interest would give TCI greater incentives to disadvantage programmer competitors of Time Warner, similarly it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.

*Efficiencies.* Finally, Commissioner Azcuenaga seems to suggest that the acquisition may result in certain efficiencies in terms of "more and better programming options" and "reduced transaction costs." There was little or no evidence presented to the Commission to suggest that these efficiencies were likely to occur.

*Public comments.* Although our colleagues did not address the issue of scope of relief, some public comments raised questions about the requirement that Time Warner carry an alternative news network to CNN. In particular, Fox News and Bloomberg stated that the effectiveness of the carriage requirement is undermined by the Commission's decision to allow Time Warner to select which competitor to carry. Both firms contend that Time Warner's incentive is to select the weakest competitor to CNN.

We do not agree that the carriage requirement is made ineffective by Time Warner's right to choose. The order ensures that Time Warner must select a programming service that has the potential to be competitive with CNN.

In addition, the Commission sought to avoid any requirement that may interfere with other Time Warner programming decisions. Thus, the order does not require, but it does permit, Time Warner to carry more than one additional news channel. Moreover, the order requires that Time Warner place the additional news channel on cable systems reaching at least half of its subscribers, but it is up to Time Warner to decide whether to go beyond that. Requiring a greater level of market penetration might have compelled Time Warner to drop current programming (or abandon planned programming) to make room for the CNN rival.

Finally, the Commission abstained from the role of selecting the rival to CNN. The Commission restricts its role in divestiture applications to simply determining whether the seller's selection meets the requirements of the order. In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated -- the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process

could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors.

#### DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today issues a consent order to settle allegations that the acquisition by Time Warner Inc. ("Time Warner") of Turner Broadcasting System, Inc. ("Turner"), and related agreements with Tele-Communications, Inc. ("TCI"),<sup>1</sup> would be unlawful. Alleging that this transaction violates the law is possible only by abandoning the rigor of the Commission's usual analysis under Section 7 of the Clayton Act. To reach this result, the majority adopts a highly questionable market definition, ignores any consideration of efficiencies and blindly assumes difficulty of entry in the antitrust sense in the face of overwhelming evidence to the contrary. The decision of the majority also departs from more general principles of antitrust law by favoring competitors over competition and contrived theory over facts.

The usual analysis of competitive effects under the law, unlike the apparent analysis of the majority, would take full account of the swirling forces of innovation and technological advances in this dynamic industry. Unfortunately, the complaint and the underlying theories on which the order is based do not begin to satisfy the rigorous standard for merger analysis that this agency has applied for years. Instead, the majority employs a looser standard for liability and a regulatory order that threatens the likely efficiencies from the transaction. Having found no reason to relax our standards of analysis for this case, I cannot agree that the order is warranted.

#### PRODUCT MARKET

We focus in merger analysis on the likelihood that the transaction will create or enhance the ability to exercise market power, *i.e.*, raise prices. The first step usually is to examine whether the merging firms sell products that are substitutes for one another to see if there is a horizontal competitive overlap. This is important in a case based on a theory of unilateral anticompetitive effects, as this one is, because

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<sup>1</sup> Liberty Media Corporation, a wholly-owned subsidiary of TCI, also is named in the complaint and order. For simplicity, references in this statement to TCI include Liberty.

the theory requires a showing that the products of the merging firms are the first and second choices for consumers.<sup>2</sup>

In this case, it could be argued from the perspective of cable system operators and other multichannel video program distributors ("MVPDs"), who are purchasers of programming services, that all video programming networks<sup>3</sup> are substitutes. This is the horizontal competitive overlap that is alleged in the complaint.<sup>4</sup>

One problem with the alleged all-programming market is that basic cable programming services (such as Turner's CNN) and premium cable programming services (such as Time Warner's HBO) are not substitutes along the usual dimensions of competition. Most significantly, they do not compete on price. CNN is sold to MVPDs for a fee per subscriber that is on average less than one-tenth of the average price for HBO, and it is resold as part of a package of basic services for an inclusive fee. HBO is sold at wholesale for more than ten times as much; it is resold to consumers on an a la carte basis or in a package with other premium services, and a subscription to basic service usually is a prerequisite. It is highly unlikely that a cable operator, to avoid a price increase, would drop a basic channel and replace it with a significantly more expensive premium channel. Furthermore, cable system operators tell us that when the price for basic cable services increases, consumers drop pay services, suggesting that at least at the retail level these goods are complementary rather than substitutes for one another.

Another possible argument is that CNN and HBO should be in the same product market because from the cable operator's perspective, each is "necessary to attract and retain a significant percentage of their subscribers."<sup>5</sup> If CNN and HBO were substitutes in this sense,

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<sup>2</sup> See 1992 Horizontal Merger Guidelines ¶ 2.2. The theory is that when the post-merger firm raises the price on product A or on products A and B, sales lost due to the price increase on the first-choice product (A) will be diverted to the second-choice product (B). The price increase is unlikely to be profitable unless a significant share of consumers regard the products of the merged firm as their first and second choices.

<sup>3</sup> The terms "programming services," "networks," and "channels" are used interchangeably in this statement. For example, The History Channel is a video programming service or network that is sold to MVPDs for distribution to consumers.

<sup>4</sup> Complaint ¶ 24. Note that this market excludes broadcast programming, which "is a primary source of programming for most viewers regardless of distribution media." Federal Communications Commission, Third Annual Report on the Status of Competition in the Market for the Delivery of Video Programming at 7 (Dec. 26, 1996) (hereafter "1996 FCC Report").

<sup>5</sup> Complaint ¶¶ 4 & 9. To the extent that each network (CNN and HBO) is viewed as "necessary" to attract subscribers, as alleged in the complaint, each would appear to have market power quite independent of the proposed transaction and of each other.

we would expect to see cable system operators playing them against one another to win price concessions in negotiations with programming sellers. But there is no evidence that they have been used in this way, and cable system operators have told us that basic and premium channels do not compete on price.<sup>6</sup> There are closer substitutes, in terms of price and content, for CNN (in basic cable services) and for HBO (in premium cable services).

I am not persuaded that the product market alleged in the complaint could be sustained. CNN and HBO are not substitutes, and they are not the first and second choices for consumers (or for cable system operators or other MVPDs). There are no other horizontal overlaps warranting enforcement action in any other cable programming market.<sup>7</sup> Under these circumstances, it would seem appropriate to withdraw the complaint.

#### ENTRY

The complaint alleges that entry is difficult and unlikely.<sup>8</sup> This is an astonishing allegation, given the amount of entry in the cable programming market. The number of cable programming services or networks increased from 106 to 129 in 1995, according to the FCC.<sup>9</sup> One source reported thirty national 24-hour networks expected to launch in 1996,<sup>10</sup> and another source identified seventy-three networks "on the launch pad."<sup>11</sup> That adds up to between fifty-three and ninety-six new and announced video programming networks in two years. According to an industry trade association, thirty-three

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<sup>6</sup> If the market includes premium cable programming services, it probably ought also to take account of video cassette rentals, which constrain the pricing of premium channels. See Federal Communications Commission, Second Annual Report on the Status of Competition in the Market for Delivery of Video Programming ¶ 121 (Dec. 7, 1995) (hereafter "1995 FCC Report"). If the theory is that HBO and CNN (and other networks) compete for channel space (*i.e.*, for carriage on cable systems), the market probably should include over-the-air broadcast networks, at least to the extent that they compete for cable channel space as the price for retransmission rights. See complaint ¶ 34 (alleging "shortage of available channel capacity").

<sup>7</sup> In the two product markets most likely to be sustained under the law, basic cable services and premium cable services, the transaction falls within safe harbors described in the 1992 Horizontal Merger Guidelines, which strongly suggests that no enforcement action is warranted.

<sup>8</sup> Complaint ¶¶ 33-35.

<sup>9</sup> 1995 FCC Report ¶ 10.

<sup>10</sup> National Cable Television Association, Cable Television Developments 103-17 (Fall 1995) (hereafter "1995 NCTA").

<sup>11</sup> "On the Launch Pad," Cable World, April 29, 1996, at 143; see also Cablevision, Jan. 22, 1996, at 54 (98 services announced plans to launch in 1996).

new basic networks and thirteen new premium networks were launched between 1992 and 1995.<sup>12</sup> Another source listed 141 national 24-hour cable networks launched or announced between January 1993 and March 1996.<sup>13</sup>

This does not mean that entry is easy or inexpensive. Not all the channels that have announced will launch a service, and not all those that launch will succeed.<sup>14</sup> But some of them will. Some recent entrants include CNNfn (December 1995), Nick at Nite's TV Land (April 1996), MSNBC (July 1996), and the History Channel (January 1995).<sup>15</sup> The Fox News Channel, offering twenty-four hour news, began service in October 1996, and Westinghouse and CBS Entertainment have announced that they will launch a new entertainment and information cable channel, Eye on People, in March 1997.<sup>16</sup> The fact of so much ongoing entry indicates that at any given moment, entry from somewhere is imminent, and this, translated for purposes of antitrust analysis, means that entry should be regarded as virtually immediate.

Recent entrants have achieved some measure of success. TV Land reports 15 million subscribers (almost 24% of cable households) less than one year after its launch.<sup>17</sup> The History Channel has obtained carriage to more than 40% of cable households in less than two years. Home & Garden Television, launched in December 1994, reports 18 million subscribers (more than 28% of cable households).<sup>18</sup> The SciFi Channel, launched in September 1992, has 36 million subscribers

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<sup>12</sup> National Cable Television Association, Cable Television Developments 6 (Fall 1996) (hereafter "1996 NCTA").

<sup>13</sup> "A Who's Who of New Nets," Cablevision, April 15, 1996 (Special Supp.), at 27A-44A (as of March 28, 1996, 163 new networks when regional, pay-per-view and interactive services are included).

<sup>14</sup> "The stamina and pocket-depth of backers of new players [networks] still remain key factors for survival. However, distribution [*i.e.*, obtaining carriage on cable systems] is still the name of the game." Cablevision, April 15, 1996 (Special Supp.), at 3A.

<sup>15</sup> The History Channel reportedly had one million subscribers at its launch in January 1995, reached 8 million subscribers by the end of the year and was seen in 18 million homes by May 1996. Carter, "For History on Cable, the Time Has Arrived," N.Y. Times, May 20, 1996, at D1. The History Channel now reports more than 26 million subscribers (which accounts for more than 41% of basic cable television households). See 1996 NCTA at 57.

<sup>16</sup> Carmody, "The TV Channel," The Washington Post, Aug. 21, 1996, at D12.

<sup>17</sup> 1996 NCTA at 70. The percentage figure is derived from the number of subscribers for the network, divided by the number of basic cable households (62.8 million, as estimated by Paul Kagan Associates, Inc.), reported in 1996 NCTA. As a comparison, CNN has 69.9 million subscribers. 1996 NCTA at 39. HBO has 20.8 million subscribers (about one-third of basic cable households). *Id.* at 56.

<sup>18</sup> 1996 NCTA at 58.

(57% of cable households).<sup>19</sup> The TV Food Network, launched in November 1993, reportedly has 21 million subscribers (about one-third of cable households).<sup>20</sup>

New networks need not be successful or even launched before they can exert significant competitive pressure. Announced launches can affect pricing immediately. The launch of MSNBC and the announcement of Fox's cable news channel, for example, enabled cable system operators to mount credible threats to switch to one of the new news networks in negotiations with CNN, the incumbent all-news channel.<sup>21</sup>

Any constraint on cable channel capacity does not appear to be deterring entry of new networks. Indeed, the amount of entry that is occurring apparently reflects confidence that channel capacity will expand, for example, by digital technology. In addition, alternative MVPDs, such as direct broadcast satellite ("DBS"), may provide a launching platform for new networks.<sup>22</sup> For example, CNNfn was launched in 1995 with 4 to 5 million households, divided between DBS and cable.<sup>23</sup>

Nor should we ignore significant technological changes in video distribution that are affecting cable programming. One such change is the development and commercialization of new distribution methods that can provide alternatives for both cable programmers and subscribers. DBS is one example. With digital capacity, DBS can provide hundreds of channels to subscribers. By September 1995, DBS was available in all forty-eight contiguous states and Alaska.<sup>24</sup> In April 1996, DBS had 2.6 million customers; in August 1996, DBS had 3.34 million subscribers;<sup>25</sup> by the end of January 1997, DBS had

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<sup>19</sup> 1996 NCTA at 77.

<sup>20</sup> 1996 NCTA at 86. *Cf.* the reply of the majority, at 3 ("None of the channels that has entered since 1991 has acquired more than a 1% market share.") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

<sup>21</sup> This is the kind of competition we would expect to see between cable networks that are substitutes for one another and the kind of competition that does not exist between CNN and HBO.

<sup>22</sup> The entry of alternative MVPD technologies may put competitive pressure on cable system operators to expand capacity more quickly. *See* "The Birth of Networks," *Cablevision*, April 15, 1996 (Special Supp.), at 8A (cable system operators "don't want DBS and the telcos to pick up the services of tomorrow while they are being overly arrogant about their capacity").

<sup>23</sup> CNNfn has 5.7 million subscribers, with 2.4 million on cable and 3.3 million on satellite. 1996 NCTA at 39.

<sup>24</sup> 1995 FCC Report ¶ 49.

<sup>25</sup> DBS Digest, Aug. 22, 1996 (<http://www.dbsdish.com/dbsdata.html> (Sept. 5, 1996)).

more than 4.7 million subscribers<sup>26</sup> (compared to 62 million cable customers in the U.S.). AT&T last year invested \$137.5 million in DirecTV, a DBS provider, began to sell satellite dishes and programming to its long distance customers in four markets, and planned to expand to the rest of the country in September 1996.<sup>27</sup> By the end of 1996, DirecTV had 2.3 million subscribers (up from 1.2 million in 1995<sup>28</sup>), giving DirecTV more subscribers than all but the six largest cable system operators.<sup>29</sup> Echostar and AlphaStar both have launched DBS services, and MCI Communication and News Corp. last year announced a partnership to enter DBS.<sup>30</sup> Some industry analysts predict that DBS will serve 15 million subscribers by 2000.<sup>31</sup> Direct broadcast satellite already is offering important competition for cable systems.<sup>32</sup>

Digital technology, which would expand cable capacity to as many as 500 channels, is another important development. DBS already uses digital technology, and some cable operators were planning to begin providing digital service in 1996. Last fall, Discovery Communications (The Discovery Channel) announced four new programming services designed for digital boxes for TCI's

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<sup>26</sup> DBS Digest, Jan. 20, 1997 (<http://www.dbsdish.com/dbsdata.html> (Jan. 27, 1997)).

<sup>27</sup> See Breznick, "Crowded Skies," Cable World, April 29, 1996 (<http://www.mediacentral.com/magazines/CableWorld/News961996042913.htm/539128> (Sept. 3, 1996)). National and regional advertising campaigns have helped popularize DBS. *E.g.* Newsweek, Dec. 2, 1996, at 23 (DISH Network full page ad for digital satellite system and programming); USA Today, Aug. 20, 1996, at 5D (DISH Network full page ad for digital satellite system and programming); N.Y. Times, July 14, 1996, at 23 (AT&T full page ad for digital satellite system, DirecTV and USSB). For a cable system response to DBS competition, *see, e.g.*, The Georgetown Current (Washington, D.C.), Dec. 18, 1996, at 25 (District Cablevision full page ad: "The DISH Network's real charge to hook up your home is out of this world.")

<sup>28</sup> Paikert, "Strong Christmas Revives DBS Sales," Multichannel News Digest, Jan. 13, 1997 (<http://www.multichannel.com/digest.htm> (Jan. 13, 1997)); *see also* Breznick, "DBS Celebrates the Holidays: Brisk Year End Sales a Boon for DirecTV, EchoStar," Jan. 6, 1997 (<http://www.mediacentral.com/Magazines/CableWorld/News96/1997010601.htm> (Jan. 6, 1997)).

<sup>29</sup> See 1996 NCTA at 14 (ranking the 50 largest MSOs by number of subscribers).

<sup>30</sup> Breznick, "Crowded Skies," Cable World, April 29, 1996 (<http://www.mediacentral.com/magazines/CableWorld/News96/1996042913.htm/539128> (Sept. 3, 1996)).

<sup>31</sup> *Id.*

<sup>32</sup> See Robichaux, "Time Warner Inc. Is Expected To Buy New Set-Top Boxes," Wall Street Journal, Dec. 10, 1996, at B10 (reporting that Time Warner is "look[ing] for new bells and whistles to protect its base of 12 million subscribers against an escalating raid by direct-broadcast-satellite companies"); Robichaux, "Once a Laughingstock, Direct Broadcast TV Gives Cable a Scare," Wall Street Journal, Nov. 7, 1996, at A1. *See also* Cable World, Dec. 3, 1996 (reporting that "analysts and industry observers agree that cable operators are losing customers to DBS").

"digital box rollout."<sup>33</sup> (Even without digital service, cable systems have continued to upgrade their capacity; in 1994, about 64% of cable systems offered thirty to fifty-three channels, and more than 14% offered fifty-four or more channels.<sup>34</sup>) Local telephone companies have entered as distributors via video dialtone, MMDS<sup>35</sup> and cable systems, and the telcos are exploring additional ways to enter video distribution markets.<sup>36</sup> Digital compression and advanced television technologies could make it possible for multiple programs to be broadcast over a single over-the-air broadcast channel.<sup>37</sup> When these developments will be fully realized is open to debate, but it is clear that they are on their way and affecting competition. According to one trade association official, cable operators are responding to competition by "upgrading their infrastructures with fiber optics and digital compression technologies to boost channel capacity . . . . What's more, cable operators are busily trying to polish their images with a public that has long registered gripes over pricing, customer service and programming choice."<sup>38</sup>

Ongoing entry in programming suggests that no program seller could maintain an anticompetitive price increase and, therefore, there is no basis for liability under Section 7 of the Clayton Act. Changes in the video distribution market will put additional pressure on both cable systems and programming providers to be competitive by providing quality programming at reasonable prices. The quality and quantity of entry in the industry warrants dismissal of the complaint.

#### HORIZONTAL THEORY OF LIABILITY

The complaint alleges that Time Warner will be able to exploit its ownership of HBO and the Turner basic channels by "bundling"

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<sup>33</sup> Katz, "Discovery Goes Digital," *Multichannel News Digest*, Sept. 3, 1996 ("The new networks . . . will launch Oct. 22 in order to be included in Tele-Communication Inc.'s digital box rollout in Hartford, Conn.") (<http://www.multichannel.com/digest.htm> (Sept. 5, 1996)).

<sup>34</sup> 1995 FCC Report at B-2 (Table 3).

<sup>35</sup> MMDS stands for multichannel multipoint distribution service, a type of wireless cable. *See* 1995 FCC Report ¶¶ 68-85. Industry observers project that MMDS will serve more than 2 million subscribers in 1997 and grow more than 280% between 1995 and 1998. 1995 FCC Report ¶ 71.

<sup>36</sup> *See* 1996 FCC Report ¶¶ 67-79.

<sup>37</sup> *See* 1995 FCC Report ¶ 116; 1996 FCC Report ¶ 93.

<sup>38</sup> Pendleton, "Keeping Up With Cable Competition," *Cable World*, April 29, 1996, at 158.

Turner networks with HBO, that is, by selling them as a package.<sup>39</sup> As a basis for liability in a merger case, this appears to be without precedent.<sup>40</sup> Bundling is not always anticompetitive, and we cannot predict when bundling will be anticompetitive.<sup>41</sup> Bundling can be used to transfer market power from the "tying" product to the "tied" product, but it also is used in many industries as a means of discounting. Popular cable networks, for example, have been sold in a package at a discount from the single product price. This can be a way for a programmer to encourage cable system operators to carry multiple networks and achieve cross-promotion among the networks in the package. Even if it seemed more likely than not that Time Warner would package HBO with Turner networks after the merger, we could not *a priori* identify this as an anticompetitive effect.

The alleged violation rests on a theory that the acquisition raises the potential for unlawful tying. To the best of my knowledge, Section 7 of the Clayton Act has never been extended to such a situation. There are two reasons not to adopt the theory here. First, challenging the mere potential to engage in such conduct appears to fall short of the "reasonable probability" standard under Section 7 of the Clayton Act. We do not seek to enjoin mergers on the mere possibility that firms in the industry may later choose to engage in unlawful conduct. It is difficult to imagine a merger that could not be enjoined if "mere possibility" of unlawful conduct were the standard. Here, the likelihood of anticompetitive effects is even more removed, because tying, the conduct that might possibly occur, in turn might or might not prove to be unlawful. Second, anticompetitive tying is unlawful, and Time Warner would risk private law suits and public law enforcement action for such conduct.

The remedy for the alleged bundling is to prohibit it,<sup>42</sup> with no attempt to distinguish efficient bundling from anticompetitive

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<sup>39</sup> Complaint ¶ 38a.

<sup>40</sup> *Cf. Heublein, Inc.*, 96 FTC 385, 596-99 (1980) (rejecting a claim of violation based on leveraging).

<sup>41</sup> See Whinston, "Tying, Foreclosure, and Exclusion," 80 Am. Econ. Rev. 837, 855-56 (1990) (tying can be exclusionary, but "even in the simple models considered [in the article], which ignore a number of other possible motivations for the practice, the impact of this exclusion on welfare is uncertain. This fact, combined with the difficulty of sorting out the leverage-based instances of tying from other cases, makes the specification of a practical legal standard extremely difficult.").

<sup>42</sup> Order ¶ V.

bundling.<sup>43</sup> Assuming liability on the basis of an anticompetitive horizontal overlap, the obvious remedy would be to enjoin the transaction or to require the divestiture of HBO. Divestiture is a simple, easily reviewable and complete remedy for an anticompetitive horizontal overlap. The weakness of the Commission's case seems to be the only impediment to imposing that remedy here.

#### VERTICAL THEORIES

The complaint also alleges two vertical theories of competitive harm. The first is foreclosure of unaffiliated programming from Time Warner and TCI cable systems.<sup>44</sup> The second is anticompetitive price discrimination against competing MVPDs in the sale of cable programming.<sup>45</sup> Neither of these alleged outcomes appears particularly likely.

#### FORECLOSURE

Time Warner cannot foreclose the programming market by refusing carriage on its cable system, because Time Warner has less than 20% of cable television subscribers in the United States. Even if TCI were willing to join in an attempt to barricade programming produced by others from distribution, TCI and Time Warner together control less than 50% of the cable television subscribers in the country. In that case, entry of programming via cable might be more expensive (because of the costs of obtaining carriage on a number of smaller systems), but it need not be foreclosed.<sup>46</sup> And even if Time Warner and TCI together controlled a greater share of cable systems, the availability of alternative distributors of video programming and

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<sup>43</sup> Although the proposed order would permit any bundling that Time Warner or Turner could have implemented independently before the merger, the reason for this distinction appears unrelated to distinguishing between pro- and anti-competitive bundling.

<sup>44</sup> Complaint ¶ 38b.

<sup>45</sup> Complaint ¶ 38c.

<sup>46</sup> According to the FCC, "[t]he available evidence suggests that a successful launch of a new mass market national programming network -- that is, the initial subscriber requirement for long-term success -- requires that the new channel be available to at least ten to twenty million households," which amounts to about 16% to 32% of cable households. 1996 FCC Report ¶ 135 (footnote omitted). *Cf.* the reply of the majority, at 7 ("the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

the technological advances that are expanding cable channel capacity make foreclosure as a result of this transaction improbable.

The foreclosure theory also is inconsistent with the incentives of the market. Cable systems operators want more and better programming, to woo and win subscribers. To support their cable systems, Time Warner and TCI must satisfy their subscribers by providing programming that subscribers want at reasonable prices. Given competing distributors and expanding channel capacity, neither of them likely would find it profitable to attempt to exclude new programming.

TCI as a shareholder of Time Warner, as the transaction was proposed to us (with a minority share of less than 10%), would have no greater incentive than it had as a 23% shareholder of Turner to protect Turner programming from competitive entry. Indeed, TCI's incentive to protect Turner programming would appear to be diminished.<sup>47</sup> If TCI's interest in Time Warner increased, it stands to reason that TCI's interest in the well-being of the Turner networks also would increase. But it is important to remember that TCI's principal source of income is its cable operations, and its share of Time Warner profits from Turner programming would appear to be insufficient incentive for TCI to jeopardize its cable business.<sup>48</sup> It may be that TCI could acquire an interest in Time Warner that could have anticompetitive consequences, but the Commission should analyze that transaction when and if TCI increases its holdings.

Another aspect of the foreclosure theory alleged in the complaint is a carriage agreement (programming service agreement or PSA) between TCI and Turner. Under the PSA, TCI would carry certain Turner networks for twenty years, at a discount from the average price at which Time Warner sells the Turner networks to other cable operators. The complaint alleges that TCI's obligations under the PSA would diminish TCI's incentives and ability to carry programming that competes with Turner programming,<sup>49</sup> which in turn would raise barriers to entry for unaffiliated programming. The increased difficulty of entry, so the theory goes, would in turn enable Time

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<sup>47</sup> Turner programming would account for only part of TCI's interest in Time Warner.

<sup>48</sup> Looking only at cash flow, even if its share of Time Warner were increased to 18%, TCI's interest in the combined Time Warner/Turner would be only slightly greater than TCI's pre-transaction interest in Turner, and it still would amount to only an insignificant fraction of the cash flow generated by TCI's cable operations.

<sup>49</sup> Complaint ¶ 38b(2).

Warner to raise the price of Turner programming sold to cable operators and other MVPDs.

It is hard to see that the PSA would have anticompetitive effects. TCI already has contracts with Turner that provide for mandatory carriage of CNN and TNT, and TCI is likely to continue to carry these programming networks for the foreseeable future.<sup>50</sup> The current agreements do not raise antitrust issues, and the PSA raises no new ones. Any theoretical bottleneck on existing systems would be even further removed by the time the carriage requirements under the PSA would have become effective (when existing carriage agreements expire), because technological changes will have expanded cable channel capacity and alternative MVPDs will have expanded their subscribership. The PSA could even give TCI incentives to compete with Time Warner's programming and keep TCI's costs down.<sup>51</sup> The PSA would have afforded Time Warner long term carriage for the Turner networks, provided TCI with long term programming commitments with some price protection, and eliminated the costs of renegotiating a number of existing Turner/TCI carriage agreements as they expire. These are efficiencies. No compelling reason has been advanced for requiring that the carriage agreement be cancelled.<sup>52</sup>

In addition to divestiture by TCI of its Time Warner shares and cancellation of the TCI/Turner carriage agreement, the proposed remedies for the alleged foreclosure include:

(1) Antidiscrimination provisions by which Time Warner must abide in dealing with program providers;<sup>53</sup> (2) recordkeeping requirements to police compliance with the antidiscrimination provision;<sup>54</sup> and (3) a requirement that Time Warner carry "at least one Independent Advertising-Supported News and Information

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<sup>50</sup> Cable system operators like to keep their subscribers happy, and subscribers do not like to have popular programming cancelled. For example, TCI recently "decided to yield to subscriber cries of 'I Want My MTV and VH1' and restore the channels on cable systems . . ." Media Central, Jan. 23, 1997 (<http://www.mediacentral.com/Magazines/MediaDaily/#08>).

<sup>51</sup> TCI would have incentives to encourage new programming entry, to the extent that such entry would reduce the "industry average price" referred to in the PSA and thereby reduce the price that TCI would pay under the PSA.

<sup>52</sup> See Order ¶ IV. There would appear to be even less justification for cancelling the PSA in light of the requirements (Order ¶¶ II & III) that TCI spin off or cap its shareholdings in Time Warner.

<sup>53</sup> Order ¶ VII.

<sup>54</sup> Order ¶ VIII.

National Video Programming Service."<sup>55</sup> These remedial provisions are unnecessary, and they may be harmful.

Paragraph VII of the order, the antidiscrimination provision, seeks to protect unaffiliated programming vendors from exploitation and discrimination by Time Warner. The order provision is taken almost verbatim from a regulation of the Federal Communications Commission.<sup>56</sup> It is highly unusual, to say the least, for an order of the FTC to require compliance with a law enforced by another federal agency, and it is unclear what expertise we might bring to the process of assuring such compliance. Although a requirement to obey existing law and FCC regulations may not appear to burden Time Warner unduly, the additional burden of complying with the FTC order may be costly for both Time Warner and the FTC. In addition to imposing extensive recordkeeping requirements,<sup>57</sup> the order apparently would create another forum for unhappy programmers, who could seek to instigate an FTC investigation of Time Warner's compliance with the order, instead of or in addition to citing the same conduct in a complaint filed with and adjudicated by the FCC.<sup>58</sup> The burden of attempting to enforce compliance with FCC regulations is one that this agency need not and should not assume.

The order also requires Time Warner to carry an independent all-news channel.<sup>59</sup> This requirement is entirely unwarranted. A duty to deal might be appropriate on a sufficient showing if Time Warner were a monopolist. But with less than 20% of cable subscribers in the United States, Time Warner is neither a monopolist nor an "essential facility" in cable distribution.<sup>60</sup> CNN, the apparent target of the FTC-sponsored entry, also is not a monopolist but is one of many cable programming services in the all-programming market alleged in the complaint. Clearly, CNN also is one of many sources of news and

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<sup>55</sup> Order ¶ IX.

<sup>56</sup> See 47 CFR 76.1301(a)-(c).

<sup>57</sup> To the extent that the recordkeeping requirements may replicate what is required by the FCC, no additional costs would appear to be imposed by the order on Time Warner.

<sup>58</sup> See 47 CFR 76.1302. The FCC may mandate carriage and impose prices, terms and other conditions of carriage.

<sup>59</sup> Order ¶ IX.

<sup>60</sup> Even in New York City, undoubtedly an important media market, available data indicate that Time Warner apparently serves only about one-quarter of cable households. See *Cablevision*, May 13, 1996, at 57; April 29, 1996, at 13. (Time Warner has about 1.1 million subscribers in New York, which has about 4.5 million cable households). We do not have data about alternative MVPD subscribers in the New York area.

information readily available to the public, although neither televised news programming nor ad-supported cable TV news programming is a market alleged in the complaint.

Antitrust law, properly applied, provides no justification whatsoever for the government to help establish a competitor for CNN on the Time Warner cable systems. Nor is there any apparent reason, other than the circular reason that it would be helpful to them, why Microsoft, NBC or Fox needs a helping hand from the FTC in their new programming endeavors. CNN and other programming networks did not obtain carriage mandated by the FTC when they launched; why should the Commission now tilt the playing field in favor of other entrants?

#### PRICE DISCRIMINATION

The complaint alleges that Time Warner could discriminatorily raise the prices of programming services to its MVPD rivals,<sup>61</sup> presumably to protect its cable operations from competition. This theory assumes that Time Warner has market power in the all-cable programming market. As discussed above, however, there are reasons to think that the alleged all-cable programming market would not be sustained, and entry into cable programming is widespread and, because of the volume of entry, immediate. Under the circumstances, it appears not only not likely but virtually inconceivable that Time Warner could sustain any attempt to exercise market power in the alleged all-cable programming market.

Whatever the merits of the theory in this case, however, discrimination against competing MVPDs in price or other terms of sale of programming is prohibited by federal statute<sup>62</sup> and by FCC regulations,<sup>63</sup> and the FCC provides a forum to adjudicate complaints of this nature. Unfortunately, the majority is not content to leave policing of telecommunications to the FCC.

The order addresses the alleged violation in the following way: (1) it requires Time Warner to provide Turner programming to competing MVPDs on request; and (2) it establishes a formula for determining the prices that Time Warner can charge MVPDs for Turner programming in areas in which Time Warner cable systems

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<sup>61</sup> Complaint ¶ 38c.

<sup>62</sup> 47 U.S.C.A. 548.

<sup>63</sup> 47 CFR 76.1000 - 76.1002.

and the MVPDs compete.<sup>64</sup> The provision is inconsistent with two antitrust principles. Antitrust traditionally does not impose a duty to deal absent monopoly, which does not exist here, and antitrust traditionally has not viewed price regulation as an appropriate remedy for market power. Indeed, price regulation usually is seen as antithetical to antitrust.

Although the provision ostensibly has the same nondiscrimination goal as federal telecommunications law and FCC regulations, the bright line standard in the proposed order for determining a nondiscriminatory price fails to take account of the circumstances Congress has identified in telecommunications statutes in which price differences could be justified, such as, for example, cost differences, economies of scale or "other direct and legitimate economic benefits reasonably attributable to the number of subscribers serviced by the distributor."<sup>65</sup> These are significant omissions, particularly for an agency that has taken pride in its mission to prevent unfair methods of competition and, in so doing, to identify and take account of efficiencies. There is no apparent reason or authority for creating this exception to a congressional mandate. To the extent that the proposed order creates a regulatory scheme different from that afforded by Congress and the FCC, disgruntled MVPDs may find it to their advantage to seek sanctions against Time Warner at the FTC.<sup>66</sup> This is likely to be costly for the FTC and for Time Warner, and the differential scheme of regulation also could impose other, unforeseen costs on the industry.

#### EFFICIENCIES

As far as I can tell, the consent order entirely ignores the likely efficiencies of the proposed transaction. The potential vertical efficiencies include more and better programming options for consumers and reduced transaction costs for the merging firms. The potential horizontal efficiencies include savings from the integration of overlapping operations and of film and animation libraries. For many years, the Commission has devoted considerable time and effort to identifying and evaluating efficiencies that may result from

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<sup>64</sup> Order ¶ VI.

<sup>65</sup> 47 U.S.C. 548(c)(2)(B)(i)-(iii).

<sup>66</sup> Most people outside the FTC and the FCC already confuse the two agencies. Surely we do not want to contribute to this confusion.

proposed mergers and acquisitions. Although cognizable efficiencies occur less frequently than one might expect, the Commission has not stinted in its efforts to give every possible consideration to efficiencies. That makes the apparent disinterest in the potential efficiencies of this transaction decidedly odd.

#### INDUSTRY COMPLAINTS

We have heard many expressions of concern about the transaction. Cable system operators and alternative MVPDs have been concerned about the price and availability of programming from Time Warner after the acquisition. Program providers have been concerned about access to Time Warner's cable system. These are understandable concerns, and I am sympathetic to them. To the extent that these industry members want assured supply or access and protected prices, however, this is (or should be) the wrong agency to help them. Because Time Warner cannot foreclose either level of service and is neither a monopolist nor an "essential facility" in the programming market or in cable services, there would appear to be no basis in antitrust for the access requirements imposed in the order.

The Federal Communications Commission is the agency charged by Congress with regulating the telecommunications industry, and the FCC already has rules in place prohibiting discriminatory prices and practices. While there may be little harm in requiring Time Warner to comply with communications law, there also is little justification for this agency to undertake the task. To the extent that the consent order offers a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress. To the extent that the consent order would offer a more attractive remedy for complaints from disfavored competitors and customers of Time Warner, they are more likely to turn to us than to the FCC. There is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC.

I dissent.

## DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a complaint and final order against Time Warner Inc. ("TW"), Turner Broadcasting System, Inc. ("TBS"), Tele-Communications, Inc. ("TCI"), and Liberty Media Corporation. The complaint against these producers and distributors of cable television programming alleges anticompetitive effects arising from (1) the horizontal integration of the programming interests of TW and TBS and (2) the vertical integration of TBS's programming interests with TW's and TCI's distribution interests. I am not persuaded that either the horizontal or the vertical aspects of this transaction are likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, or otherwise to constitute "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Moreover, even if one were to assume the validity of one or more theories of violation underlying this action, the order does not appear to prevent the alleged effects and may instead create inefficiency.

## HORIZONTAL THEORIES OF COMPETITIVE HARM

This transaction involves, *inter alia*, the combination of TW and TBS, two major suppliers of programming to multichannel video program distributors ("MVPDs"). Accordingly, there is a straightforward theory of competitive harm that merits serious consideration by the Commission. In its most general terms, the theory is that cable operators regard TW programs as close substitutes for TBS programs. Therefore, the theory says, TW and TBS act as premerger constraints on each other's ability to raise program prices. Under this hypothesis, the merger eliminates this constraint, allowing TW -- either unilaterally or in coordination with other program vendors -- to raise prices on some or all of its programs.

Of course, this story is essentially an illustration of the standard theory of competitive harm set forth in Section 2 of the 1992 Horizontal Merger Guidelines.<sup>1</sup> Were an investigation pursuant to this theory to yield convincing evidence that it applies to the current transaction, under most circumstances the Commission would seek injunctive relief to prevent the consolidation of the assets in question.

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<sup>1</sup> U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 2 (1992), 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6 *et seq.*

The Commission has eschewed that course of action, however, choosing instead a very different sort of "remedy" that allows the parties to proceed with the transaction but restricts them from engaging in some (but not all) "bundled" sales of programming to unaffiliated cable operators.<sup>2</sup> Clearly, this choice of relief implies an unusual theory of competitive harm from what ostensibly is a straightforward horizontal transaction. The Commission's remedy does nothing to prevent the most obvious manifestation of postmerger market power -- an across-the-board price increase for TW and TBS programs. Why has the Commission forgone its customary relief directed against its conventional theory of harm?

The plain answer is that there is little persuasive evidence that TW's programs constrain those of TBS (or vice-versa) in the fashion described above. In a typical FTC horizontal merger enforcement action, the Commission relies heavily on documentary evidence establishing the substitutability of the parties' products or services.<sup>3</sup> For example, it is standard to study the parties' internal documents to determine which producers they regard as their closest competitors. This assessment also depends frequently on internal documents supplied by customers that show them playing off one supplier against another -- via credible threats of supplier termination -- in an effort to obtain lower prices.

In this matter, however, documents of this sort are conspicuous by their absence. Notwithstanding a voluminous submission of

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<sup>2</sup> In the Analysis of Proposed Consent Order to Aid Public Comment (Section IV.C) that it released in connection with acceptance of the consent agreement in this case, the Commission asserted that "the easiest way the combined firm could exert substantially greater negotiating leverage over cable operators is by combining all or some of such 'marquee' services and offering them as a package or offering them along with unwanted programming." As I note below, it is far from obvious why this bundling strategy represents the "easiest" way to exercise market power against cable operators. The easiest way to exercise any newly-created market power would be simply to announce higher programming prices.

<sup>3</sup> The Merger Guidelines emphasize the importance of such evidence. Section 1.11 specifically identifies the following two types of evidence as particularly informative: "(1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables [and] (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables."

To illustrate, in *Coca-Cola Bottling Co. of the Southwest*, Docket No. 9215, complaint counsel argued in favor of a narrow product market consisting of "all branded carbonated soft drinks" ("CSDs"), while respondent argued for a much broader market. In determining that all branded CSDs constituted the relevant market, the Commission placed great weight on internal documents from local bottlers of branded CSDs showing that those bottlers "[took] into account only the prices of other branded CSD products [and not the prices of private label or warehouse-delivered soft drinks] in deciding on pricing for their own branded CSD products." 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,413 (Aug. 31, 1994), *vacated and remanded on other grounds, Coca-Cola Bottling Co. of the Southwest v. FTC*, 85 F.3d 1139 (5th Cir. 1996). (The Commission dismissed its complaint on September 6, 1996.)

materials from the respondents and third parties (and the considerable incentives of the latter -- especially other cable operators -- to supply the Commission with such documents), there are no documents that reveal cable operators threatening to drop a TBS "marquee" network (e.g., CNN) in favor of a TW "marquee" network (e.g., HBO). There also are no documents from, for instance, TW suggesting that it sets the prices of its "marquee" networks in reference to those of TBS, taking into account the latter's likely competitive response to unilateral price increases or decreases. Rather, the evidence supporting any prediction of a postmerger price increase consists entirely of customers' contentions that program prices would rise following the acquisition. Although customers' opinions on the potential effects of a transaction often are important, they seldom are dispositive. Typically the Commission requires substantial corroboration of these opinions from independent information sources.<sup>4</sup>

Independent validation of the anticompetitive hypothesis becomes particularly important when key elements of the story lack credibility. For a standard horizontal theory of harm to apply here, one key element is that, prior to the acquisition, an MVPD could credibly threaten to drop a marquee network (e.g., CNN), provided it had access to another programmer's marquee network (e.g., HBO) that it could offer to potential subscribers. This threat would place the MVPD in a position to negotiate a better price for the marquee networks than if those networks were jointly owned.

Here, the empirical evidence gathered during the investigation reveals that such threats would completely lack credibility. Indeed, there appears to be little, if any, evidence that such threats ever have been made, let alone carried out. CNN and HBO are not substitutes, and both are carried on virtually all cable systems nationwide. If, as

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<sup>4</sup> For example, in *R.R. Donnelley Sons & Co., et al.*, Docket No. 9243, the Administrative Law Judge's decision favoring complaint counsel rested in part on his finding that "[a]s soon as the Meredith/Burda acquisition was announced, customers expressed concern to the FTC and the parties about the decrease in competition that might result." (Initial Decision Finding 404.) In overturning the ALJ's decision, the Commission cautioned: "There is some danger in relying on these customer complaints to draw any general conclusions about the likely effects of the acquisition or about the analytical premises for those conclusions. The complaints are consistent with a variety of effects, and many -- including those the ALJ relied upon -- directly contradict [c]omplaint [c]ounsel's prediction of unilateral price elevation." 5 Trade Reg. Rep. (CCH) ¶ 23,876 at 23,660 n.189 (July 21, 1995).

Also, in several instances involving hospital mergers in concentrated markets, legions of third parties came forth to attest to the transaction's efficiency. The Commission has discounted this testimony, however, when these third parties could not articulate or document the source of the claimed efficiency, or when the testimony lacked corroboration from independent information sources. I believe that the Commission should apply the same evidentiary standards to the third-party testimony in the current matter.

a conventional horizontal theory of harm requires, these program services are truly substitutes -- if MVPDs regularly play one off against the other, credibly threatening to drop one in favor of another -- then why are there virtually no instances in which an MVPD has carried out this threat by dropping one of the marquee services? The absence of this behavior by MVPDs undermines the empirical basis for the asserted degree of substitutability between the two program services.<sup>5</sup>

Faced with this pronounced lack of evidence to support a conventional market power story and a conventional remedy, the Commission has sought refuge in what appears to be a very different theory of postmerger competitive behavior. This theory posits an increased likelihood of program "bundling" as a consequence of the transaction.<sup>6</sup> But there are two major problems with this theory as a basis for an enforcement action. First, there is no strong theoretical or empirical basis for believing that an increase in bundling of TW and TBS programming would occur postmerger. Second, even if such bundling did occur, there is no particular reason to think that it would be competitively harmful.

Given the lack of documentary evidence to show that TW intends to bundle its programming with that of TBS, I do not understand why the majority considers an increase in program bundling to be a likely feature of the postmerger equilibrium, nor does economic theory supply a compelling basis for this prediction. Indeed, the rationale for this element of the case (as set forth in the Analysis to Aid Public Comment) can be described charitably as "incomplete." According to the Analysis, unless the FTC prevents it, TW would undertake a bundling strategy in part to foist "unwanted programming" upon cable operators.<sup>7</sup> Missing from the Analysis, however, is any sensible

<sup>5</sup> In virtually any case involving less pressure to come up with something to show for the agency's strenuous investigative efforts, the absence of such evidence would lead the Commission to reject a hypothesized product market that included both marquee services. Suppose that two producers of product A proposed to merge and sought to persuade the Commission that the relevant market also included product B, but they could not provide any examples of actual substitution of B for A, or any evidence that threats of substitution of B for A actually elicited price reductions from sellers of A. In the usual run of cases, this lack of substitutability would almost surely lead the Commission to reject the expanded market definition. But not so here.

<sup>6</sup> As I noted earlier, a remedy that does nothing more than prevent "bundling" of different programs would fail completely to prevent the manifestations of market power -- such as across-the-board price increases -- most consistent with conventional horizontal theories of competitive harm.

<sup>7</sup> As I have noted, *supra* n.2, the Analysis also claimed that TW could obtain "substantially greater negotiating leverage over cable operators . . . by combining all or some of [the merged firm's] 'marquee' services and offering them as a package . . ." If the Analysis used the term "negotiating leverage" to mean "market power" as the latter is conventionally defined, then it confronts three difficulties: (1) the record fails to support the proposition that the TW and TBS "marquee" channels

explanation of why TW should wish to pursue this strategy, because the incentives to do so are not obvious.<sup>8</sup>

A possible anticompetitive rationale for "bundling" might run as follows: by requiring cable operators to purchase a bundle of TW and TBS programs that contains substantial amounts of "unwanted" programming, TW can tie up scarce channel capacity and make entry by new programmers more difficult. But even if that strategy were assumed *arguendo* to be profitable,<sup>9</sup> the order would have only a trivial impact on TW's ability to pursue it. The order prohibits only the bundling of TW programming with TBS programming; TW remains free under the order to create new "bundles" comprising exclusively TW, or exclusively TBS, programs. Given that many TW and TBS programs are now sold on an unbundled basis -- a fact that

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are close substitutes for each other; (2) even assuming that those channels are close substitutes, there are more straightforward ways for TW to exercise postmerger market power; and (3) the remedy does nothing to prevent these more straightforward exercises of market power. *See* discussion *supra*.

<sup>8</sup> In "A Note on Block Booking" in *THE ORGANIZATION OF INDUSTRY* (1968), George Stigler analyzed the practice of "block booking" -- or, in current parlance, "bundling" -- "marquee" motion pictures with considerably less popular films. Some years earlier, the United States Supreme Court had struck this practice down as an anticompetitive "leveraging" of market power from desirable to undesirable films. *United States v. Loew's Inc.*, 371 U.S. 38 (1962). As Stigler explained (at 165), it is not obvious why distributors should wish to force exhibitors to take the inferior film:

Consider the following simple example. One film, Justice Goldberg cited *Gone with the Wind*, is worth \$10,000 to the buyer, while a second film, the Justice cited *Gettling Gertie's Garter*, is worthless to him. The seller could sell the one for \$10,000, and throw away the second, for no matter what its cost, bygones are forever bygones. Instead the seller compels the buyer to take both. But surely he can obtain no more than \$10,000, since by hypothesis this is the value of both films to the buyer. Why not, in short, use his monopoly power directly on the desirable film? It seems no more sensible, on this logic, to block book the two films than it would be to compel the exhibitor to buy *Gone with the Wind* and seven Ouija boards, again for \$10,000.

<sup>9</sup> The argument here basically is a variant of the argument often used to condemn exclusive dealing as a tool for monopolizing a market. Under this argument, an upstream monopolist uses its market power to obtain exclusive distribution rights from its distributors, thereby foreclosing potential manufacturing entrants and obtaining additional market power. But there is [sic] problem with this argument, as Bork explains in *THE ANTITRUST PARADOX* (1978):

[The monopolist] can extract in the prices it charges retailers all that the uniqueness of its line is worth. It cannot charge the retailer that full worth in money and then charge it again in exclusivity the retailer does not wish to grant. To suppose that it can is to commit the error of double counting. If [the firm] must forgo the higher prices it could have demanded in order to get exclusivity, then exclusivity is not an imposition, it is a purchase.

*Id.* at 306; *see also id.* at 140-43.

Although modern economic theory has established the theoretical possibility that a monopolist might, under very specific circumstances, outbid an entrant for the resources that would allow entry to occur (thus preserving the monopoly), modern theory also has shown that this is not a generally applicable result. It breaks down, for example, when (as is likely in MVPD markets) many units of new capacity are likely to become available sequentially. *See, e.g.*, Krishna, "Auctions with Endogenous Valuations: The Persistence of Monopoly Revisited," 83 *Am. Econ. Rev.* 147 (1993); Malueg and Schwartz, "Preemptive investment, toehold entry, and the mimicking principle," 22 *RAND J. Econ.* 1 (1991).

calls into question the likelihood of increased postmerger bundling<sup>10</sup> -- and given that, under the majority's bundling theory, any TW or TBS programming can tie up a cable channel and thereby displace a potential entrant's programming, the order hardly would constrain TW's opportunities to carry out this "foreclosure" strategy.

Finally, all of the above analysis implicitly assumes that the bundling of TW and TBS programming, if undertaken, would more likely than not be anticompetitive. The Analysis to Aid Public Comment, however, emphasizes that bundling programming in many other instances can be procompetitive. There seems to be no explanation of why the particular bundles at issue here would be anticompetitive, and no articulation of the principles that might be used to differentiate welfare-enhancing from welfare-reducing bundling.<sup>11</sup>

Thus, I am neither convinced that increased program bundling is a likely consequence of this transaction nor persuaded that any such bundling would be anticompetitive. Were I convinced that anticompetitive bundling is a likely consequence of this transaction, I would find the remedy inadequate.

#### VERTICAL THEORIES OF COMPETITIVE HARM

The consent order also contains a number of provisions designed to alleviate competitive harm purportedly arising from the increased degree of vertical integration between program suppliers and program distributors brought about by this transaction.<sup>12</sup> I have previously expressed my skepticism about enforcement actions predicated on

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<sup>10</sup> If bundling is profitable for anticompetitive reasons, why do we not observe TW and TBS now exploiting all available opportunities to reap these profits?

<sup>11</sup> Perhaps this reflects the fact that the economics literature does not provide clear guidance on this issue. See, e.g., Adams and Yellen, "Commodity Bundling and the Burden of Monopoly," 90 Q.J. Econ. 475 (1976). Adams and Yellen explain how a monopolist might use bundling as a method of price discrimination. (This also was Stigler's explanation, *supra* n.8.) As Adams and Yellen note, "public policy must take account of the fact that prohibition of commodity bundling without more may increase the burden of monopoly . . . [M]onopoly itself must be eliminated to achieve high levels of social welfare." 90 Q.J. Econ. at 498. Adams and Yellen's conclusion is apposite here: if the combination of TW and TBS creates (or enhances) market power, then the solution is to enjoin the transaction rather than to proscribe certain types of bundling, since the latter "remedy" may actually make things worse. And if the acquisition does not create or enhance market power, the basis for the bundling proscription is even harder to discern.

<sup>12</sup> Among other things, the order (1) constrains the ability of TW and TCI to enter into long-term carriage agreements (§ IV); (2) compels TW to sell Turner programming to downstream MVPD entrants at regulated prices (§ VI); (3) prohibits TW from unreasonably discriminating against non-TW programmers seeking carriage on TW cable systems (§ VII(C)); and (4) compels TW to carry a second 24-hour news service (*i.e.*, in addition to CNN) (§ IX).

theories of harm from vertical relationships.<sup>13</sup> The current complaint and order only serve to reinforce my doubts about such enforcement actions and about remedies ostensibly designed to address the alleged competitive harms.

The vertical theories of competitive harm posited in this matter, and the associated remedies, are strikingly similar to those to which I objected in *Silicon Graphics, Inc. ("SGI")*, and the same essential criticisms apply. In SGI, the Commission's complaint alleged anticompetitive effects arising from the vertical integration of SGI -- the leading manufacturer of entertainment graphics workstations -- with Alias Research, Inc., and Wavefront Technologies, Inc. -- two leading suppliers of entertainment graphics software. Although the acquisition seemingly raised straightforward horizontal competitive problems arising from the combination of Alias and Wavefront, the Commission inexplicably found that the horizontal consolidation was not anticompetitive on net.<sup>14</sup> Instead, the order addressed only the alleged vertical problems arising from the transaction. The Commission alleged, *inter alia*, that the acquisitions in SGI would reduce competition through two types of foreclosure: (1) nonintegrated software vendors would be excluded from the SGI platform, thereby inducing their exit (or deterring their entry); and (2) rival hardware manufacturers would be denied access to Alias and Wavefront software, without which they could not effectively compete against SGI. Similarly, in this case the Commission alleges (1) that nonintegrated program vendors will be excluded from TW and TCI cable systems and (2) that potential MVPD entrants into TW's cable markets will be denied access to (or face supracompetitive prices for) TW and TBS programming -- thus lessening their ability to effectively compete against TW's cable operations. The complaint further charges that the exclusion of nonintegrated program vendors from TW's and TCI's cable systems will deprive those vendors of

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<sup>13</sup> Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Waterous Company, Inc./Hale Products, Inc.*, Docket Nos. C-3693 & C-3694 (Nov. 22, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,076 at 23,888-90; Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront Technologies, Inc.)*, Docket No. C-3626 (Nov. 14, 1995), 61 Fed. Reg. 16797 (Apr. 17, 1996); Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina Del Rey, California, Feb. 24, 1995) [available on the Commission's World Wide Web site at <http://www.ftc.gov>].

<sup>14</sup> I say "inexplicably" not because I necessarily believed this horizontal combination should have been enjoined, but because the horizontal aspect of the transaction would have exacerbated the upstream market power that would have had to exist for the vertical theories to have had any possible relevance.

scale economies, render them ineffective competitors *vis-à-vis* the TW/Turner programming services, and thus confer market power on TW as a seller of programs to MVPDs in non-TW/non-TCI markets.

My dissenting statement in SGI identified the problems with this kind of analysis. For one thing, these two types of foreclosure -- foreclosure of independent program vendors from the TW and TCI cable systems, and foreclosure of independent MVPD firms from TW and TBS programming -- tend to be mutually exclusive. The very possibility of excluding independent program vendors from TW and TCI cable systems suggests the means by which MVPDs other than TW and TCI can avoid foreclosure. The nonintegrated program vendors surely have incentives to supply the "foreclosed" MVPDs,<sup>15</sup> and each MVPD has incentives to induce nonintegrated program suppliers to produce programming for it.<sup>16</sup>

In response to this criticism, one might argue -- and the complaint alleges<sup>17</sup> -- that pervasive scale economies in programming, combined with a failure to obtain carriage on the TW and TCI systems, would doom potential programming entrants (and "foreclosed" incumbent programmers) because, without TW and/or TCI carriage, they would be deprived of the scale economies essential to their survival. In other words, the argument goes, the competitive responses of "foreclosed" programmers and "foreclosed" distributors identified in the preceding paragraph never will materialize. There are, however, substantial conceptual and empirical problems with this argument, and its implications for competition policy have not been fully explored.

First, if one believes that programming is characterized by such substantial scale economies that the loss of one large customer results in the affected programmer's severely diminished competitive effectiveness (in the limit, that programmer's exit), then this

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<sup>15</sup> These MVPDs would include vendors of direct broadcast satellite ("DBS") systems, which are rapidly becoming an important competitive alternative to cable. According to Multichannel News (Jan. 13, 1997), "strong Christmas sales for the satellite dishes have shattered any hope [on the part of cable systems] that the primary competitive threat to cable TV is abating . . . [T]he number of DBS subscribers [has] doubled, rising from approximately 2.18 million in 1995 to 4.25 million in 1996."

<sup>16</sup> Moreover, as was also true in SGI, the complaint in the present case characterizes premerger entry conditions in a way that appears to rule out significant anticompetitive foreclosure of nonintegrated upstream producers as a consequence of the transaction. Paragraphs 33, 34, and 36 of the complaint allege in essence that there are few producers of "marquee" programming before the merger (other than TW and TBS), in large part because entry into "marquee" programming is so very difficult (stemming from, e.g., the substantial irreversible investments that are required). If that is true -- *i.e.*, if the posited programming market already was effectively foreclosed before the merger -- then, as in SGI, TW's acquisition of TBS could not cause substantial postmerger foreclosure of competitively significant alternatives to TW/TBS programming

<sup>17</sup> See paragraph 38.b of the complaint.

essentially is an argument that the number of program producers that can survive in equilibrium (or, perhaps more accurately, the number of program producers in a particular program "niche") will be small -- with perhaps only one survivor. Under the theory of the current case, this will result in a supracompetitive price for that program. Further, this will occur irrespective of the degree of vertical integration between programmers and distributors. Indeed, under these circumstances, there is a straightforward reason why vertical integration between a program distributor and a program producer would be both profitable and procompetitive (*i.e.*, likely to result in lower prices to consumers): instead of monopoly markups by both the program producer and the MVPD, there would be only one markup by the vertically integrated firm.<sup>18</sup>

Second, and perhaps more important, if the reasoning of the complaint is carried to its logical conclusion, it constitutes a basis for challenging any vertical integration by large cable operators or large programmers -- even if that vertical integration were to occur via *de novo* entry by an operator into the programming market, or by *de novo* entry by a programmer into distribution. Consider the following hypothetical: A large MVPD announces both that it intends to enter a particular program niche and that it plans to drop the incumbent supplier of that type of programming. According to the theory underlying the complaint, the dropped program would suffer substantially from lost scale economies, severely diminishing its competitive effectiveness, which in turn would confer market power on the vertically integrated entrant in its program sales to other MVPDs. Were the Commission to apply its current theory of competitive harm consistently, it evidently would have to find this *de novo* entry into programming by this large MVPD competitively objectionable.

I suspect, of course, that virtually no one would be comfortable challenging such integration, since there is a general predisposition

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<sup>18</sup> See, e.g., Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 174-76 (1988). The program price reductions would be observed only in those geographic markets where TW owned cable systems. Thus, the greater the number of cable subscribers served by TW, the more widespread would be the efficiencies. According to the complaint (¶ 32), TW cable systems serve only 17 percent of cable subscribers nationwide, so one might argue that the efficiencies are accordingly limited. But this, of course, leaves the Commission in the uncomfortable position of arguing that TW's share of total cable subscribership is too small to yield significant efficiencies, yet easily large enough to generate substantial "foreclosure" effects.

to regard expansions of capacity as procompetitive.<sup>19</sup> Consequently, one might attempt to reconcile the differential treatment of the two forms of vertical integration by somehow distinguishing them from each other.<sup>20</sup> But in truth, the situations actually merit similar treatment -- albeit not the treatment prescribed by the order. In neither case should an enforcement action be brought, because any welfare loss flowing from either scenario derives from the structure of the upstream market, which in turn is determined primarily by the size of the market and by technology, not by the degree of vertical integration between different stages of production.

Third, it is far from clear that TCI's incentives to preclude entry into programming are the same as TW's.<sup>21</sup> As an MVPD, TCI is harmed by the creation of entry barriers to new programming. Even if TW supplies it with TW programming at a competitive price, TCI is still harmed if program variety or innovation is diminished. On the other hand, as a part owner of TW, TCI benefits if TW's programming earns supracompetitive returns on sales to other MVPDs. TCI's net incentive to sponsor new programming depends on which factor dominates -- its interest in program quality and innovation, or its interest in supracompetitive returns on TW programming. All of the analyses of which I am aware concerning this tradeoff show that TCI's ownership interest in TW would have to increase substantially -- far beyond what the current transaction contemplates, or what would be possible without a significant

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<sup>19</sup> This would appear true especially when, as posited here, there is substantial premerger market power upstream because, under such circumstances, vertical integration is a means by which a downstream firm can obtain lower input prices. As noted earlier (*supra* n.18 and accompanying text), this integration can be procompetitive whether it occurs via merger or internal expansion.

<sup>20</sup> One might attempt to differentiate my hypothetical from a situation involving an MVPD's acquisition of a program supplier by arguing that the former would yield two suppliers of the relevant type of programming, but the latter only one. But this conclusion would be incorrect. If we assume that the number of suppliers that can survive in equilibrium is determined by the magnitude of scale economies relative to the size of the market, and that the pre-entry market structure represented an equilibrium, then the existence of two program suppliers will be only a transitory phenomenon, and the market will revert to the equilibrium structure dictated by these technological considerations -- that is, one supplier. Upstream integration by the MVPD merely replaces one program monopolist with another; but as noted above, under these circumstances vertical integration can yield substantial efficiencies.

<sup>21</sup> Even TW has mixed incentives to preclude programming entry. As a programmer allegedly in possession of market power, TW would wish to deter programming entry to protect this market power. But as an MVPD, TW -- like any other MVPD -- benefits from the creation of valuable new programming services that it can sell to its subscribers. On net, however, it appears true that TW's incentives balance in favor of wishing to prevent entry.

modification of TW's internal governance structure<sup>22</sup> -- for TCI to have an incentive to deter entry by independent programmers. TCI's incentive to encourage programming entry is intensified, moreover, by the fact that it has undertaken an ambitious expansion program to digitize its system and increase capacity to 200 channels. Because this appears to be a costly process, and because not all cable customers can be expected to purchase digital service, the cost per buyer -- and thus the price -- of digital services will be fairly high. How can TCI expect to induce subscribers to buy this expensive service if, through programming foreclosure, it has restricted the quantity and quality of programming that would be available on this service tier?<sup>23</sup>

The foregoing illustrates why foreclosure theories fell into intellectual disrepute: because of their inability to articulate how vertical integration harms competition and not merely competitors. The majority's analysis of the Program Service Agreement ("PSA") illustrates this perfectly. The PSA must be condemned, we are told, because a TCI channel slot occupied by a TW program is a channel slot that cannot be occupied by a rival programmer. As Bork noted, this is a tautology, not a theory of competitive harm.<sup>24</sup> It is a theory of harm to competitors -- competitors that cannot offer TCI inducements (such as low prices) sufficient to cause TCI to patronize them rather than TW.

All of the majority's vertical theories in this case ultimately can be shown to be theories of harm to competitors, not to competition. Thus, I have not been persuaded that the vertical aspects of this transaction are likely to diminish competition substantially. Even were I to conclude otherwise, however, I could not support the

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<sup>22</sup> TW has a "poison pill" provision that would make it costly for TCI to increase its ownership of TW above 18 percent.

<sup>23</sup> Note too that there is an inverse relationship between TCI's ability to prevent programming entry and its incentives to do so. Much of the analysis in this case has emphasized that TCI's size (27 percent of cable households) gives it considerable ability to determine which programs succeed and which fail, and the logic of the complaint is that TCI will exercise this ability so as to protect TW's market power in program sales to non-TW/non-TCI MVPDs. But although increases in TCI's size may increase its ability to preclude entry into programming, at the same time such increases reduce TCI's incentives to do so. The reasoning is simple: as the size of the non-TW/non-TCI cable market shrinks, the supracompetitive profits obtained from sales of programming to this sector also shrink. Simultaneously, the harm from TCI (as a MVPD) from precluding the entry of new programmers increases with TCI's subscriber share. (In the limit -- *i.e.*, if TCI and TW controlled all cable households -- there would be no non-TW/non-TCI MVPDs, no sales of programming to such MVPDs, and thus no profits to be obtained from such sales.) Any future increases in TCI's subscriber share would, other things held constant, reduce its incentives to "foreclose" entry by independent programmers.

<sup>24</sup> Bork, *THE ANTITRUST PARADOX*, *supra* n.9, at 304.

extraordinarily regulatory remedy contained in the order, two of whose provisions merit special attention: (1) the requirement that TW sell programming to MVPDs seeking to compete with TW cable systems at a price determined by a formula contained in the order; and (2) the requirement that TW carry at least one "Independent Advertising-Supported News and Information National Video Programming Service."

Under paragraph VI of the order, TW must sell Turner programming to potential entrants into TW cable markets at prices determined by a "most favored nation" clause that gives the entrant the same price -- or, more precisely, the same "carriage terms" -- that TW charges the three largest MVPDs currently carrying this programming. As is well known, most favored nation clauses have the capacity to cause all prices to rise rather than to fall.<sup>25</sup> But even putting this possibility aside, this provision of the order converts the Commission into a *de facto* price regulator -- a task, as I have noted on several previous occasions, to which we are ill-suited.<sup>26</sup> During the investigation third parties repeatedly informed me of the difficulty that the Federal Communications Commission has encountered in attempting to enforce its nondiscrimination regulations. The FTC's regulatory burden would be lighter only because, perversely, our pricing formula would disallow any of the efficiency-based rationales for differential pricing recognized by the Congress and the FCC.<sup>27</sup>

Most objectionable is paragraph IX of the order, the "must carry" provision that compels TW to carry an additional 24-hour news service. I am baffled how the Commission has divined that consumers would prefer that a channel of supposedly scarce cable capacity be

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<sup>25</sup> See, e.g., *RxCare of Tennessee, Inc., et al.*, Docket No. C-3664, 5 Trade Reg. Rep. (CCH) ¶ 23,957 (June 10, 1996); see also Cooper and Fries, "The most-favored-nation pricing policy and negotiated prices," 9 *Int'l J. Ind. Org.* 209 (1991). The logic is straightforward: if by cutting price to another (noncompeting) MVPD TW is compelled also to cut price to downstream competitors, the incentive to make this price cut is diminished. Although this effect might be small in the early years of the order (when the gains to TW from cutting price to a large, independent MVPD might swamp the losses from cutting price to its downstream competitors), its magnitude will grow over the order's 10-year duration, as TW cable systems confront greater competition.

<sup>26</sup> See my dissenting statements in *Silicon Graphics and Waterous/Hale*, *supra* n.13.

<sup>27</sup> Mirroring the applicable statute, the FCC rules governing the sale of cable programming by vertically integrated programmers to nonaffiliated MVPDs allow for price differentials reflecting, *inter alia*, "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. 548(c)(2)(B)(iii); 47 CFR 76.1002(b)(3).

used for a second news service, instead of for something else.<sup>28</sup> More generally, although remedies in horizontal merger cases sometimes involve the creation of a new competitor to replace the competition eliminated by the transaction, no competitor has been lost in the present case. Indeed, substantial entry already has occurred in this segment of the programming market (e.g., Fox and MSNBC), notwithstanding the severe "difficulty" of entering the markets alleged in the complaint.<sup>29</sup> Obviously, the incentives to buy programming from an independent vendor are diminished (all else held constant) when a distributor integrates vertically into programming. This is true whether the integration is procompetitive or anticompetitive on net, and whether the integration occurs via merger or via *de novo* entry.<sup>30</sup> I could no more support a must-carry provision for TW as a result of its acquisition of CNN than I could endorse a similar requirement to remedy the "anticompetitive consequences" of *de novo* integration by TW into the news business.

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<sup>28</sup> The order (§ IX(A)) requires that TW execute a program service agreement with at least one "Independent Advertising-Supported News and Information National Video Programming Service," which in turn is defined (§ I(Q)) as a service that offers "24-hour per day service consisting of current national, international, sports, financial and weather news and/or information . . ." This definition is inherently arbitrary: why does the service have to be "advertising-supported," and why does it have to offer "weather news"? Moreover, the provision has the effect (perhaps intentional) of excluding program services such as C-SPAN and C-SPAN2 -- programming services that are devoted entirely to covering "national and international news" but are not advertising-supported and do not tell their viewers whether it is going to rain tomorrow.

<sup>29</sup> Moreover, according to the logic of the complaint, Fox's inability to obtain carriage on TW's systems -- TW apparently intends to carry MSNBC instead, at least on its Manhattan cable system -- should induce Fox to cease or curtail operations, as it seemingly would have few prospects for long-term survival absent carriage on TW's systems. That Fox apparently has not withered according to the complaint's logic suggests either (1) that Fox irrationally continues to spend money on a lost cause or (2) that carriage on TW's systems -- although obviously highly desirable for a new programming service -- is not essential to its survival. (A third alternative is that Fox expects to prevail in its litigation with TW, in which Fox contends that TW had made a premerger contractual commitment to provide Fox with carriage on TW's systems. Such a commitment, if established, would render paragraph IX of the Commission's order unnecessary.)

<sup>30</sup> The premise inherent in this provision of the order is that TW can "foreclose" independent programming entry independently (*i.e.*, without the cooperation of TCI, whose incentives to sponsor independent programming are ostensibly preserved by the stock ownership cap contained in paragraphs II and III of the order). Given that TW has only 17 percent of total cable subscribership, I find this proposition fanciful.

## IN THE MATTER OF

## GENERAL MOTORS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3710. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997*

This consent order prohibits, among other things, a Michigan-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car. The consent order also prohibits the respondent from misrepresenting the existence or amount of any balloon payment or the annual percentage rate for advertised loans.

*Appearances*

For the Commission: *Rolando Berrelez, Sally Pitofsky and Lauren Steinfeld.*

For the respondent: *Catherine Karol*, in-house counsel, Detroit, MI.

## COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation, a corporation ("respondent" or "General Motors"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent General Motors Corporation is a Delaware corporation with its principal office or place of business at 3044 West

Grand Boulevard, Detroit, Michigan. Respondent manufactures vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. Respondent has disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended.

4. 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, 15 U.S.C. 44.

#### LEASE ADVERTISING

5. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for General Motors vehicles, including but not necessarily limited to the attached General Motors Exhibits A through D. General Motors Exhibits A, B, and C are television lease advertisements (attached in video and storyboard format). General Motors Exhibit D is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "All this, just \$299 a month. The S-Blazer 2 year lease."  
[Video:] "2 Years. \$299 a Month. \$1,260 Down." [The advertisement contains the following lease disclosure at the bottom of the screen in light-colored fine print superimposed on gray, moving water background, and accompanied by background sound and images: "SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Example based on \$22,847 MSRP incl. destination charge, 1st month & lease payment \$298.63, \$1260 down payment plus \$325 refundable security deposit for a total of \$1883.63 due at lease signing (incl. capitalized cost reduction). Tax, license, title fees and insurance extra. Mileage charge of 10 [cents] mile over 30,000. GMAC must approve lease. SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Total of monthly payments is \$7,167.12. Payments may be higher in AL, AR, CA, NY, TX, and VA. Option to purchase at lease end for \$16,022.82 is fixed at lease signing and varies by model, equip., level, usage and length of lease. Lessee pays for excessive wear and use." The fine print is displayed on two screens in blocks of at least five lines, each appearing for approximately 5 seconds.] (General Motors Exhibit A).

B. [Audio:] ". . . by leasing an Oldsmobile Achieva with air, anti-lock brakes and more for just \$209 a month."

[Video:] "\$209 per month/\$1075 Down."

[The advertisement contains the following lease disclosure at the bottom of the screen in white print superimposed over a light-colored moving background, and accompanied by background sound and images: "FIRST MONTH'S LEASE PAYMENT OF \$208.72, REFUNDABLE SECURITY DEPOSIT OF \$225 AND A \$1,075 CAPITALIZED COST REDUCTION FOR A TOTAL OF \$1,508.72 DUE AT LEASE SIGNING. TAX, LICENSE, TITLE, FEES, AND INSURANCE ARE EXTRA. GMAC MUST APPROVE LEASE. EXAMPLE BASED ON ACHIEVA S SEDAN: \$15,164 M.S.R.P., INCLUDING DESTINATION CHARGE. MONTHLY PAYMENTS BASED ON CAPITALIZED COST OF \$13,225.88 INCLUDING CAPITALIZED COST REDUCTION. TOTAL OF 48 MONTHLY PAYMENTS IS \$10,018.56. AMOUNT OF CAPITALIZED COST REDUCTION MAY BE SLIGHTLY HIGHER IN AL, AR, CA, NY, TX, AND VA. OPTION TO PURCHASE AT LEASE END FOR \$6,030.64. MILEAGE CHARGE OF 10 [CENTS] PER MILE OVER MILEAGE LIMIT. LESSEE PAYS FOR EXCESSIVE WEAR AND USE. PAYMENT BASED ON RESIDUALS IN EFFECT THROUGH MARCH 31, 1993. SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS." The fine print is displayed on two screens in blocks of at least 6 lines, each block appearing for approximately 4 seconds. The two screens containing this information are interrupted by two other screens that do not contain lease information.] (General Motors Exhibit B).

C. [Audio:] "And, it's all only \$289 a month."

[Video:] "\$289 36 MONTH GMAC SMARTLEASE"

[The advertisement contains a lease disclosure that describes additional lease costs and terms, including but not limited to a downpayment, a security deposit, a purchase option amount and other lease-end fees in an extremely small, blurred, dark blue print, superimposed over the dark-colored front of the advertised vehicle.

The fine print is displayed in a block of approximately 13 lines for approximately 2.5 seconds.] (General Motors Exhibit C).

D. "Two Summers, Two Winters, Two Springs, Two Falls. \$299 A Month."

[Bold but smaller]: "The S-Blazer 2-Year Lease. \$299 A Month. \$1350 Down." [The advertisement contains the following lease disclosure below a picture of the vehicle in white fine print superimposed over a black background: "\$299/month 24-month lease at participating dealers. Tax, license, title fees and insurance extra. Mileage charge of 10 cents per mile over 30,000. . . . \$23,075 M.S.R.P., including destination charge. First month's lease payment of \$298.45, \$1350 down payment, plus \$325 refundable security deposit for a total of \$1973.45 due at lease signing (includes capitalized cost reduction). Total of monthly payments is \$7162.80. . . . Option to purchase at lease end for \$16,173.30. . . . Lessee pays for excessive wear and use. . . ." (General Motors Exhibit D).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

6. Through the means described in paragraph five, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

7. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph six was, and is, false or misleading.

8. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY  
IN LEASE ADVERTISING

9. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a General Motors vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

10. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND  
REGULATION M VIOLATIONS

11. Respondent's lease advertisements, including but not necessarily limited to General Motors Exhibits A through D, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a

statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

12. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to General Motors Exhibits A, B, and C, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds and images, and/or over a moving background. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to General Motors Exhibit D, are also not clear and conspicuous because they appear in small type.

13. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

#### CREDIT ADVERTISING

14. Respondent has disseminated or has caused to be disseminated credit sale advertisements ("credit advertisements") for General Motors vehicles, including but not necessarily limited to General Motors Exhibits E and F. General Motors Exhibits E and F are television credit advertisements (attached in video and storyboard format). These advertisements contain the following statements:

A. [Audio:] "Then we told them that Jimmy was only \$299 a month with a GMAC SmartBuy. [Consumer #6:] \$299 a month? [Consumer #7:] \$299 a month -- that's great. [Consumer #8:] A Jimmy like this for \$299 a month would be fantastic."

[Video:] "\$299 a month 36-Month GMAC SmartBuy."

[The advertisement contains the following credit disclosure in white print superimposed on a light-colored background, and accompanied by background sound and images: "Example based on Jimmy MSRP of \$20,498. 6.9% APR GMAC SMARTBUY FINANCING. For 36 months, 35 months at \$299.38 per month and final payment of \$9441.94. \$3350 down, actual down payment may vary. Tax, license, title fees and insurance extra. Purchaser may refinance the final payment, or with 30 days advance written notice sell the vehicle to GMAC at end of term and pay \$250 disposal fee plus any excess mileage and wear charges. Dealer financial participation may affect consumer cost. See your participating dealer for qualification details. You must take retail delivery out of dealer stock by 9/22/93." The fine print is displayed in a scrolling format of 11 lines for approximately 4 seconds.] (General Motors Exhibit E).

B. [Audio:] "Still waiting to buy a new Buick? Well don't. Buick's Model Year Close-Out is on. . . . Or get this great SmartBuy payment."  
[Video:] "Still waiting to buy a new Buick? Well Don't. Buick's 1995 Model Year Close-Out. . . . Buick Regal SmartBuy \$249 per month 30 months/\$2000 down."  
[The advertisement contains the following credit disclosure at the bottom of the screen in white print superimposed on a black background with a moving vehicle above the disclosure block and accompanied by background sound: "For cash back, you must take retail delivery from dealer stock by 11/30/95. SmartBuy on 1995 Regal Custom SE with 3800 engine. \$20,853 MSRP incl. destination charge for a monthly payment of \$248.67/mo. 30 mo. \$2000 cash down or trade-in value (\$3500 down payment less \$1500 customer cash back). First month's payment plus down payment trade-in value for total of \$3746.67 due at lease signing. Payment based on capitalized cost of \_\_\_\_\_. Tax, title, license, doc. fee extra. Must take retail delivery from dealer stock by October. 4, 1995. GMAC must approve the SmartBuy. Options at contract maturity: pay the final payment of \$11,677.68, refinance the final payment with GMAC, sell the vehicle to GMAC and remit \$250 disposal fee plus 15 cents/mile for mileage exceeding 30,000 miles for excessive wear and use. See participating Buick dealers for qualification details." The fine print is displayed in a scrolling format of 11 lines for approximately 4 seconds.] (General Motors Exhibit F).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT IV: MISREPRESENTATION IN CREDIT ADVERTISING

15. Through the means described in paragraph fourteen, respondent has represented, expressly or by implication, that consumers can buy the advertised General Motors vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down."

16. In truth and in fact, consumers cannot buy the advertised General Motors vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." Consumers are also responsible for a final balloon payment of several thousand dollars to purchase the advertised vehicles. Therefore, respondent's representation as alleged in paragraph fifteen was, and is, false or misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT V: FAILURE TO DISCLOSE ADEQUATELY  
IN CREDIT ADVERTISING

18. In its credit advertisements, respondent has represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the credit offer, including but not necessarily limited to a final balloon payment of several thousand dollars and the annual percentage rate. The existence of these additional terms would be material to consumers in deciding whether to buy a General Motors vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

19. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT VI: TRUTH IN LENDING ACT AND  
REGULATION Z VIOLATIONS

20. Respondent's credit advertisements, including but not necessarily limited to General Motors Exhibits E and F, state a monthly payment amount and/or an amount "down." The credit disclosures in these advertisements contain the following terms required by Regulation Z: the annual percentage rate and the terms of repayment.

21. The credit disclosures in respondent's television credit advertisements, including but not necessarily limited to General Motors Exhibits E and F, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, in a rapid scrolling format, and/or with background sounds.

22. Respondent's practices violate Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended.

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## EXHIBIT A

## General Motors Exhibit A

## VIDEO

(Black and white scene of man fishing. Red Blazer on rocks.)

[Super]:

Two Summers

Two Winters

Two Springs

Two Falls

[Super]:

All This

[Super]:

2 Years. \$299 a Month.

\$1,260 Down.

[Disclosure\*]

\*[First Screen]:

SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Example based on \$22,847 MSRP incl. destination charge, 1st month & lease payment \$298.63, \$1260 down payment plus \$325 refundable security deposit for a total of \$1883.63 due at lease signing (incl. capitalized cost reduction). Tax, license, title fees and insurance extra. Mileage charge of 10 [cents] mile over 30,000. GMAC must approve lease.

[Second Screen]:

SEE YOUR PARTICIPATING DEALER FOR QUALIFICATION DETAILS. Total of monthly payments is \$7,167.12. Payments may be higher in AL, AR, CA, NY, TX, and VA. Option to purchase at lease end for \$16,022.82 is fixed at lease signing and varies by model, equip., level, usage, and length of lease. Lessee pays for excessive wear and use.

## AUDIO

(Background sound throughout)

Two Summers

Two Winters

Two Springs

Two Falls

All this, just \$299 a month.

The S-Blazer 2 year lease.

Why drive an imitation when you can drive the vehicle that originated the species?

Chevy S-Blazer

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Complaint

## EXHIBIT B

## General Motors Exhibit B

## VIDEO

[Title Card]:  
Party On, Dude

(Running shot of Achieva S Sedan)

[Super]:  
\$209 per month/\$1075 Down

[Disclosure\*]

[Title Card]:

Excellent

[Title Card]:

Major Bummer

(Running shot of Achieva S Sedan)

[Super]:  
\$209 a month/\$1075 Down.

[Disclosure\*\*]

[Title Card]:

Most Excellent

[Title Card]:

Demand Better

[Title Card]:

Achieva by Oldsmobile

\* FIRST MONTH'S LEASE PAYMENT OF \$208.72, REFUNDABLE SECURITY DEPOSIT OF \$225 AND A \$1,075 CAPITALIZED COST REDUCTION FOR A TOTAL OF \$1,508.72 DUE AT LEASE SIGNING. TAX, LICENSE, TITLE, FEES, AND INSURANCE ARE EXTRA. GMAC MUST APPROVE LEASE. EXAMPLE BASED ON ACHIEVA S SEDAN: \$15,164 M.S.R.P., INCLUDING DESTINATION CHARGE.

MONTHLY PAYMENTS BASED ON CAPITALIZED COST OF \$13,225.88 INCLUDING

\*\* CAPITALIZED COST REDUCTION TOTAL OF 48 MONTHLY PAYMENTS IS \$10,018.56. AMOUNT OF CAPITALIZED COST REDUCTION MAY BE SLIGHTLY HIGHER IN AL, AR, CA,

## AUDIO

(Background music throughout)

[Announcer]:  
If your team wins tonight, you'll  
wanna celebrate.

Like by leasing an Oldsmobile  
Achieva with air, anti-lock brakes  
and more for just \$209 a month.

Of course, if your team loses, you'll  
probably be depressed, in which case  
you'll want to console yourself.  
Like by leasing an Oldsmobile  
Achieva for just \$209 a month.

It's your choice.

NY, TX, AND VA. OPTION TO PURCHASE AT LEASE END FOR \$6,030.64. MILEAGE CHARGE OF 10 [CENTS] PER MILE OVER MILEAGE LIMIT. LESSEE PAYS FOR EXCESSIVE WEAR AND USE. PAYMENT BASED ON RESIDUALS IN EFFECT THROUGH MARCH 31, 1993.

See your participating dealer for qualification details.

### EXHIBIT C

#### General Motors Exhibit C

#### VIDEO

(Consumer standing in front of Jimmy)

[Super and scrolling]:  
1993 GMC Jimmy 4-Wheel Drive  
Air Conditioning Automatic  
Transmission AM/FM Stereo  
Cassette Power Steering Power  
Windows Power Door Locks

[Super]:  
4 Wheel Anti-Lock Brakes

[Super and scrolling]:  
4.3 Liter V6 Engine Fully  
Independent Front Suspension

[Super]:  
\$289 for 36 Month GMAC  
SmartLease

#### AUDIO

(Background music throughout)

[Announcer]:  
What would it take to get you to  
look at a GMC Jimmy?

[Consumer]:  
Compared to what?

[Announcer]:  
Ford Explorer.

[Consumer]:  
Okay Shoot.

This GMC Jimmy comes with 4-  
wheel drive, air, automatic  
transmission, AM/FM cassette,  
power steering, power windows and  
locks.

[Consumer]:  
Gimme more.

[Announcer]:  
The GMC Jimmy has 4 wheel anti-  
lock brakes, also standard.

[Consumer]:  
No kidding?

[Announcer]:  
And this GMC Jimmy comes with  
standard with a 4.3 Liter V6 and an  
independent suspension. Explorer?  
doesn't have it.

[Announcer]:  
And it's all only \$289 a month.

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[Disclosure\*]

\* A down payment of \$1,562.90, plus first month's lease payment of \$289.00 and \$300 refundable security deposit for a total of \$2,151.90 due at lease signing. Tax, license, title fees and insurance extra. You must take retail delivery out of dealer stock by 12/31/92. GMAC must approve lease. Example based on 1993 Jimmy with an MSRP of \$23,661 including destination charge. Total of 36 monthly payments is \$10,404. Option to purchase at lease for \$13,274. Mileage charge of 10 cents per mile over 45,000 miles. Lessee pays for excessive wear and use. See your participating dealer for qualification details. Manufacturer's rebate not available under this program.

[Note: GM did not provide a storyboard for this advertisement and the disclosure in this ad were indecipherable when viewed on television. Therefore, staff used a storyboard from a virtually identical advertisement to fill in some of the indecipherable terms.]

[Consumer]:

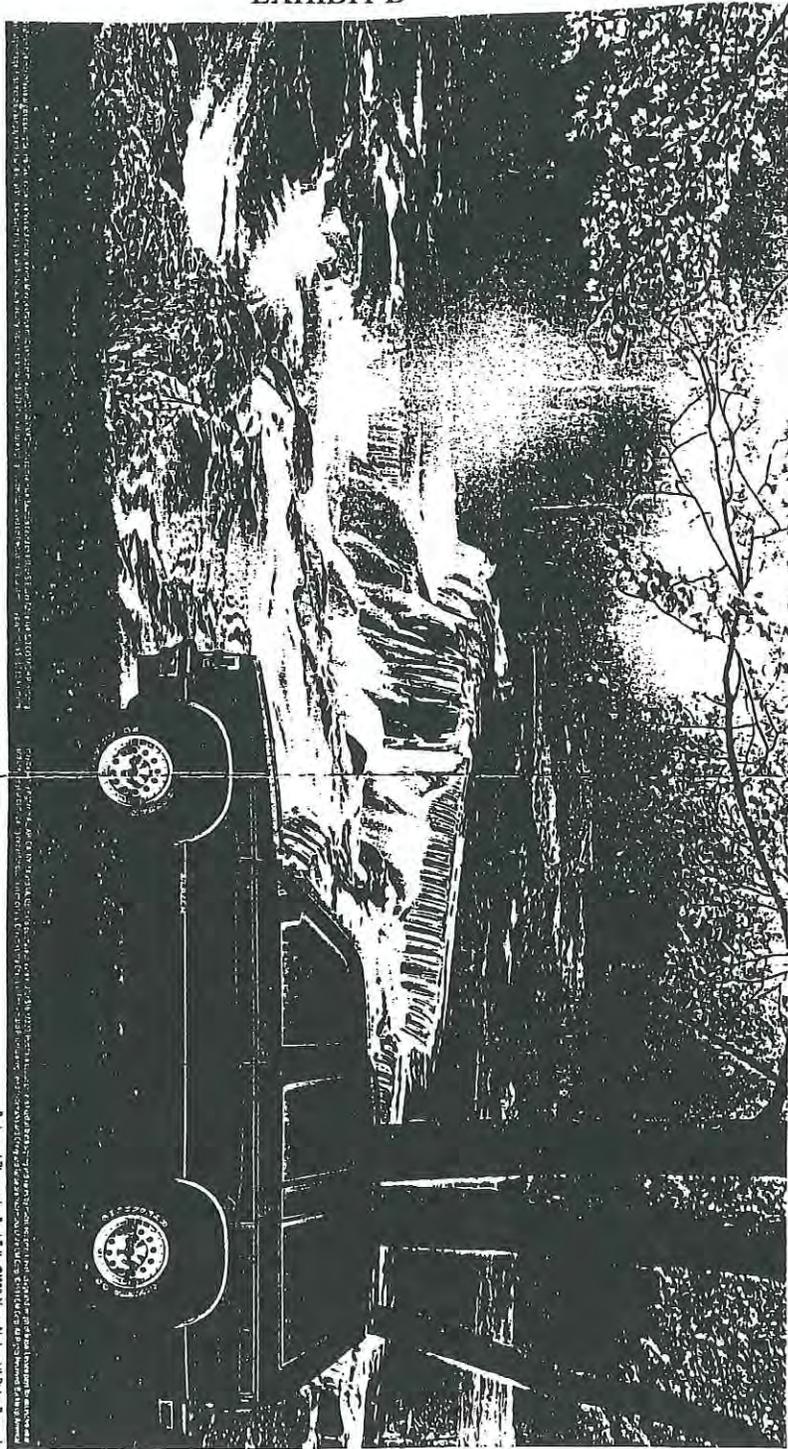
Forget Ford, GMC Jimmy is the only way to go.

[Announcer]:

See your GMC truck dealer today.

EXHIBIT D

TWO SUMMERS, TWO WINTERS, TWO SPRINGS, TWO FALLS. \$299 A MONTH.



The S-Blazer 2-Year Lease, \$299 A Month, \$1350 Down.  
 Whatever said, "You only go around once," was wrong. With  
 the S-Blazer 2-Year Lease Plan, you go around twice. Two  
 glorious years of travel and adventure in a '94 Chevy.

S-Blazer Takes 4x4 With a 200-HP V-6, electronic anti-  
 lock transmission, push-button 4WD, aluminum wheels,  
 air, and power windows and locks. S-Blazer is not just

any other vehicle that's well equipped to go anywhere, do anything.  
 S-Blazer gives you all this, and after just two years, it gives you  
 something that's new to lease your freedom. Make the most

two years the best years of your life. **S-BLAZER**  
 Spend them in a Chevy S-Blazer.  
 The vehicle that originated the species. **CHEVROLET**

GENERAL MOTORS  
EXHIBIT D

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## EXHIBIT E

## General Motors Exhibit E

## VIDEO

(Potential consumers standing in front of Jimmy at shopping mall)

[Super]:  
GMC Jimmy

[Super]:  
3-Year 36,000 Mile No Deductible Warranty  
[smaller type]:  
See your GMC Truck dealer for terms of this limited warranty

[Super]:  
\$299 a month 36-month GMAC SmartBuy

[Disclosure, scrolling\*]  
\* Example based on Jimmy MSRP of \$20,498. 6.9% APR GMAC SMARTBUY FINANCING. For 36 months, 35 months at \$299.38 per month and final payment of \$9221.94. \$3350 down, actual down payment may vary. Tax, license, title fees and insurance extra. Purchaser may refinance the final payment, or with 30 days advance written notice sell the vehicle to GMAC at end of term and pay \$250 disposal fee plus any excess mileage and wear charges. Dealer financial participation may affect consumer cost. See your

## AUDIO

(Background music throughout)

[Announcer]:  
We asked folks why they liked the 1993 GMC Jimmy.

[Consumer #1]:  
This is a quality truck.

[Consumer #2]:  
Jimmy's very comfortable.

[Consumer #3]:  
Jimmy has a real sporty look.

[Announcer]:  
We told them about the Jimmy 3-year no deductible warranty.

[Consumer #4]:  
No deductible warranty?

[Consumer #5]:  
No deductible warranty -- you can't beat that.

[Announcer]:  
Then we told them that Jimmy was only \$299 a month with a GMAC Smartbuy.

[Consumer #6]:  
\$299 a month?

[Consumer #7]:  
\$299 month that's great.

[Consumer #8]:  
A Jimmy like this for \$299 a month would be fantastic.

participating dealer for qualification details. You must take retail delivery out of dealer stock by 9/22/93.

## EXHIBIT F

## General Motors Exhibit F

## VIDEO

(Moving footage of Buick)  
[Consumer pointing at title card reading, Super]:  
Still waiting to buy a new Buick?  
[Consumer pointing at title card reading, Super]:  
Well Don't.

(Moving footage of Buick)  
[Consumer sitting on title card letters reading, Super]:

Buick 1995 Model Year Close-Out  
(Moving footage of Buick)

[Woman sitting near title card letters reading, Super]:

\$1500 Cash Back. Buick LeSabre, Roadmaster, Regal, Century, and Skylark.

[Woman sitting near title card letters reading, Super]:

Buick Regal SmartBuy \$249 per month 30 months/\$2000 down.

(Moving footage of Buick)

[Disclosure\*]

[Consumer walking by title card letters reading, Super]:

You're just in time.

\* For cash back, you must take retail delivery from dealer stock by 11/30/95. SmartBuy on 1995 Regal Custom SE with 3800 engine \$20,853 MSRP incl. destination charge for a monthly payment of \$248.67/mo. 30 mo. \$2000 cash down or trade-in value (\$3500 down payment less \$1500 customer cash back). First month's payment plus down payment trade-in value for

## AUDIO

(Background music throughout -- "I can't wait forever. . .")

Still waiting to buy a new Buick?

Well don't.

Buick Model Year Close-Out is on.

Get \$1500 cash back on all these new Buicks.

Or get this great SmartBuy payment.

For the biggest savings of the year.

You're just in time.

Now wouldn't you really rather have a Buick?

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total of \$3746.67 due at lease signing. Payment based on capitalized cost of \_\_\_\_\_. Tax, title, license, doc. fee extra. Must take retail delivery from dealer stock by October 4, 1995. GMAC must approve the SmartBuy. Options at contract maturity pay the final payment of \$11,677.68, refinance the final payment with GMAC, sell the vehicle to GMAC and remit \$250 disposal fee plus 15 cents/mile for mileage exceeding 30,000 miles for excessive wear and use. See participating Buick dealers for qualification details.

## DECISION AND ORDER

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

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

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

1. Respondent General Motors Corp. is a Delaware corporation with its principal office or place of business at 3044 West Grand Boulevard, Detroit, Michigan.

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

## ORDER

## DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean:

1) Video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease inception*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. "*Balloon payment*" as used herein shall mean any scheduled payment with respect to a consumer credit transaction that is at least twice as large as the average of earlier scheduled payments.

4. Unless otherwise specified, "*respondent*" as used herein shall mean General Motors Corp., its successors and assigns, and its officers, agents, representatives, and employees.

5. "*In or affecting commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

## II.

*It is further ordered*, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, \_\_\_\_ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

## III.

*It is further ordered*, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

## IV.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or

indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the existence and amount of any balloon payment or the annual percentage rate.

B. State the amount of any payment, including but not limited to any monthly payment, in any advertisement unless the amount of any balloon payment is disclosed prominently and in close proximity to the most prominent of the above statements.

C. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any periodic payment, including but not limited to any monthly payment, or the amount of any finance charge, without disclosing clearly and conspicuously:

1. The amount or percentage of the downpayment;
2. The terms of repayment, including but not limited to the amount of any balloon payment; and
3. The correct annual percentage rate, using that term or the abbreviation "APR," as defined in Regulation Z and the Official Staff Commentary to Regulation Z. If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

V.

*It is further ordered*, That respondent General Motors Corp., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

VI.

*It is further ordered*, That respondent General Motors Corp., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising

agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

## VII.

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

## VIII.

*It is further ordered,* That respondent General Motors Corp., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IX.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an

accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

## AMERICAN HONDA MOTOR CO., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3711. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997*

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

*Appearances*

For the Commission: *Rolando Berrelez, Sally Pitofsky and Lauren Steinfeld.*

For the respondent: *Richard Feinstein, McKenna & Cuneo, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that American Honda Motor Co., Inc., a corporation ("respondent" or "Honda"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, and the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Honda Motor Co., Inc. is a California corporation with its principal office or place of business at 1919 Torrance Boulevard, Torrance, California. Respondent manufactures and distributes vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

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, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Honda vehicles, including but not necessarily limited to the attached Honda Exhibits A through C. Honda Exhibits A and B are television lease advertisements (attached hereto in video and storyboard format). Honda Exhibit C is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "Here's what you might put down on a typical car lease [\$1750]. At Honda, however, we had a different idea. We took our fully equipped 1995 Accord LX and lowered the downpayment to some rather nice round numbers. [pause] The zero down, short-term lease from your Honda dealer. Zero down and \$289 a month for 30 months."

[Video:] [View of an odometer set on \$1750 that rolls down to \$0000] "The \$0 Down Lease. The Accord LX \$0 Down \$289/30 months" [The advertisement contains the following lease disclosure in white print superimposed on a black background and accompanied by background sound: ". . . Advertised rate based on 30-mo. closed-end lease for 1995 Honda Accord 4-Door LX w/Automatic Trans.(Model CD583S). MSRP \$18,880 (includes destination) with dealer cap. cost reduction of \$620.50. DEALER PARTICIPATION MAY AFFECT ACTUAL PAYMENT. Taxes, title, lic. & reg., ins., opt. equip. & services not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest \$25 increment & applicable title, lic., reg. fee & tax. Total monthly payments \$8,670 + applicable tax. Opt. to purchase at lease end for \$12,548.50 + tax + official fees, except in NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than \$400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear and use. Mi. charge of \$.15 [cents]/mi. over 12,000 mi./year. MSRP, dealer cap. cost reduction & opt. to purchase differ slightly in CA. . . ." The fine print is displayed on two screens, each containing a block of ten lines, each block appearing for approximately three seconds.] (Honda Exhibit A).

B. [Audio:] "Now we've made the process of driving your own Accord just as streamlined. Lease an Accord LX for just \$239 a month."

[Video:] "\$239 a Month, 36 Months, \$1500 Down." [The advertisement contains the following lease disclosure at the top of the screen in white print superimposed on a black background and accompanied by background sound: ". . . Advertised rate based on 36-month closed-end lease for the 1994 Accord LX Sedan with MSRP of \$18,330.00 with a dealer capitalized cost reduction of \$795.35 (\$965.35

in IL, IN, KS, ME, NY, OK, and UT where no security deposit is required); condition of dealer participation may affect actual rate. Taxes, title, license, and registration, insurance and optional equipment, and services not included. Due at lease signing are \$1,500.00 down-payment, first lease payment, refundable deposit equal to one payment rounded to the next highest \$25.00 increment where applicable, title, license and registration fee, and tax as applicable. Total monthly payment is \$8,604.00 (plus tax, as applicable). Option to purchase at end of lease for \$10,061.50 plus tax and official fees, except in MS, NY, and SD where no option available. Lessee pays maintenance, insurance, repairs, service, any and all related taxes, registration renewals, and excessive wear and use. Mileage charge of \$.15/mile over 15,000 miles per year. A disposition fee up to \$400.00 is due if vehicle not purchased at end of lease term. . . ." The fine print is displayed on three screens, each containing a block of eight lines, each block appearing for approximately three seconds.] (Honda Exhibit B).

C. "INTRODUCING ZIP, ZERO, NADA.

Civic LX \$229 per month/30 months

Accord LX \$289 per month/30 months

Passport 4WDLX \$389 per month/30 months

The \$0 down lease. Now, for a limited time, you can get an affordable, short-term lease on a fully equipped Honda for zero (as in zip, as in nada) dollars down . . . ." [The advertisement contains the following lease disclosure at the bottom of the page in small print:

". . . Taxes, title, lic. & reg., ins., opt. equip. & services not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest \$25 increment (except where no security dep. is collected) & applicable title, lic., reg. fee & tax. Total monthly payments \$6,870 for the Civic LX Sedan, \$8,670 for the Accord LX Sedan and \$11,670 for the Passport 4WD LX + applicable tax. Opt. to purchase at lease end for \$9,681.50 for the Civic LX Sedan, \$12,649.60 for the Accord LX Sedan and \$15,879.50 for the Passport 4WD LX + tax + official fees, except in MS, NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than \$400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear & use. Mi. Charge of 15[cents]/mi. over 12,000 mi/yr. . . ." ] (Honda Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements, including but not necessarily limited to "\$0 down," is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated

as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or the amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Honda vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Honda Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

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11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Honda Exhibits A and B, are not clear and conspicuous because they appear on the screen in small type for a very short duration. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Honda Exhibit C, are not clear and conspicuous because they appear in small type.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

## EXHIBIT A

## Honda Exhibit A

## VIDEO

(Open with view of odometer and Accord LX Sedan)  
(Odometer reads \$1750)

(Engine starts revving)  
(Odometer starts to scroll down)  
[Super]:  
The \$0 Down Lease.  
From your Honda dealer.

(Odometer reads \$0000)  
[Super]:  
The Accord LX \$0 Down \$285/30 months  
(View Disclosure\*)  
Leadership Leasing

\* [First screen]:  
SUBJECT TO LIMITED AVAILABILITY.  
Avail. thru January 5, 1995 at participating Honda dealers to approved lessees by American Honda Finance Corp. Advertised rate based on 30-mo. closed-end lease for 1995 Honda Accord 4-Door LX w/Automatic Trans. (Model CD5838.) MSRP \$18,880 (includes destination) with dealer cap. cost reduction of \$620.50  
DEALER PARTICIPATION MAY AFFECT ACTUAL PAYMENT. Taxes, title, lic. & reg., ins., opt. equip. & services

## AUDIO

(Background music throughout)

Here's what you might put down on a typical car lease.

At Honda, however, we had a different idea. We took our fully equipped 1995 Accord LX and lowered the downpayment to some rather nice round numbers.

The zero down short-term lease from your Honda dealer.  
\$0 down and \$289 a month for 30 months.

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not included. Due at lease signing are 1st mo.'s lease payment, refundable security dep. equal to 1 mo.'s payment rounded to the next highest \$25 increment & applicable title, lic.,

[Second screen]:

reg. fee & tax. Total monthly payments \$8,670 + applicable tax. Opt. to purchase at lease end for \$12,548.50 + tax & official fees, except in NY & SD where no purchase opt. avail. If not purchased at lease end, customer returns vehicle & pays a disp. fee of no more than \$400. Lessee pays maint., ins., repairs, service, all related taxes, reg. renewals, excessive wear and use. Mi. charge of \$.15 [cents] /mi. over 12,000 mi./year. MSRP, dealer cap. cost reduction & opt. to purchase differ slightly in CA. This offer may not be available in conjunction with any other advertised offer. See your participating Honda dealer for details.

## EXHIBIT B

### Honda Exhibit B

#### VIDEO

(Open with view of white stream and view of Accord LX)

[Super]:

\$239 a Month, 36 Months, \$1500 Down.

(View Disclosure\*)

We Won. You Win. A Car Ahead.

\*[First screen]:

#### AUDIO

(Background music throughout)  
Motor Trend calls it the most fuel-efficient, the best performing, the quietest, the strongest, and the safest Accord we've ever built. And they named us Motor Trend Import Car of the Year.

Now we've made the process of driving your own Accord just as streamlined.

Lease an Accord LX for just \$239 a month. Leadership leasing from Honda.

We Won. You Win.

Available through 2/28/94, at participating Honda dealers to qualified lessees approved by American Honda Fin. Corp. Subject to availability. Advertised rate based on 36-month closed-end lease for the 1994 Accord LX Sedan with MSRP of \$18,330.00 with a dealer capitalized cost reduction of \$795.35 (\$965.35 in IL, IN, KS, ME, NY, OK and UT where no security deposit is required); condition of dealer participation may affect actual rate. Taxes, title, license, and

[Second screen]:

registration, insurance and optional equipment, and services not included. Due at lease signing are \$1,500.00 down-payment, first lease payment, refundable deposit equal to one payment rounded to the next highest \$25.00 increment where applicable, title, license and registration fee, and tax as applicable. Total monthly payment is \$8,604.00 (plus tax, as applicable). Option to purchase at end of lease for \$10,061.50 plus tax and official fees, except in MS, NY, and

[Third screen]:

SD where no option available. Lessee pays maintenance, insurance, repairs, service, any and all related taxes, registration renewals, and excessive wear and use. Mileage charge of \$.15/mile over 15,000 miles per year. A disposition fee up to \$400.00 is due if vehicle not purchased at end of lease term. MSRP, dealer capital cost reduction, and option-to-purchase price differ in AK, CA and HI. See participating Honda dealers for details.



## DECISION AND ORDER

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

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

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

1. Respondent American Honda Motor Co., Inc. is a California corporation with its principal office or place of business located at 1919 Torrance Boulevard, Torrance, California.

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

## ORDER

## DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease inception*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, "*respondent*" as used herein shall mean American Honda Motor Co., Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*In or affecting commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

## II.

*It is further ordered*, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, \_\_\_\_\_ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

## III.

*It is further ordered*, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

## IV.

*It is further ordered*, That respondent American Honda Motor Co., Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make

available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

V.

*It is further ordered,* That respondent American Honda Motor Co., Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

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

VII.

*It is further ordered,* That respondent American Honda Motor Co., Inc., and its successors and assigns, shall within one hundred and

twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

## IN THE MATTER OF

## AMERICAN ISUZU MOTORS INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3712. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997*

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

*Appearances*

For the Commission: *Rolando Berrelez, Sally Pitofsky and Lauren Steinfeld.*

For the respondent: *Randy Reiser, David & Gilbert, New York, N.Y.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that American Isuzu Motors Inc., a corporation ("respondent" or "Isuzu"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Isuzu Motors Inc. is a California corporation with its principal office or place of business at 2300 Pellissier Place, Whittier, California. Respondent distributes Isuzu vehicles.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and

"consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

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, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Isuzu vehicles, including but not necessarily limited to the attached Isuzu Exhibits A through C. Isuzu Exhibits A through C are television lease advertisements (attached in video and storyboard format). These advertisements contain the following statements:

A. [Audio:] "Hey, hey, hey, hey. What the heck does this mean? Very simply, it means for \$999 down, you can lease a brand new Trooper for only \$319 a month."

[Video:] "THE TROOPER LEASE EXPLAINED. [highlighted in yellow]. \$319 MONTH FOR 24 MONTHS. \$999 CUSTOMER CAPITALIZED COST REDUCTION. [highlighted in yellow]."

[The advertisement contains the following lease disclosure which appears on the screen for a brief duration, in a scrolling format, interrupted or obscured by other images, and accompanied by background sound: "\*ADVERTISED PAYMENT APPLICABLE TO 4WD TROOPER S MODEL MANUAL TRANSMISSION ONLY. First month's payment of \$319 plus a refundable Security Deposit of \$350 (or a non-refundable last month's payment in IL, IN, KS, ME, and NY) plus a customer down payment of \$999 for a total of \$1,668 due at lease signing. Based on a 24 month low mileage closed-end lease offered to qualified customers by GE Capital Auto Lease through participating dealers through June 30, 1994 -- Subject to availability. Prices based on \$23,000 MSRP and capitalized cost of \$20,075 for a 1994 model Isuzu Trooper S with manual transmission including destination charges and a dealer capitalized cost reduction of \$2,376, excluding taxes, registration, title, license, dealer prep, options and other charges. Prices/monthly payments may vary. 24 monthly payments total \$7,660 plus tax as applicable. Option to purchase at lease end for \$14,030 plus a \$250 purchase option fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear and mileage charges of up to .15 cents per mile over 24,000 miles at lease end. Program not available in Alaska. 800-726-9200. See your participating Isuzu dealer for details." (Isuzu Exhibit A).

B. [Audio:] "Okay. It says here for \$1,999 down you can lease a Trooper LS with standard dual airbags for just \$339 a month."

[Video:] "THE TROOPER LEASE . . . \$1,999 CUSTOMER CAPITALIZED COST REDUCTION. \$339/MONTH FOR 30 MONTHS." [Index finger points to bolded text while hand moves across remaining text on screen].

[The advertisement contains the following lease disclosure which appears on the screen for a brief duration, in a scrolling format, interrupted or obscured by other images, and accompanied by background sound: "First month's payment of \$339, a refundable Security Deposit of \$350 (or a non-refundable last month's payment of \$339, in IL, IN, KS, ME, and NY) and a customer capitalized cost reduction of

\$1,999 for a total of \$2,688 due at lease signing. Total monthly payments: \$10,170. Taxes, license, title fees, options and insurance are extra. 30 month, closed-end lease example based on \$30,425 MSRP (includes destination charge), a dealer capitalized cost reduction of \$2,995 and a total capitalized cost of \$25,926. Your payments may be higher or lower. Option to purchase at lease end for \$19,472 plus \$250 purchase option fee. Mileage charge of \$.15 per mile over 30,000 miles. Lessee pays excessive wear and use. You must take retail delivery out of dealer stock by July 10, 1995. Program not available in Alaska. 800-726-9200. See your participating dealer for details." (Isuzu Exhibit B).

C. [Audio:] "Now you can drive off-road without getting soaked. The Rodeo Lease. See your dealer for details."

[Video:] "\$249/MO. The 1993 Rodeo Lease."

[The advertisement contains the following lease disclosure in white fine print superimposed over a black background and accompanied by background sound: "ADVERTISED PAYMENT APPLICABLE TO THE RODEO S MODEL ONLY. OPTIONAL EQUIPMENT SHOWN. First month's payment of \$249 plus refundable security deposit of \$249 (or non-refundable last month's payment in IL, IN, KS, ME and NY), plus a customer capitalized cost reduction of \$1,000 for a total of \$1,498 due at lease signing. Based on a 36-month closed-end lease offered to qualified consumers by GE Capital Auto Lease through participating dealers through 3/31/93. Subject to availability. Prices based on \$ \_\_\_ MSRP and a capitalized cost of \$ \_\_\_ for a 1993 Isuzu Rodeo \_\_\_ with manual transmission, including destination charges, excluding taxes, registration, title, license, dealer prep., options and charges. Dealer \_\_\_ monthly payments may vary. 36 monthly payments total \$ \_\_\_ plus tax as applicable. Option to purchase at lease end for \$ \_\_\_ plus a \$250 disposition fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear, and mileage charges of up to .15 cents/mile over 45,000 miles at lease end. Lease program not available in Alaska and Hawaii. See your participating Isuzu dealer for details." The fine print is displayed on the screen in a block of print containing 11 lines and appearing on the screen for approximately three seconds.] (Isuzu Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY  
IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease an Isuzu vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND  
REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Isuzu Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Isuzu

Exhibits A and B, are not clear and conspicuous because they appear on the screen for a brief duration, in a scrolling format, accompanied by background sound, and interrupted or obscured by other images. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Isuzu Exhibit C, are not clear and conspicuous because they appear on the screen in small type for a very short duration.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

### EXHIBIT A

#### Isuzu Exhibit A

#### Video

(Open with full-screen text)

[Super]:

THE TROOPER LEASE EXPLAINED  
(highlighted in yellow)

\$319 Month for 24 months

\$999 CUSTOMER CAPITALIZED COST  
REDUCTION (highlighted in yellow)

(Switch to Trooper)

[Super]:

\$319 MONTH FOR 24 MONTHS

(Switch to full-screen text)

Closed-end Lease (highlighted in  
yellow)

(Switch to Trooper)

(Switch to full-screen text)

800-726-9200

(highlighted in yellow)

ISUZU

Practically/Amazing

\*ADVERTISED PAYMENT APPLICABLE  
TO 4WD TROOPER S MODEL MANUAL  
TRANSMISSION ONLY. First month's  
payment of \$319 plus a refundable  
Security Deposit of \$350 (or a non-  
refundable last month's payment in  
IL, IN, KS, ME, and NY) plus a  
customer down payment of \$999 for  
a total of \$1,658 due at lease  
signing. Based on a 24 month low

#### Audio

(Background music throughout)

Hey, hey, hey, hey.

What the heck does this mean?

Very simply, it means for \$999  
down, you can lease a brand new  
Trooper for only \$319 a month.

And what about this convoluted  
muck? It means at the end of the  
lease, you can either buy your  
Trooper at a great price or walk  
away.

And this? It's an 800 number. Don't  
tell me you're watching TV without  
a pencil and paper. Hey, life's an  
adventure. Be prepared.

Complaint

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mileage closed-end lease offered to qualified customers by GE Capital Auto Lease through participating dealers through June 30, 1994 -- Subject to availability. Prices based on \$23,000 MSRP and a capitalized cost of \$20,075 for a 1994 model Isuzu Trooper S with manual transmission including destination charges and a dealer capitalized cost reduction of \$2,376, excluding taxes, registration, title, license, dealer prep, options and other charges. Prices/monthly payments may vary. 24 monthly payments total \$7,660 plus tax as applicable. Option to purchase at lease end for \$14,030 plus a \$250 purchase option fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear and mileage charges of up to .15 cents per mile over 24,000 miles at lease end. Program not available in Alaska. 800-726-9200. See your participating Isuzu dealer for details.

## EXHIBIT B

## Isuzu Exhibit B

## Video

(Open with Trooper driving on desolate stretch of road)

(Switch to full-screen text rapidly scrolling upward while index finger moves rapidly downward)

(Rapid scroll to beginning of text)

[Super]:

THE TROOPER LEASE 1995 4WD  
Trooper LS Model with automatic transmission.

[Super]:

\$1,999 CUSTOMER CAPITALIZED  
COST REDUCTION \$339/MONTH FOR  
30 MONTHS (Index finger points to

## Audio

(Background music throughout)

You know, the hardest part about leasing a vehicle these days is reading the conditions of the lease, I mean, you have to be a speed reader. Whoa. Let's see what we missed.

Okay. It says here for \$1,999 down you can lease a Trooper LS with standard dual airbags for just \$339 a month

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Complaint

bolded text while full text scrolls upward)

(Switch to Trooper)

(Switch to full-screen text)

Option to purchase at lease end for \$19,472 (Index finger points to text)

800-726-9200 (Index finger points to 800 number)

(Switch to view of Trooper)

ISUZU

Practically/Amazing

\*First month's payment of \$339, a refundable Security Deposit of \$350 (or a non-refundable last month's payment of \$339, in IL, IN, KS, ME, and NY) and a customer capitalized cost reduction of \$1,999 for a total of \$2,688 due at lease signing. Total monthly payments: \$10,170. Taxes, license, title fees, options and insurance are extra. 30 month, close-end lease example based on 430,425 MSRP (includes destination charge), a dealer capitalized cost reduction of \$2,995 and a total capitalized cost of \$25,926. Your payments may be higher or lower. Option to purchase at lease end for \$19,472 plus \$250 purchase option fee. Mileage charge of \$.15 per mile over 30,000 miles. Lessee pays excessive wear and use. You must take retail delivery out of dealer stock by July 10, 1995. Program not available in Alaska. 800-726-9200. See your participating dealer for details.

and when the lease is up you can bring the Trooper back or buy it at a really good price.

And this is the all important 800 number. So even if you're not a speed reader, you can always be a speed dialer.

## EXHIBIT C

### Isuzu Exhibit C

#### Video

(Open with Rodeo off-road)

[Super]:

Authorized 4-wheel drive area

[Super]:

\$249/MO.

The 1993 Rodeo Lease

#### Audio

(Background music throughout)

Now you can drive off-road without getting soaked. The Rodeo Lease. See your dealer for details.

(View disclosure\*)  
(View of Rodeo off-road)

## ISUZU

### Practically/Amazing

\* ADVERTISED PAYMENT APPLICABLE TO THE RODEO S MODEL ONLY. OPTIONAL EQUIPMENT SHOWN. First month's payment of \$249 plus refundable security deposit of \$249 (or non-refundable last month's payment in IL, IN, KS, ME and NY), plus a customer capitalized cost reduction of \$1,000 for a total of \$1,498 due at lease signing. Based on a 36-month closed-end lease offered to qualified consumers by GE Capital Auto Lease through participating dealers through 3/31/93. Subject to availability. Prices based on \$\_\_\_ MSRP and a capitalized cost of \$\_\_\_ for a 1993 Isuzu Rodeo \_\_\_ with manual transmission, including destination charges, excluding taxes, registration, title, license, dealer prep., options and charges. Dealer \_\_\_ monthly payments may vary. 36 monthly payments total \$\_\_\_ plus tax as applicable. Option to purchase at lease end for \$\_\_\_ plus a \$250 disposition fee. Lessee pays for maintenance, insurance, repairs, excessive wear and tear, and mileage charges of up to .15 cents/mile over 45,000 miles at lease end. Lease program not available in Alaska and Hawaii. See your participating Isuzu dealer for details.

## DECISION AND ORDER

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

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

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

1. Respondent American Isuzu Motors Inc. is a California corporation with its principal office or place of business located at 2300 Pellissier Place, Whittier, California.

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

## ORDER

## DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease inception*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, "*respondent*" as used herein shall mean American Isuzu Motors Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*In or affecting commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

## II.

*It is further ordered,* That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, \_\_\_\_ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

## III.

*It is further ordered,* That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

## IV.

*It is further ordered,* That respondent American Isuzu Motors Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make

available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

#### V.

*It is further ordered,* That respondent American Isuzu Motors Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

#### VI.

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

#### VII.

*It is further ordered,* That respondent American Isuzu Motors Inc., and its successors and assigns, shall within one hundred and

twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

MITSUBISHI MOTOR SALES OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3713. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997*

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car. The consent order also prohibits the respondent from misrepresenting the existence or amount of any balloon payment or the annual percentage rate for advertised loans.

### *Appearances*

For the Commission: *Rolando Berrelez, Sally Pitofsky and Lauren Steinfeld.*

For the respondent: *Kristi Fischer*, in-house counsel, Cypress, CA.

### COMPLAINT

The Federal Trade Commission, having reason to believe that Mitsubishi Motor Sales of America, Inc., a corporation ("respondent" or "Mitsubishi"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mitsubishi Motor Sales of America, Inc. is a California corporation with its principal office or place of business at

6400 Katella Avenue, Cypress, California. Respondent distributes Mitsubishi vehicles and offers such vehicles for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. Respondent has disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended.

4. 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, 15 U.S.C. 44.

#### LEASE ADVERTISING

5. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Mitsubishi Exhibits A through C. Mitsubishi Exhibits A and B are television lease advertisements (attached in video and storyboard format). Mitsubishi Exhibit C is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "Lease for zero down and just two forty-nine a month for thirty-six months."

[Video:]

"MITSUBISHI GALLANT S \$0 DOWN \$249 A MONTH, 36 MONTHS"

[The advertisement contains the following lease disclosure at the bottom of the screen in dark-colored fine print superimposed on a background of similar shade: "First payment, plus a \$0 down payment and a refundable security deposit of \$250 (in NY, final monthly payment of \$249 in lieu of security deposit) due upon delivery. 36 monthly payments based on MSRP of \$18,043 . . . with a dealer capitalized cost reduction of \$922, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 36-closed month closed-end lease. . . . Total payments: \$8964 Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15[cents]/mile over 36,000 miles and \$350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of \$10,068, plus applicable fees and taxes and purchase option fee of \$150. . . ." The fine print is displayed on three screens,

each containing a block of at least seven lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit A).

B. [Audio:] "Lease for just two forty-nine a month for forty-eight months with a thousand dollars down."

[Video:]

"\$1000 DOWN \$249 A MONTH 48 MONTHS"

[The advertisement contains the following lease disclosure at the bottom of the screen in white fine print superimposed on a dark-colored, moving background and accompanied by background sound and other moving images: "First payment, plus a \$1000 down payment and a refundable security deposit of \$250 (in NY, final monthly payment of \$249 in lieu of security deposit) due upon delivery. 48 monthly payments based on MSRP of \$18,747 . . . with a dealer capitalized cost reduction of \$1,289, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 48-month closed-end lease. . . . Total payments: \$11,952 Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15 [cents]/mile over 60,000 miles and \$350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of \$8,436, plus applicable fees, taxes and purchase option fee of \$150. . . ." The fine print is displayed on three screens, each containing a block of seven lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit B).

C. "\$0 Down Plus \$500 CASH BACK\* Now, Lease for 36 Months or Buy a Galant S\* LEASE OR BUY \$0 DOWN \$249 A MONTH"

[The advertisement contains the following lease disclosure at the bottom of the page in small print:

". . . \*\*First payment, plus a \$0 down payment and a refundable security deposit of \$250 (in NY, final monthly payment of \$249 in lieu of security deposit) due upon delivery. 36 monthly payments based on MSRP of \$18,043 for a Galant S with automatic transmission (FOG A88), with a dealer capitalized cost reduction of \$922, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 36-month closed-end lease rounded to the nearest dollar. Total payments: \$8,964. Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15 [cents]/mile over 36,000 miles and \$350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of \$10,068, plus applicable fees and taxes and purchase option fee of \$150. . . ."] (Mitsubishi Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

6. Through the means described in paragraph five, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

7. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles.

Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment and security deposit, at lease inception. Therefore, respondent's representation as alleged in paragraph six was, and is, false or misleading.

8. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

9. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These lease advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit and first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease a Mitsubishi vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

10. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

11. Respondent's lease advertisements, including but not necessarily limited to Mitsubishi Exhibits A through C, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount

or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

12. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Mitsubishi Exhibits A and B, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds or images, and/or over a moving background. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Mitsubishi Exhibit C, are not clear and conspicuous because they appear in small type.

13. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

#### CREDIT ADVERTISING

14. Respondent has disseminated or has caused to be disseminated credit sale advertisements ("credit advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Mitsubishi Exhibits C, D, and E. Mitsubishi Exhibits D and E are television credit advertisements (attached in video and storyboard format). Mitsubishi Exhibit C, described above, is also a print credit advertisement. These advertisements contain the following statements:

A. [Audio:] "Buy a new Galant ES with automatic transmission and air conditioning for seven hundred fifty dollars down and one ninety-nine a month." [Video:] "\$199 a mo. \$750 down/Auto. Transmission Air conditioning. [The advertisement contains the following credit disclosure at the bottom of the screen in light-colored fine print superimposed on a light-colored, moving background with background sounds and images: "Example based on MSRP of \$18,300 and a selling price of \$16,764 for a Galant ES (FOG A83). \$750 down. 5.15% APR Diamond Advantage Plan financing for 60 months: 59 months at \$199 per month and a FINAL PAYMENT OF \$7,320. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra. Under certain conditions you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term . . ." The fine print is displayed on two screens, each containing a block of five lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit D).

B. [Audio:] "Now you can buy a ninety-four Eclipse for one fifty-nine a month with five hundred down." [Video:] "BUY: \$159 a month/\$500 DOWN"

[The advertisement contains the following credit disclosure at the bottom of the screen in white fine print superimposed on a multi-colored, moving background and accompanied by background sound: "Example based on MSRP of \$12,519 and a selling price of \$11,827 for an Eclipse STD M/T (FOG A01). \$500 down. 5.06% APR Diamond Advantage Plan financing for 54 mos.: 53 months at \$159/mo. and a FINAL PAYMENT OF \$4,757. Tax, title, lic., registration, regionally required equipment, dealer options, and charges extra. Under certain conditions you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term. . . ." The fine print is displayed on two screens, each containing a block of five lines, and each block appearing for approximately three seconds.] (Mitsubishi Exhibit E).

C. [Along with the statements described in paragraph five, Exhibit C contains the following credit disclosure at the bottom of the page in small print: " . . . For example: 2.9% APR Diamond Retail Plan financing available for 24 months at \$801 per month for a Galant S with automatic transmission (FOG A88), with a selling price of \$18,043. \$0 down. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra . . . Example based on MSRP of \$18,043 and a selling price of \$17,121 for a Galant S with automatic transmission (FOG A88). \$0 down. 5.53% APR Diamond Advantage Plan financing for 42 months: 41 months at \$249 per month and a FINAL PAYMENT OF \$9,509. Tax, title, license, registration, regionally required equipment, dealer options, and charges extra. Under certain conditions, you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term. . . ." ] (Mitsubishi Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT IV: MISREPRESENTATION IN CREDIT ADVERTISING

15. Through the means described in paragraphs five and fourteen, respondent has represented, expressly or by implication, that consumers can buy the advertised Mitsubishi vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down."

16. In truth and in fact, consumers cannot buy the advertised Mitsubishi vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." Consumers are also responsible for a final balloon payment of several thousand dollars to purchase the advertised vehicles. Therefore, respondent's representation as alleged in paragraph fifteen was, and is, false or misleading.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Complaint

123 F.T.C.

COUNT V: FAILURE TO DISCLOSE ADEQUATELY IN  
CREDIT ADVERTISING

18. In its credit advertisements, respondent has represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the credit offer, including but not necessarily limited to a final balloon payment of several thousand dollars and the annual percentage rate. The existence of these additional terms would be material to consumers in deciding whether to buy a Mitsubishi vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

19. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

## COUNT VI: TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS

20. Respondent's credit advertisements, including but not necessarily limited to Mitsubishi Exhibits C, D, and E, state a monthly payment amount and/or an amount "down." The credit disclosures in these advertisements contain the following terms required by Regulation Z: the annual percentage rate and the terms of repayment.

21. The credit disclosures in respondent's television credit advertisements, including but not necessarily limited to Mitsubishi Exhibits D and E, are not clear and conspicuous because they appear on the screen in small type, against a background of similar shade, for a very short duration, with background sounds and images, and/or over a moving background. The credit disclosures in respondent's print credit advertisements, including but not necessarily limited to Mitsubishi Exhibit C, are not clear and conspicuous because they appear in small print.

22. Respondent's practices violate Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended.

Complaint

EXHIBIT A

AS PRODUCED TELEVISION

CM Advertising Inc.  
One Pacific Plaza  
7711 Center Avenue, Suite 400  
Huntington Beach, CA 92648  
(714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: Galant Summer of Thunder/Lease MGM-1570		JOB NUMBER:	
DATE: 7/26/95	PAGE NUMBER: 1	REVISION: 1	LENGTH:
COPYWRITER: I. STONE	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC. (X)Yes ( )No

Video

Audio

SUMMER OF THUNDER

Mitsubishi's Summer of Thunder continues...

**SUPER:**  
**GALANT S PREFERRED EQUIPMENT PACKAGE**

with our best offer ever on a Galant S with the Preferred Equipment Package.

**SUPER:**  
**MITSUBISHI GALANT S \$0 DOWN \$249 A MONTH, 36 MONTHS**

Lease for zero down, and just two forty-nine a month for thirty-six months,

**DISCLAIMER:**  
First payment, plus a \$0 down payment and a refundable security deposit of \$250 (in NY, final monthly payment of \$249 in lieu of security deposit) due upon delivery. 36 monthly payments based on MSRP of \$18,043 for a Galant S with automatic transmission (FOG A88), with a dealer capitalized cost reduction of \$922, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 36-month closed-end lease rounded to the nearest dollar. Total payments: \$8,964. Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and

MITSUBISHI  
EXHIBIT A

Complaint

123 F.T.C.

## EXHIBIT A

G2

TELEVISION

☐ Advertising Inc.  
One Pacific Plaza  
7711 Center Avenue, Suite 400  
Huntington Beach, CA 92647  
(714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: Galant Summer of Thunder Lease MGMM-1570		JOB NUMBER: 415-i0-824	
DATE: 7/26/95	PAGE NUMBER: 2	REVISION:	LENGTH: 30
COPYWRITER: J. Stone	FILM: ( ) Yes ( ) No	TAPE: ( ) Yes ( ) No	AS REC (X) Yes ( ) No

**SUPER:  
\$0 DOWN  
\$245 A MONTH, 36 MONTHS  
AUTOMATIC TRANSMISSION  
AIR CONDITIONING  
POWER WINDOWS AND DOOR  
LOCKS  
CRUISE CONTROL**

**DISCLAIMER:**  
up to 15¢/mile over 36,000 miles and \$350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of \$ 10,068, plus applicable fees and taxes and purchase option fee of \$150. Purchase option during lease (after first 12 months) for Initial Lease Balance of \$17,521 reduced by the depreciation portion of the monthly payments, plus applicable fees and taxes, plus purchase option fee of \$150. Depreciation is determined on a level yield basis following the rules for journal entries for lessors under "Direct Financing Leases" in statement of Financial Accounting Standards No. 13 issued by the Financial Accounting Standards Board and will reduce the Initial Lease Balance to the residual value at the end of the lease term. Lease offered to qualified customers with approved credit and insurance. Program for 1995 models only through Mitsubishi Motors Credit of America, Inc. and not available in HI on these terms. Program scheduled to end July 31, 1995. DEALER PRICE AND TERMS MAY VARY. SEE PARTICIPATING DEALERS FOR DETAILS.

and get automatic transmission, air conditioning, power windows and door locks, and much more.

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Complaint

EXHIBIT A

G2

TELEVISIO

G2 Advertising Inc.  
 One Pacific Plaza  
 7711 Canyon Avenue, Suite 400  
 Huntington Beach, CA 92647  
 (714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: Galant Summer of Thunder/Lease MGM-1570		JOB NUMBER: 415-10-824	
DATE: 7/26/95	PAGE NUMBER: 3	REVISION:	LENGTH: :30
COPYWRITER: J. Stone	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: (X)Yes ( )No

**SUPER  
 PLUS \$500 CASH BACK**  
**DISCLAIMER:**  
 \$500 cash back when financed through Mitsubishi Motors Credit of America, Inc. \$1,100 savings includes \$500 cash back plus \$602 savings on PEP which is based on MSRP for air conditioning, power windows and door locks, cruise control, six-speaker stereo cassette, large door armrests and pockets, molded door trim with fabric inserts, full trunk trim, and courtesy door lights.

Plus, right now, get five hundred dollars cash back. That's eleven hundred dollars in savings.

**SUPER:  
 \$ 0 DOWN PLUS \$500 CASH BACK**

Zero down, plus cash back, for a limited time,

during the Summer of Thunder,

**LOGO: Mitsubishi.  
 The New Thinking in  
 Automobiles™  
 1-800-55MITSU**

from Mitsubishi. The New Thinkin-  
 in Automobiles™.

Complaint

123 F.T.C.

## EXHIBIT B

AS PRC

32 Advertising, Inc  
 7711 Center Avenue, Suite 400  
 Huntington Beach, CA 92647  
 (714) 372-6600

CLIENT: MMSA		PRODUCT: Eclipse	
TITLE: Final Storm - Eclipse Lease MGMM 2514		JOB NUMBER: 415-12-829	
DATE: 9/29/95	PAGE NUMBER: 1	REVISION: 2	LENGTH: 30
WRITER:	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: ( )Yes

## Video

Montage of clouds expands.

Graphic type treatment of "Thunder"  
with clouds back drop.

## Audio

(MUSIC UNDER)

This summer's hottest event.. just got  
hotter

Mitsubishi's Summer of Thunder heats  
up with an electrifying offer on an  
Eclipses GS:

MITSUBISHI  
EXHIBIT B

Complaint

EXHIBIT B

G2 Advertising, Inc.  
 7711 Center Avenue, Suite 400  
 Huntington Beach, CA 92647  
 (714) 372-6600

CLIENT: MMSA		PRODUCT: Eclipse	
TITLE: Final Storm - Eclipse Lease MGMM 2514		JOB NUMBER: 415-12-829	
DATE: 9/29/95	PAGE NUMBER: 2	REVISION: 2	LENGTH: :30
WRITER:	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: ( )Yes ( )No

**SUPER:**  
**\$249 A MONTH, 48 MONTHS**  
**\$1,000 DOWN**

**DISCLAIMER:**  
 First payment, plus a \$1,000 down payment and a refundable security deposit of \$250 (in NY, final monthly payment of \$249 in lieu of security deposit) due upon delivery. 48 monthly payments based on MSRP of \$18,747 for an Eclipse GS with manual transmission (FOG A87), with a dealer capitalized cost reduction of \$1,289, excluding tax, title, license, registration, regionally required equipment, dealer options, and charges for a 48-month closed-end lease rounded to the nearest dollar. Total payments: \$11,952. Lessee liable for maintenance, non-warrantable repairs, excess wear and tear, and up to 15¢/mile over 60,000 miles and \$350 disposition fee and applicable taxes at lease end. Option to purchase at lease end for residual value of \$8,436, plus applicable fees and taxes and purchase option fee of \$150. Purchase option during lease (after first 12 months) for Initial Lease Balance of \$16,858 reduced by the depreciation portion of the monthly payments, plus applicable fees and taxes, plus purchase option fee of \$150. Depreciation is determined on a level yield basis following the rules for journal entries for lessors under "Direct Financing Leases" in statement of Financial Accounting Standards No. 13 issued by the Financial Accounting Standards Board and will reduce the Initial Lease Balance to the residual value at the end of the lease term. Lease offered to qualified customers with approved credit and insurance. Program for 1995 models only through Mitsubishi Motors Credit of America, Inc. and not available in HI on these terms. Program scheduled to end September 11, 1995. DEALER PRICE AND TERMS MAY VARY. SEE

Lease for just two forty-nine a month for forty-eight months with a thousand dollars down.

Complaint

123 F.T.C.

## EXHIBIT B

G2 Advertising, Inc.  
7711 Center Avenue, Suite 400  
Huntington Beach, CA 92647  
(714) 372-6600

CLIENT: MMSA		PRODUCT: Eclipse	
TITLE: Final Storm - Eclipse Lease MGMM 2514		JOB NUMBER: 415-12-829	
DATE: 9/29/95	PAGE NUMBER: 3	REVISION: 2	LENGTH: :30
WRITER:	FILM: <input type="checkbox"/> Yes <input type="checkbox"/> No	TAPE: <input type="checkbox"/> Yes <input type="checkbox"/> No	AS REC: <input type="checkbox"/> Yes <input type="checkbox"/> No

**SUPER:**  
AIR CONDITIONER  
POWER WINDOWS AND DOOR  
LOCKS  
ALLOY WHEELS  
SIX-SPEAKER STEREO CASSETTE

*But hurry in. Because this offer ends  
soon.*

*And so does the Summer of Thunder.*

**LOGO:** Mitsubishi  
The New Thinking in  
Automobiles™  
1-800-55MITSU

From Mitsubishi.  
The New Thinking in Automobiles.



Complaint

123 F.T.C.

## EXHIBIT D

G2 Advertising, Inc.  
7711 Center Avenue, Suite 400  
Huntington Beach, CA 92647  
(714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: "Favorite Things" \$199 Buy (AS REC) MGMM-1473		JOB NUMBER: 415-10-712	
DATE: 9/25/95	PAGE NUMBER: 1	REVISION: 2	LENGTH: :30
WRITER: J. Stone	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: (X)Yes ( )No

## Video

ROSE IN VASE WITH DRIVER'S  
SEAT RECLINING

7/8 OVERHEAD FRONT BEAUTY  
SHOT, DRIVER'S SIDE W/  
BADGING

DRIVER'S SEAT MOVES BACK  
AND RECLINES

ARMREST LIFTS OPEN

CRUISE INDICATOR COMES ON

POWER ANTENNA COMES UP

Footage of Galant S appears with buy  
mention.

SUPER: \$199 a mo. \$750 down/  
Auto. transmission  
Air conditioning.

## DISCLAIMER:

Example based on MSRP of 18,300, and a  
selling price of \$16,764 for a Galant ES, (FOG  
A83). \$750 down. 5.15% APR Diamond  
Advantage Plan financing for 60 months: 59  
months at \$199 per month and a FINAL  
PAYMENT OF \$7,320. Tax, title, license,  
registration, regionally required equipment,  
dealer options, and charges extra. Under  
certain conditions you may refinance the final  
payment or sell the vehicle to Mitsubishi  
Motors Credit of America, Inc. at end of term.

## Audio

(MUSIC UNDER)

"RAINDROPS ON ROSES AND...

...WHISKERS ON KITTENS..."

The all-new Mitsubishi Galant. Filled  
with thoughtful details.

"THESE ARE A ...

...FEW OF MY ...

...FAVORITE ...

...THINGS."

Buy a new Galant ES with automatic  
transmission and air conditioning for  
seven hundred fifty dollars down and  
one ninety-nine a month.

MITSUBISHI  
EXHIBIT D

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Complaint

EXHIBIT D

G2

TELEVI

G2 Advertising, Inc.  
7711 Center Avenue, Suite 400  
Huntington Beach, CA 92647  
(714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: "Favorite Things" \$199 Buy (AS REC) MGMM-1473		JOB NUMBER: 415-10-712	
DATE: 9/25/95	PAGE NUMBER: 2	REVISION: 2	LENGTH: :30
WRITER: J. Stone	FILM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: (X)Yes ( )

Diamond Advantage Plan offered to qualified customers with approved credit and insurance. Program for 1994 models only through Mitsubishi Motors Credit of America, Inc. and not available in HI on these terms. Diamond Advantage Plan financing not available in NC. Program scheduled to end June 30, 1994. DEALER PRICE AND TERMS MAY VARY. SEE PARTICIPATING DEALERS FOR DETAILS. AVAILABILITY OF SPECIFIC MODELS MAY VARY BY DEALER.

HEIGHT ADJUSTABLE SAFETY BELT

"THESE ARE A...

REAR SEAT ARMREST FOLDS DOWN

...FEW OF...

DUAL AIR BAGS DEPLOY

...MY FAVORITE THINGS."

SUPER: Always wear safety belts.

3/4 Overhead front beauty shot, driver side.

The affordable Galant ES offer. Perhaps the most ...

SUPER: \$199 a mo. \$750 down./  
Auto. transmission  
Air conditioning.

LOGO: Mitsubishi  
The New Thinking in  
Automobiles.™  
1-800-55MITSU

... favorite thing of all.

Complaint

123 F.T.C.

## EXHIBIT E

G2

TELEX

G2 Advertising  
 One Pacific Plaza  
 7711 Center Avenue, Suite 400  
 Huntington Beach, CA 92647  
 (714) 372-6600

CLIENT: MMSA		PRODUCT: ECLIPSE	
TITLE: Eclipse all others R4 MGMM-2414		JOB NUMBER: 415-02-713	
DATE: 3/24/93	PAGE NUMBER: 1	REVISION:	LENGTH: 30
WORD COUNT:	FLM: ( )Yes ( )No	TAPE: ( )Yes ( )No	AS REC: (X)Yes ( )No

**Video****Audio**

FRONT VIEW OF BUS DRIVING  
FORWARD

MUSIC BEAT

BUS DRIVES RIGHT TO LEFT OF  
SCREEN

ANNCR: *If you're looking for a way  
get from here to there*

SIDE VIEW OF BUS SHOWING A  
BILLBOARD OF THE MITSUBISHI  
ECLIPSE

MUSIC BEAT

CLOSE-UP OF ECLIPSE BILLBOARD  
THE CAR IS BEGINNING TO COME  
ALIVE

*that eclipses all other forms of  
transportation,*

THE ECLIPSE HAS DRIVEN OFF THE  
BILLBOARD

*look at this. The Mitsubishi Eclipse.*

RUNNING FOOTAGE OF ECLIPSE

MUSIC BEAT

RUNNING FOOTAGE OF ECLIPSE  
SUPER: BUY: \$159 A MONTH/\$500  
DOWN

ANNCR: *Now you can buy a ninety  
four Eclipse for one fifty-nine a month  
with five hundred down. Or, buy an  
ninety-four Eclipse and get factory  
cash back.*

DISCLAIMER:  
(SEE ATTACHED FOR DETAILS)  
SUPER: \$1,000 FACTORY CASH BACK  
DISCLAIMER: *Factory cash back on the  
purchase of any '94 Eclipse model, offer ends  
June 30, 1994. See your participating Mitsubishi  
Motors Dealer for details.*

REAR VIEW OF ECLIPSE DRIVING OFF

*The Eclipse from Mitsubishi.*

MITSUBISHI LOGO  
1-800-55MITSU

*The New Thinking in Automobiles*

MITSUBISHI  
EXHIBIT E

EXHIBIT E

G2

TELEVISION

G2 Advertising  
 One Pacific Plaza  
 7711 Center Avenue, Suite 400  
 Huntington Beach, CA 92647  
 (714) 372-6600

CLIENT: MMSA		PRODUCT: ECLIPSE	
TITLE: Eclipse all others RA MGMM-2414		JOB NUMBER: 415-02-713	
DATE: 3/24/94	PAGE NUMBER: 2	REVISION:	LENGTH: 30
WORD COUNT:	FLM: <input type="checkbox"/> Yes <input type="checkbox"/> No	TAPE: <input type="checkbox"/> Yes <input type="checkbox"/> No	AS REC: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

Example based on MSRP of \$12,519 and a selling price of \$11,827 for an Eclipse STD M/T (FOG A01). \$500 down. 5.06% APR Diamond Advantage Plan financing for 54 months: 53 months at \$159/mo. and a FINAL PAYMENT OF \$4,757. Tax, title, lic., registration, regionally required equipment, dealer options, and charges extra. Under certain conditions you may refinance the final payment or sell the vehicle to Mitsubishi Motors Credit of America, Inc. at end of term. Diamond Advantage Plan offered to qualified customers with approved credit and insurance. Program for 1994 models only through Mitsubishi Motors Credit of America, Inc. and not available in HI on these terms. Diamond Advantage Plan financing not available in NC. Program scheduled to end June 30, 1994.

DEALER PRICE AND TERMS MAY VARY. SEE PARTICIPATING DEALERS FOR DETAILS.

## DECISION AND ORDER

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

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

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

1. Respondent Mitsubishi Motor Sales of America, Inc., is a California corporation with its principal office or place of business at 6400 Katella Avenue, Cypress, California.

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

## ORDER

## DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease inception*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. "*Balloon payment*" as used herein shall mean any scheduled payment with respect to a consumer credit transaction that is at least twice as large as the average of earlier scheduled payments.

4. Unless otherwise specified, "*respondent*" as used herein shall mean Mitsubishi Motor Sales of America, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

5. "*In or affecting commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not

including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

## II.

*It is further ordered*, That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, \_\_\_\_ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

## III.

*It is further ordered*, That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

## IV.

*It is further ordered,* That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit in or affecting commerce, as "advertisement" and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the existence and amount of any balloon payment or the annual percentage rate.

B. State the amount of any payment, including but not limited to any monthly payment, in any advertisement unless the amount of any balloon payment is disclosed prominently and in close proximity to the most prominent of the above statements.

C. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any periodic payment, including but not limited to any monthly payment, or the amount of any finance charge, without disclosing clearly and conspicuously:

1. The amount or percentage of the downpayment;
2. The terms of repayment, including but not limited to the amount of any balloon payment; and
3. The correct annual percentage rate, using that term or the abbreviation "APR," as defined in Regulation Z and the Official Staff Commentary to Regulation Z. If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

## V.

*It is further ordered,* That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

## VI.

*It is further ordered*, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

## VII.

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

## VIII.

*It is further ordered*, That respondent Mitsubishi Motor Sales of America, Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in

detail the manner and form in which they have complied with this order.

### IX.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

## MAZDA MOTOR OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-3714. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997*

This consent order prohibits, among other things, a California-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car.

*Appearances*

For the Commission: *Rolando Berrelez, Sally Pitofsky and Lauren Steinfeld.*

For the respondent: *Elroy H. Wolff, Sidley & Austin, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Mazda Motor of America, Inc., a corporation ("respondent" or "Mazda"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mazda Motor of America, Inc. is a California corporation with its principal office or place of business at 7755 Irvine Center Drive, Irvine, California. Respondent distributes Mazda vehicles.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and

"consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

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, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Mazda vehicles, including but not necessarily limited to the attached Mazda Exhibits A through D. Mazda Exhibits A through C are television lease advertisements (attached hereto in video and storyboard format) and Exhibit D is a print lease advertisement. These advertisements contain the following statements:

A. [Audio:] "One penny down. Great leases. Very little time. On Protegé. A penny (down). And one eighty-nine. The B2300 SE. A penny down. And one ninety-nine. 626. A penny and two-o-nine. Miata. . . . A penny and two nineteen. Passion for the road. Put your penny down."

[Video:] [open on a man jumping through a rain of pennies.]

"MAZDA ONE PENNY DOWN 36 MO. LEASES [running footage of Protege] \$189 A MO. [over graphic of a penny spinning] [running footage of B2300] \$199 A MO. [over graphic of a penny spinning] [running footage of 626] \$209 A MO. [over graphic of a penny spinning] [running footage of Miata] \$219 A MO." [over graphic of a penny spinning] [The advertisement contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and accompanied by background sounds and images: ". . . Offer on '96 Protegé DX w/Conv. Pkg., MSRP \$14,720. Assumes \$1325 dealer contribution. 36 mo. payments = \$6,809.04. Initial fees = \$439.15. Purchase option at lease end = \$7,654.40 Offer on '96 B2300 SE . . . MSRP \$14,605. Assumes \$859 dealer contribution. 36 mo. payments = \$7,198.92. Initial fees = \$449.98. Purchase option at lease end = \$7,594.60. Offer on '96 626 DX w/Conv. Pkg., MSRP \$17,540. Assumes \$1,241 dealer contribution. 36 mo. payments = \$7,532.64. Initial fees = \$459.25. Purchase option at lease end = \$9,471.60. Offer on '96 Miata . . . MSRP \$19,280. Assumes \$1,198 dealer contribution. 36 monthly payments = \$7,908.84. Initial fees = \$469.70. Purchase option at lease end = \$10,796.80. . . . \$450 Acq. fee plus taxes, title, license, & registration also due at lease signing. Early termination = \$200. Lessee liable for \$.10/mile over 36,000, maintenance, repairs & excess wear/tear. . . ." The fine print is displayed on four screens, each containing a block of at least five lines, and each block appearing for approximately three seconds.](Mazda Exhibit A).

B. [Audio:] "Lease a 626. Zero down, two-o-nine a month."

[Video:] "From \$0 DOWN \$209 A MO. 36 MONTHS."

[The advertisement contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and accompanied by background sounds and images: ". . . 36 mo. payments = \$7,551. Initial fees = \$459.75 plus \$450 acq. fee, taxes, title, license & registration. Early termination fee = \$200. Lessee liable for \$.10/mile over 36,000, maintenance, repairs & excess wear/tear. Purchase option at lease end = \$9471.60. . . ." The fine

print is displayed on three screens, each containing a block of at least three lines, and each block appearing for approximately two seconds.](Mazda Exhibit B).

C. [Audio:] "Its Mazda Jump . . . on Summer."

[Video:] "ZERO DOWN LEASES 36 MONTHS"

[cut to Protege badge. Mazda Protege running footage]

[Audio:] "On Protégé. Zero and one eighty-nine." [Video:] "\$0 DOWN PYMT. \$189 A MONTH WELL-EQUIPPED" [cut to B2300 badge. Mazda B2300 running

footage] [Audio:] "B2300 SE-5. Zero and one ninety-nine." [Video:] "\$0 DOWN PYMT. \$199 A MONTH FULLY LOADED SE-5." [cut to 626 badge. . . 626

running footage] [Audio:] "Six-two-six. . . Zero and two-o-nine." [Video:] "\$0 DOWN PYMT. \$209 A MONTH WELL-EQUIPPED" [The advertisement

contains the following lease disclosure at the bottom of the screen in white colored fine print superimposed on a black background and accompanied by background

sounds and images: "Closed-end leases to qualified lessees. Approval of Mazda American Credit & insurance required. Offer on '96 Protégé DX w/ Conv. Pkg.,

MSRP \$14,720. Assumes \$1,325 dealer contribution. 36 mo. pymts = \$6,836.04. Initial fees = \$439.89. Purchase option at lease end = \$7,507.20. Offer on '96

B2300 SE Reg Cab w/ A/C & Pref. Equip. Grp., MSRP \$14,605. Assumes \$1,888 dealer contribution. 36 mo. pymts = \$7,193.16. Initial fees = \$449.81. Purchase

option at lease end = \$7,740.65. Offer on '96 626 DX w/ Conv. Pkg., MSRP \$17,540. Assumes \$1,241 dealer contribution. 36 mo. pymts = \$7,558.20. Initial

fees = \$459.95. Purchase option at lease end = \$9,647. All leases incl. freight, excl. CA/MA/NY emissions. \$450 Acq. Fee plus taxes, title, license & registration also

due at lease signing. Early termination = \$200. Lessee liable for \$.10/mile over 36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 6/3/96. SEE PARTICIPATING DEALERS FOR DETAILS AND ACTUAL

TERMS." The fine print is displayed on three screens, each containing a block of at least four lines, and each block appearing for approximately three

seconds.](Mazda Exhibit C).

D. "MAZDA PENNY DOWN GREAT LEASES OR BUY"

[The advertisement contains lease offers for four vehicles:]

"MAZDA PROTEGÉ. . .LEASE 1¢ DOWN \$189 MO. 36 MOS. . . .B2300SE SPORT TRUCK. . .LEASE 1¢ DOWN \$199 MO. 36 MOS. . . .626 SPORT

SEDAN. . .LEASE 1¢ DOWN \$209 MO. 36 MOS. . . .MAZDA MIATA. . . .LEASE 1¢ DOWN \$219 MO. 36 MOS."

[The advertisement contains the following lease disclosure at the bottom of the page in small print: "Offer on '96 Protégé DX (LX shown) w/Conv. Pkg., MSRP

\$14,720. Assumes \$1,325 dealer contribution. 36 mo. payments = \$6,809.04. Initial fees = \$439.15. Purchase option at lease end = \$7,654.40. Offer on '96

B2300 SE Reg. Cab (Cab Plus shown) w/ A/C & Pref. Equip. Grp., MSRP \$14,605. Assumes \$859 dealer contribution. 36 mo. payments = \$7,198.92. Initial

fees = \$449.98. Purchase option at lease end = \$7,594.60. Offer on '96 626 DX w/ Conv. Pkg., MSRP \$17,540. Assumes \$1,241 dealer contribution. 36 mo. payments

= \$7,532.64. Initial fees = \$459.25. Purchase option at lease end = \$9,471.60. Offer on '96 Miata w/ pwr. steering & mats, MSRP \$19,280. Assumes \$1,198

dealer contribution. 36 mo. payments = \$7,908.84. Initial fees = \$469.70. Purchase option at lease end = \$10,796.80. All leases incl. freight. Protégé/626/B2300 SE

excl. CA/MA/NY emissions. \$450 Acq. fee + taxes, title, license, & registration also due at lease signing. Early termination = \$200. Lessee liable for \$.10/mile over

36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 4/1/96. See participating dealer for details & actual terms."](Mazda Exhibit D)

FEDERAL TRADE COMMISSION ACT VIOLATIONS  
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that the amount stated as "down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

6. In truth and in fact, the amount stated as "down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down," such as the first month's payment, a security deposit, and/or an acquisition fee, at lease inception. Therefore, the representation as alleged in paragraph five was, and is, false or misleading.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

8. In its lease advertisements, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to a required security deposit, an acquisition fee, and/or the first month's payment due at lease inception. The existence of additional terms would be material to consumers in deciding whether to lease a Mazda vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

## COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Mazda Exhibits A through D, state a monthly payment amount, the number of required payments, and/or an amount "down." The lease disclosures in these advertisements contain one or more of the following terms required by Regulation M: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the total of periodic payments due under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time or the method of determining the purchase-option price; and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Mazda Exhibits A through C, are not clear and conspicuous because they appear on the screen in small type for a very short duration, accompanied by background sounds or images. The lease disclosures in respondent's print lease advertisements, including but not necessarily limited to Mazda Exhibit D, are not clear and conspicuous because they appear in small type.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended.

Complaint

EXHIBIT A

**Header**  
**FCB** FOOTE, CONE & BELDING  
 4 Hutton Centre Drive, Santa Ana, CA 92707  
 (714) 662-4500

CLIENT: MAZDA MOTOR OF AMERICA

JOB# : MAZD-DTP-T3626  
 PRODUCT: Lease/Penny Down  
 LENGTH: :30  
 TITLE: Penny Down-Protege/626/Miata/Trk-L-30  
 ORIGINAL ISCI:  
 NEW ISCI: JQDB 0832

Page 1 of 3

As Produced: 3/10/96

VIDEO

AUDIO:

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1. OPEN ON MAN JUMPING THROUGH A RAIN OF PENNIES.<br/> <u>SUPERS:</u> MAZDA ONE PENNY DOWN ZOOMS IN AND FADES ON.</p> <p>2. CUT TO PROTEGE RUNNING FOOTAGE. CUT TO B2300 RUNNING FOOTAGE. SUPER APPEARS AS LINE AT BOTTOM WITH PENNY SPINNING APPEARS.<br/> <u>SUPER:</u> 36 MO. LEASES.<br/> <u>SUPER:</u> ENDS APRIL 1ST<br/> <u>DISC:</u> Closed-end leases to qualified lessees. Approval of Mazda American Credit &amp; insurance required. Offer on '96 Protege DX w/ Conv. Pkg., MSRP \$14,720. Assumes \$1,325 dealer contribution. 36 mo. payments = \$6,809.04. Initial fees = \$439.15. Purchase option at lease end = \$7,654.40. Offer on '96 B2300 SE Reg. Cab w/ A/C</p> <p>3. CUT TO PROTEGE BADGE. CUT TO PROTEGE RUNNING FOOTAGE.<br/> <u>DISC:</u>(cont) and Pref. Equip. Grp., MSRP \$14,605. Assumes \$839 dealer contribution. 36 mo. payments = \$7,198.92. Initial fees = \$449.98. Purchase option at lease end = \$7,394.60. Offer on '96 626 DX w/ Conv. Pkg., MSRP \$17,540. Assumes \$1,241 dealer contribution. 36 mo. payments = \$7,532.64. Initial fees</p> <p>4. CUT TO PROTEGE RUNNING WITH GRAPHIC OF A PENNY SPINNING INTO FRAME.</p> <p>5. <u>SUPER:</u> \$189 A MO.</p> | <p>1. <u>SINGERS:</u> Mazda...One penny down.</p> <p>2. <u>YO:</u> One penny down. Great leases. Very little time.</p> <p>3. <u>YO:</u> On Protege.</p> <p>4. <u>SINGERS:</u> A penny (down).</p> <p>5. <u>YO:</u> And one eighty-nine.</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Exhibit A

Page 1 of 3 Pages

Complaint

123 F.T.C.

## EXHIBIT A



**FOOTE, CONE & BELDING**  
4 Hudson Centre Drive, Santa Ana, CA 92707  
(714) 862-8500

CLIENT: MAZDA MOTOR OF AMERICA

JOB# : MAZD-DTP-T3626

PRODUCT: Lease/Penny Down

LENGTH: :30

TITLE: Penny Down-Protege/626/Miata/Trk-I - 30

ORIGINAL ISCI:

NEW ISCI: JQDB 0832

Page 2 of 3

As Produced: 3/10/96

VIDEO:AUDIO:

- |     |                                                                                                                                                                                                                                                                                                                                                                                                                            |     |                                   |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----------------------------------|
| 6.  | CUT TO B2300 BADGE. CUT TO BOY JUMPING THROUGH RAIN OF PENNIES.                                                                                                                                                                                                                                                                                                                                                            | 6.  | <u>YO:</u> The B2300 SE.          |
| 7.  | CUT TO RUNNING FOOTAGE OF TRUCK WITH GRAPHIC OF A PENNY SPINNING INTO FRAME.<br><u>DISC:</u> (cont) = \$499.23. Purchase option at lease end = \$9,471.60. Offer on '96 Miata w/ pwr. steering & mats, MSRP \$19,280. Assumes \$1,198 dealer contribution. 36 mo payments = \$7,908.84. Initial fees = \$469.70. Purchase option at lease end = \$10,796.80. All leases incl. freight. Protege/626/B2300 SE excl. CA/MA/NY | 7.  | <u>SINGERS:</u> A penny down...   |
| 8.  | <u>SUPER:</u> \$199 A MO.                                                                                                                                                                                                                                                                                                                                                                                                  | 8.  | <u>YO:</u> and one ninety-nine.   |
| 9.  | CUT TO 626 BADGE.                                                                                                                                                                                                                                                                                                                                                                                                          | 9.  | <u>YO:</u> Six-two-six.           |
| 10. | CUT TO MAN GRABBING PENNY.                                                                                                                                                                                                                                                                                                                                                                                                 | 10. | <u>SINGERS:</u> A penny (down)... |
| 11. | CUT TO 626 RUNNING WITH GRAPHIC OF A PENNY WIPING ON SUPER.<br><u>DISC:</u> (cont) emissions, \$450 Acq. fee plus taxes, title, license & registration also due at lease signing. Early termination = \$200. Lessee liable for \$.10/mile over 36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 4/1/96. SEE PARTICIPATING DEALER FOR DETAILS AND ACTUAL TERMS.<br><u>SUPER:</u> \$209 A MONTH | 11. | <u>YO:</u> and two-o-nine.        |
| 12. | RUNNING FOOTAGE OF MIATA.                                                                                                                                                                                                                                                                                                                                                                                                  | 12. | <u>YO:</u> Miata.                 |
| 13. | CUT TO GIRL WITH HAT.                                                                                                                                                                                                                                                                                                                                                                                                      | 13. | <u>SINGERS:</u> Mazda!            |

Exhibit A

Page 2 of 3 Pages

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Complaint

## EXHIBIT A

**FCB** FOOTE, CONE & BELDING  
4 Hudson Centre Drive, Santa Ana, CA 92707  
(714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

As Produced: 3/10/96

JOB# : MAZD-DTP-T3626

PRODUCT: Lease/Penny Down

LENGTH: :30

TITLE: Penny Down-Protège/626/Miata/Trk-L-30

ORIGINAL ISCI:

NEW ISCI: JQDB 0832

Page 3 of 3

VIDEO:AUDIO:

- |     |                                                                                                                                |     |                                                                               |
|-----|--------------------------------------------------------------------------------------------------------------------------------|-----|-------------------------------------------------------------------------------|
| 14. | CUT TO GIRL WITH HAT IN MIATA.<br>CUT TO MIATA RUNNING FOOTAGE<br>WITH GRAPHIC OF SPINNING PENNY.<br><u>SUPER:</u> \$219 A MO. | 14. | <u>YO:</u> A penny and two nineteen.                                          |
| 15. | CUT TO PROTEGE DRIVING AWAY<br><u>LOGO:</u> MAZDA<br>PASSION FOR THE ROAD™                                                     | 15. | <u>SOLO:</u> Passion for the road ...<br><u>SINGERS:</u> Put your penny down! |
| 16. |                                                                                                                                | 16. |                                                                               |
| 17. | CUT TO FALLING PENNIES WITH<br>MAN HOLDING ON TO ONE.<br><u>SUPER:</u> ENDS APRIL 1.                                           | 17. | <u>YO:</u> Ends April 1st.                                                    |

Exhibit A

Page 3 of 3 Pages

Complaint

123 F.T.C.

## EXHIBIT B



FOOTE, CONE & BELDING  
4 Hutton Centre Drive, Santa Ana, CA 92707  
(714) 662-6500



JOB# : MAZD-NTP-T3632

PRODUCT: '96 626 DX

LENGTH: :30

TITLE: Passion -626 DX-0 Downr/209 L-30

CLIENT: MAZDA MOTOR OF AMERICA

ORIGINAL ISCI: JQDB 0816

NEW ISCI: JQNB 0840

Page 1 of 2

AS PRODUCED: 3/28/96

VIDEOAUDIO

- |    |                                                                                                                                             |    |                                                         |
|----|---------------------------------------------------------------------------------------------------------------------------------------------|----|---------------------------------------------------------|
| 1. | OPEN ON QUICK CUTS OF DRIVER STARTING CAR AND 626 WITH EXPLOSION.                                                                           | 1. | SONG: I got a passion.                                  |
| 2. | QUICK CUTS OF LOCKED FENCE, 626 DRIVING ACROSS GRAPHIC WITH RUNNER FOLLOWED BY MORE EXPLOSIONS.<br><u>SUPER</u> : 626                       | 2. | VO: Six two six.                                        |
| 3. | 626 DRIVES OVER FRAME AS WOMAN APPEARS IN SKY WITH 626 IN BACKGROUND.                                                                       | 3. | SONG: Passion.                                          |
| 4. | CUT TO RUNNING FOOTAGE OF 626.                                                                                                              | 4. | VO: Total luxury.                                       |
| 5. | CUT TO GEAR SHIFT WITH LIGHTENING AS CAR DRIVES THROUGH TUNNEL.<br><u>DISC</u> :<br>See dealer for limited-warranty details. Based on MSRP. | 5. | SFX: (THUNDER CRASH.)<br>VO: Priced like a base Altima. |
| 6. | QUICK CUTS OF 626 EXITING TUNNEL AND DRIVING ACROSS DESERT WITH MAN LOOKING ON.                                                             | 6. | VO: Best basic warranty in its class.                   |
| 7. | <u>SUPER</u> : MAZDA<br>FLOATS ACROSS SCREEN AS CAR DRIVES THROUGH DESERT.                                                                  | 7. | SONG: Mazda!                                            |
| 8. | QUICK CLOSE UPS OF 626. QUICK CUT OF 626 BADGE.                                                                                             | 8. | VO: Six two six.                                        |
| 9. | QUICK CUTS OF 626 DRIVING IN FRONT OF PYRAMIDS. WOMAN WITH CAT EYES APPEARS IN FOREGROUND.                                                  | 9. | SONG: Passion for the Road.                             |

Exhibit B

Page 1 Of 2 Pages

EXHIBIT B



**FOOTE, CONE & BELDING**  
 4 Hutton Centre Drive, Santa Ana, CA 92707  
 (714) 662-6500

**JOB# : MAZD-NTP-T3632**  
**PRODUCT: '96 626 DX**  
**LENGTH: :30**  
**TITLE: Passion -626 DX-0 Down/209 L-3'**

**CLIENT: MAZDA MOTOR OF AMERICA**

**ORIGINAL ISCI: JQDB 0816**  
**NEW ISCI: JQNB 0840** Page 2 of 2

**AS PRODUCED: 3/28/96**

<u>VIDEO</u>		<u>AUDIO</u>	
10.	QUICK CUTS OF RUNNING FOOTAGE OF 626.	10.	VO: Lease a 626 ...
11.	CUT TO TITLES. <b>SUPER: From \$0 DOWN \$209 A MO. 36 MONTHS.</b>	11.	zero down, two-o-nine a month.
12.	CUT TO 626 DRIVING ACROSS DESERT. <b>DISC:</b> 626 LX shown, net MSRP \$17,695. Closed-end lease to qualified lessees on a '96 626 DX with Conv. Pkg., MSRP \$17,540 incl. freight, excl. CA/NY/MA emissions. Assumes \$1,241 dealer contribution. Approval of Mazda	12.	SONG: Ooh, ooh Mazda!
13.	CONTINUE RUNNING FOOTAGE ACROSS DESERT AS SCREEN SPLITS AS CAR DRIVES ON AND MATCH IS BLOWN OUT. <b>DISC:</b> (cont.) American Credit & insurance required. 36 monthly payments = \$7,551. Initial fees = \$459.75 plus \$450 acq. fee, taxes, title, license & registration. Early termination fee = \$200. Lessee liable for \$.10/mi over 36,000.	13.	
14.	CONTINUE RUNNING FOOTAGE OF 626 AS SUPER COMES UP. <b>SUPER: 626</b> <b>DISC:</b> (cont.) maintenance, repairs & excess wear/tear. Purchase option at lease end = \$9,471.60. Must take delivery by 4/30/96. SEE PARTICIPATING DEALERS FOR DETAILS AND ACTUAL TERMS. Prices slightly higher in HI.	14.	VO: Six two six.
15.	CUT TO 626 DRIVING AWAY ACROSS DESERT. <b>SUPER: MAZDA Passion for the Road™</b>	15.	SONG: Passion for the Road.

Complaint

123 F.T.C.

## EXHIBIT C



FOOTE, CONE & BELDING  
4 Hutton Centre Drive, Santa Ana, CA 92707  
(714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

TYPE OF SCRIPT:

NATIONAL  
 REGIONAL

JOB#: MAZD-DTP-T3631

PRODUCT: 626, Protégé, B2300 SE-5

LENGTH: :30

TITLE: Jump-626/Prot/SE-5-L-30

As Produced: 5/9/96

ORIGINAL ISCI:

NEW ISCI: JQNB 0900

Page 1 of 4

VIDEOAUDIO

- |                                                                                      |                                                |
|--------------------------------------------------------------------------------------|------------------------------------------------|
| 1. OPEN ON BIG MAZDA LOGO. LOGO ZOOMS IN, AWAY FROM CAMERA.                          | 1. <u>MUSIC UP</u><br><u>SINGERS:</u> MAZDA... |
| 2. CUT TO MAN JUMPING INTO FRAME, IN FRONT OF LOGO.                                  | 2. <u>SINGERS:</u> ...JUMP!                    |
| 3. EVENT TITLE BUILDS OVER HYPER STREET.                                             | 3. <u>ANNCR VO:</u> It's Mazda Jump...         |
| 4. <u>SUPER:</u><br>MAZDA JUMP ON SUMMER                                             | 4. <u>ANNCR VO:</u> ...On Summer.              |
| 5. CAR PUSHES THROUGH EVENT TITLE.<br><u>SUPER:</u><br>ZERO DOWN LEASES<br>36 MONTHS | 5. <u>ANNCR VO:</u> Zero down leases.          |
| 6. <u>SUPER:</u><br>ENDS JUNE 3RD                                                    | 6. <u>ANNCR VO:</u> Ends June 3rd.             |
| 7. CUT TO WOMAN BY VEHICLE. SHE DOES A "PSYCHED" JUMP.                               | 7. <u>SINGERS:</u> JUMP!                       |
| 8. CUT TO PROTEGÉ BADGE.                                                             | 8. <u>ANNCR VO:</u> On Protégé.                |
| 9. MAZDA PROTEGÉ RUNNING FOOTAGE.<br><u>SUPER:</u><br>\$0 DOWN PYMT.                 | 9. <u>ANNCR VO:</u> Zero.                      |

Exhibit C

Page 1 of 4 Pages

EXHIBIT C

**FCB** FOOTE, CONE & BELDING  
 4 Hutton Centre Drive, Santa Ana, CA 92707  
 (714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

TYPE OF SCRIPT:

NATIONAL  
 REGIONAL

JOB#: MAZD-DTP-T3631  
 PRODUCT: 626, Protegé, B2300 SE-5  
 LENGTH: :30  
 TITLE: Jump-626/Prot/SE-5-L-30

As Produced: 5/9/96

ORIGINAL ISCI:

NEW ISCI: JQNB 0900

Page 2 of 4

VIDEO

AUDIO

- 10. PROTEGE RUNNING FOOTAGE.  
SUPER:  
 \$189 A MONTH WELL-EQUIPPED  
DISC: Closed-end leases to qualified lessees. Approval of Mazda American Credit & insurance required. Offer on '96 Protegé DX w/ Conv. Pkg., MSRP \$14,720. Assumes \$1,325 dealer contribution. 36 mo. pymts = \$6,836.04. Initial fees = \$439.89. Purchase option at lease end = \$7,507.20. Offer on '96 B2300 SE Reg Cab w/ A/C &
- 11. CUT TO MAN
- 12. CUT TO B2300 BADGE.
- 13. MAZDA B2300 RUNNING FOOTAGE.  
SUPER:  
 \$0 DOWN PYMT.
- 14. B2300 RUNNING FOOTAGE  
SUPER:  
 \$199 A MONTH FULLY LOADED SE-5.  
DISC: (cont) Pref. Equip. Grp., MSRP \$14,605. Assumes \$1,888 dealer contribution. 36 mo. pymts = \$7,193.16. Initial fees = \$449.81. Purchase option at lease end = \$7,740.65. Offer on '96 626 DX w/ Conv. Pkg., MSRP \$17,540. Assumes \$1,241 dealer contribution. 36 mo. pymts = \$7,558.20. Initial fees = \$459.95. Purchase option at lease end = \$9,647.

- 10. ANNCR VO: and one eighty-nine.
- 11. SINGERS:  
 JUMP! JUMP! JUMP!
- 12. ANNCR VO:  
 B2300 SE-5.
- 13. ANNCR VO:  
 Zero.
- 14. ANNCR VO: and one ninety-nine.

Complaint

123 F.T.C.

## EXHIBIT C

**FCB** FOOTE, CONE & BELDING  
4 Hutton Centre Drive, Santa Ana, CA 92707  
(714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

TYPE OF SCRIPT:

NATIONAL  
 REGIONAL

JOB#: MAZD-DTP-T3631

PRODUCT: 626, Protégé, B2300 SE-5

LENGTH: :30

TITLE: Jump-626/Prot/SE-5-L-30

As Produced: 5/9/96

ORIGINAL ISCI:

NEW ISCI: JQNB 0900

Page 3 of 4

VIDEOAUDIO

- |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                 |     |                                             |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|---------------------------------------------|
| 15. | WOMAN JUMPING OFF BED OF TRUCK ONTO GUY'S BACK.                                                                                                                                                                                                                                                                                                                                                                                                 | 15. | <u>SINGERS:</u> JUMP!                       |
| 16. | CUT TO 626 BADGE.                                                                                                                                                                                                                                                                                                                                                                                                                               | 16. | <u>ANNCR VO:</u><br>six-two-six.            |
| 17. | CUT TO WOMAN DOING HIGH FIVE.                                                                                                                                                                                                                                                                                                                                                                                                                   | 17. | <u>SINGERS:</u> MAZDA ...                   |
| 18. | 626 RUNNING FOOTAGE.<br><u>SUPER:</u><br>\$0 DOWN PYMT.                                                                                                                                                                                                                                                                                                                                                                                         | 18. | <u>ANNCR VO:</u><br>Zero.                   |
| 19. | 626 RUNNING FOOTAGE.<br><u>SUPER:</u><br>\$209 A MONTH WELL-EQUIPPED.<br><u>DISC:</u> (cont) All leases incl. freight, excl. CA/MA/NY emissions. \$450 Acq. Fee plus taxes, title, license & registration also due at lease signing. Early termination = \$200. Lessee liable for \$.10/mile over 36,000, maintenance, repairs & excess wear/tear. Must take retail delivery by 6/3/96. SEE PARTICIPATING DEALERS FOR DETAILS AND ACTUAL TERMS. | 19. | <u>ANNCR VO:</u><br>and two-o-nine.         |
| 20. | MAZDA LOGO COMES UP OVER DESERT ROAD.<br><u>SUPER:</u><br>MAZDA<br>PASSION FOR THE ROAD™                                                                                                                                                                                                                                                                                                                                                        | 20. | <u>SINGERS:</u><br>...PASSION FOR THE ROAD. |
| 21. | <u>SUPER:</u> MAZDA JUMP ON-SUMMER.                                                                                                                                                                                                                                                                                                                                                                                                             | 21. |                                             |

Exhibit C

Page 3 of 4 Pages

EXHIBIT C

**FCB** FOOTE, CONE & BELDING  
 4 Hudson Centre Drive, Santa Ana, CA 92707  
 (714) 662-8500

CLIENT: MAZDA MOTOR OF AMERICA

TYPE OF SCRIPT:  
 NATIONAL  
 REGIONAL

JOB#: MAZD-DTP-T3631  
 PRODUCT: 626, Protegé, B2300 SE-5  
 LENGTH: :30  
 TITLE: Jump-626/Prot/SE-5-L-30

As Produced: 5/9/96

ORIGINAL ISCI:  
 NEW ISCI: JQNB 0900

Page 4 of 4

VIDEO

AUDIO

- |                                                                                                                                                                                                                  |                                                                                                                                                                               |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>22. CLOSE UP OF WOMAN JUMPING INTO AIR TOWARDS CAMERA.</p> <p>23. <u>SUPER:</u><br/>ZERO DOWN LEASES<br/>36 MONTHS</p> <p>24. <u>SUPER:</u><br/>ENDS JUNE 3RD.</p> <p>25. TITLE JUMPS IN SYNC WITH MUSIC.</p> | <p>22. <u>ANNCR VO:</u><br/>Jump on it.</p> <p>23. <u>SINGERS:</u><br/>Jump</p> <p>24. <u>ANNCR VO:</u> Zero down ...<br/>ends June 3rd.</p> <p>25. <u>SINGERS:</u> JUMP!</p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|



## DECISION AND ORDER

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

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

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

1. Respondent Mazda Motor of America, Inc. is a California corporation with its principal office or place of business located at 7755 Irvine Center Drive, Irvine, California.

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

Decision and Order

123 F.T.C.

## ORDER

## DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease inception*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, excluding dealer and government mandated fees and charges (if any).

3. Unless otherwise specified, "*respondent*" as used herein shall mean Mazda Motor of America, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*In or affecting commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of revised Regulation M, 61 Fed. Reg. 52,246, 52,258 (Oct. 7, 1996)(to be codified at 12 CFR 213.2) ("revised Regulation M"), as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the total amount due at lease inception, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

B. Make any reference to any charge that is part of the total amount due at lease inception or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease inception.

C. State the amount of any payment or that any or no initial payment is required at lease inception unless all of the following items are disclosed clearly and conspicuously, as applicable:

1. That the transaction advertised is a lease;
2. The total amount due at lease inception;
3. That a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

## II.

*It is further ordered,* That an advertisement that complies with subparagraph I.C shall be deemed to satisfy the requirements of Section 184(a) of the Consumer Leasing Act, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, \_\_\_\_\_ (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 (to be codified at 12 CFR 213.7(d)(2)), as amended.

## III.

*It is further ordered,* That if the revised CLA, as amended, or revised Regulation M, as amended, are amended in the future to alter definition 2 of this order ("total amount due at lease inception") or to require or permit advertising disclosures that are different from those set forth in subparagraphs I.B or I.C of this order, then the change or changes shall be incorporated in subparagraph I.B, subparagraph I.C, and/or definition 2 for the purpose of complying with subparagraphs I.B and I.C only, as appropriate; provided however, that all other requirements of this order, including definition 1 ("clearly and conspicuously"), will survive any such revisions.

## IV.

*It is further ordered,* That respondent Mazda Motor of America, Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make

available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

V.

*It is further ordered,* That respondent Mazda Motor of America, Inc. and its successors and assigns, shall distribute a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

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

VII.

*It is further ordered,* That respondent Mazda Motor of America, Inc. and its successors and assigns shall, within one hundred and

twenty (120) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### VIII.

This order will terminate on February 6, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

## CALIFORNIA SUNCARE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3715. Complaint, Feb. 11, 1997--Decision, Feb. 11, 1997*

This consent order prohibits, among other things, a California-based company and its president from misrepresenting the safety, benefits, performance or efficacy of tanning products and UV exposure, or any tests, studies or endorsements of their tanning products. The consent order requires the respondents to possess scientific evidence to substantiate such claims, and to send letters to distributors and retailers summarizing the Commission's action.

*Appearances*

For the Commission: *Joel Winston, Nancy Warder, Laura Fremont and Toby M. Levin.*

For the respondents: *Andrew J. Strenio, Jr., Hunton & Williams, Washington, D.C. and Norm D. St. Landau, Tucker, Flyer & Lewis, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that California SunCare, Inc., a corporation, and Donald J. Christal, 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 California SunCare, Inc., is a California corporation, with its principal office or place of business at 1100 Glendon Avenue, Suite 1250, Los Angeles, California.

Respondent Donald J. Christal 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 and 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 skin care products for use in

connection with tanning in sunlight or indoor UV radiation emitted by tanning beds and artificial sunlamps, and other products. These skin care products are sold under the trade name Heliotherapy™ and the brand name California Tan® (hereinafter referred to as "California Tan Heliotherapy products"). California Tan Heliotherapy products are "drugs" or "cosmetics" 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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for California Tan Heliotherapy products, including but not necessarily limited to the attached Exhibits A-J. These advertisements and promotional materials contain the following statements and depictions:

A. "I love the sun, but how can I feel good about tanning?"  
Heliotherapy™ . . . The Positive Effects of The Sun™

While overexposure to the sun and burning are bad for you, medical studies demonstrate that, in moderation, exposure to sunlight is crucial for the maintenance of good physical and psychological health. Besides making you feel good about how you look, numerous studies indicate that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.

Did You Know?

.....

\*Exposure to sunlight increases the body's ability to metabolize cholesterol, leading to a 13% decrease in blood cholesterol levels. (New England Medical Journal, 1953)

\* Studies indicate that exposure to UV light may have similar effects as exercise: a decrease in blood pressure, a lower resting heart rate and a 39% increase in the heart's output of blood. (University of Frankfurt, Germany, 1992)

\* Seasonal Affective Disorder (SAD), with symptoms such as as [sic] sadness, insomnia and carbohydrate cravings, is common in northern areas where exposure to sunlight in winter months is significantly decreased. (National Institute of Mental Health, 1985)

\* Of course, no single study or studies may prove scientific fact. As further studies are done, science will tell us more about the effects of sun exposure. However, as these studies emphasize, the sun may have positive as well as negative effects.

REMEMBER! The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PREMATURE AGING, WRINKLING AND SKIN CANCER.

Moderate exposure, however, in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you to optimize a proven positive effect of the sun - your tan.

CAUTION: California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported physiological and psychological benefits of the sun that are described above. Studies provided by California Tan's Scientific Research Center (Exhibit A, brochure)

B. VITATAN™ The Tanning Technology of the Future . . . .

\* VITATAN™ delivers an additional molecule of oxygen to the surface of the skin which significantly enhances the oxidation of melanin for faster tanning results. When compared to Unipertan, products containing 2% VITATAN™ help improve your natural ability to develop a golden brown base tan by up to 67%.

Heliotherapy™ Maximizer - VT™ . . . .

[new page]

Heliotherapy™ . . . The Positive Effects of The Sun™

California Tan's Scientific Research Center, a panel of renowned scientists and researchers, reviews thousands of studies on the effects of sunlight. Inspired by Heliotherapy™ . . . The Positive Effects of the Sun™, California Tan® created the complete Heliotherapy™ three step system to help you maximize a proven positive effect of the sun - your tan.

#### CONDITION

#### MEDICAL EFFECT

##### AIDS

AIDS is a fatal and incurable epidemic

Preliminary studies indicate that phototherapy may be beneficial in treating patients with AIDS-related complex.

##### Cancer Prevention

Breast and colon cancer can be fatal if not detected early.

Sunlight exposure may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona.

. . . .

##### Fitness

Fitness increases energy and reduces risk of heart disease.

Exposure to sunlight may have similar effects to exercise: decreased blood pressure, lower resting heart disease and a 39% increase in the output of blood.

[each "MEDICAL EFFECT" accompanied by citation]

Studies provided by California Tan's Scientific Research Center

While these studies indicate a wealth of benefits may result from sun exposure, no single study or studies may prove scientific fact. As research continues, science will reveal more about the effects of the sun. These studies emphasize that the sun may have positive as well as negative effects.

Remember!

To maximize the benefits of sun exposure you must achieve balance. . . .

REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER.

However, moderate exposure in combination with California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a

spectacular, golden brown tan while minimizing the negative effects of skin dehydration.

**Caution:**

California Tan<sup>®</sup> products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above and California Tan<sup>®</sup> does not represent that such benefits result from the use of its products.

HELIO THERAPY (Exhibit B, brochure)(sources for each medical effect omitted)

**C. Heliotherapy™ . . . The Positive Effects of The Sun™**

**2 \* What is Heliotherapy?**

he-li-o-ther-a-py. . . [HELIO- + THERAPY] the treatment of disease by exposing the body to sunlight Heliotherapy is a science, documented by thousands of scientific studies which have been conducted on the benefits of sun exposure. Acknowledged and practiced by the American Medical Association, heliotherapy is the treatment of disease by means of the sun's electromagnetic waves. Red, orange, yellow, green, blue, indigo, violet, and mid and near ultraviolet waves are used whether collectively or independently to treat and cure everything from acne to jaundice.

Did you know that? . . . .

\*Heliotherapy is the only known cure for Seasonal Effective [sic] Disorder, a cyclic mood disorder caused by sunlight deprivation during fall and winter months.

\*Currently, AIDS research clinics use heliotherapy as an effective tool for boosting the body's immune system.

. . . .

\*Scientists at the Baylor University Medical Center have successfully used heliotherapy to destroy the AIDS virus and other infectious diseases and are developing heliotherapy to decontaminate blood for transfusions. . . .

While fully recognizing that long term overexposure to the sun and burning can result in skin cancer, premature aging and wrinkling in some cases, the science of heliotherapy supports that the sun also offers many benefits. In the months to come, California Tan's Scientific Research Center will uncover the FACTS about Heliotherapy™ ... The Positive Effects of The Sun™ .

Studies provided by California Tan's Scientific Research Center

. . . .

1-800-SUN-CARE

CALIFORNIA

TAN<sup>®</sup>

The science of heliotherapy has inspired the California Tan<sup>®</sup> Heliotherapy™ line of products. These products are intended to be used for tanning and moisturization only and not for any of the psychological or physiological benefits described in this advertisement.

SOLD IN SALONS

(Exhibit C, magazine ad)

**D. Is Sunlight the Answer for cancer prevention?**

New studies from the University of California, San Diego indicate that exposure to sunlight may play an important role in the prevention of certain types of cancer. While long-term overexposure to the sun and burning can be harmful, this research

shows that the sun may have many properties that help prevent breast, colon and ovarian cancer.

As a leader in the study of Heliotherapy, California Tan's Scientific Research Center has uncovered thousands of studies demonstrating the benefits of UV-exposure.

Studies by Dr. Edward Gorham at the University of California, San Diego, show that the incidence of breast cancer is lowest in countries nearest the equator where the opportunity for sunlight exposure is highest. Vitamin D produced by exposure to sunlight is associated with a lower rate of fatal breast cancer.

**Vitamin D produced by exposure to sunlight is associated with a lower risk of fatal breast cancer.** [banner]

It's not surprising that within the U.S., colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona, according to research conducted by Dr. Frank Garland at the University of California, San Diego.

In addition, the Melanoma Clinic at the University of Sydney, Australia released new research showing that the lowest incidence of skin cancer occurs in those people whose main occupation is outdoors.

While the jury is still out on the true effects of sun exposure, the science of Heliotherapy indicates that the sun is necessary for our health and well being. Experts agree that overexposure and burning can lead to skin cancer in some cases. However, with moderation, exposure to sunlight may bring us many benefits.

....  
 CALIFORNIA TAN<sup>®</sup> Heliotherapy™ . . . The Positive Effect of The Sun™  
 (Exhibit D, magazine ad)

E. From high blood pressure to AIDS . . . Is Sunlight the Cure of the '90's?  
 Although the experts warn against long-term overexposure to the sun and burning, new research points to the healing powers of the sun....

Today, people are looking for more natural cures for everything from common ailments to serious diseases. As a major contributor to the science of Heliotherapy™, California Tan's Research Center has uncovered hundreds of studies demonstrating the positive effects of sun exposure.

\*In a recent study by Dr. Zane Kime, patients with high blood pressure experienced a dramatic decrease in blood pressure lasting five to six days after just one treatment of UV- light. . . .

\*According to studies conducted by Dr. Norman Rosenthal at the National Institute of Mental Health, light treatment is the most effective cure for Seasonal Affective Disorder (SAD), or the winter blues.

\*UV-light treatment is on the forefront of the search for an AIDS cure. Scientists at Baylor University Medical Center have used light to destroy the AIDS virus and other infectious diseases.

Even though the jury is still out on the true effects of sun exposure, we are now discovering that the sun plays an important role in the maintenance of good health. Through the science of Heliotherapy™, we are learning that balance is most important. Overexposure and burning can lead to skin cancer in some cases. However, in the right amounts, we can benefit from the sun's healing powers.

....  
 CALIFORNIA TAN<sup>®</sup>  
 Heliotherapy™ . . . The Positive Effects of The Sun™  
 (Exhibit E, magazine ad)

F. Heliotherapy™ The Positive Effects of The Sun™  
CALIFORNIA TAN®

California Tan's Scientific Research Center, a panel of renowned doctors, researchers and dermatologists, reviews thousands of studies each year about the positive and negative effects of UV-light. Overexposure and burning are bad for you and may lead to premature aging and skin cancer. However, medical evidence shows that sunlight is connected to everything from osteoporosis prevention to vitamin D synthesis.

[picture of California Tan Heliotherapy products]

Inspired by the science of Heliotherapy, California Tan® has created scientifically proven formulations to help you maximize a proven positive effect of the sun - your tan. [caption]

CANCER PREVENTION: Research from Dr. Cedric Garland at the University of California, San Diego suggests that sunlight may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states compared to sunny southern states. OSTEOPOROSIS: A new study by Dr. J. Rosen demonstrates that reduced winter sunlight can lead to osteoporosis and the vitamin D deficient bone disease osteomalacia (adult rickets). SEASONAL AFFECTIVE DISORDER (SAD): A 1993 study by Dr. A. Wirz-Justice shows that 70% of SAD patients show improvement after light treatment, the only known cure for the "winter blues." SKIN CANCER: Skin cancer has been linked to non-UV causes: diet, genetics, and alcohol, according to a 1992 study by Dr. L. Marchand. VITAMIN D: A 1990 study by Dr. Matsuoka shows that vitamin D, which regulates calcium and phosphorus absorption and is needed to maintain a healthy skeleton, is produced during the tanning process.

California Tan products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above.

(Exhibit F, magazine ad)

G. CALIFORNIA TAN® TROPICAL FURY™  
Heliotherapy™ MAXIMIZER™ Maximize The Positive Effects of the Sun™

....  
A unique, scientifically proven blend of California Tan's Heliotherapy™ MAXIMIZER Complex provides the most effective moisturization to help you achieve up to 42% better tanning results and counteract the drying effects of the sun for a spectacular, golden brown tan.

....  
CALIFORNIA TAN®  
Heliotherapy™ . . . The Positive Effects of The Sun™

California Tan's exclusive Heliotherapy™ formulas are a precise, scientifically proven combination of state-of-the-art skin care and tanning ingredients that help you maximize a proven positive effect of the sun - your tan!

While it's true that over exposure to the sun and burning are bad for you, medical science has also discovered that, in moderation, exposure to the sun is crucial to the maintenance of good physical and psychological health.

In addition to the fact that a tan makes you feel good about how you look, a number of studies have noted that little to no sun exposure may be equally as bad, if not worse, to your overall health as too much sun.

## DID YOU KNOW THAT?

\*According to a study conducted by the University of Sydney and Melanoma Clinic in 1982, the people with the lowest risk of skin cancer were those whose main outdoor activity was sunbathing.(see note 1)

\*The same study also found that the highest incidence of skin cancer occurred in those who spent most of their time indoors under fluorescent lighting which is deficient of the ultraviolet portion of the sun spectrum.(see note 2)

....

\*In a 1980 study, it was concluded that exposure to sunlight produces the same benefits as exercise: increases in strength, energy, endurance, tolerance to stress, and the ability of the blood to absorb and carry oxygen; and decreasing the resting heart rate, blood pressure, respiratory rate, blood sugar and lactic acid.(see note 6)

....

\*Researchers also found that the dietary vitamin D found in milk and vitamin supplements is not a sufficient replacement to the vitamin D that is produced by exposure to the sun for the maintenance of healthy bones and teeth and at high levels, dietary vitamin D has been found to be very toxic.(see note 8)

\*Studies indicate that exposure to ultra-violet light is an effective tool for lowering elevated blood pressure.(see note 9)

\*According to a recent study conducted at the Tulane University, the heart became stronger and pumped more blood when the subjects were exposed to ultra-violet light.(see note 10)

....

\*Sunlight has been scientifically proven in numerous studies to reduce serum cholesterol levels.(see note 12)

\*In a study conducted by The American Society for the Study of Arteriosclerosis, 97% of the subjects had a 13% decrease in the level of cholesterol within two hours after the first exposure.(see note 13)

....

\*In 1987, the Wall Street Journal reported that chickens raised under full-spectrum lighting, the closest match to natural sunlight, lived twice as long, laid more eggs, were less aggressive, and laid eggs that were 25% lower in cholesterol than chickens raised under fluorescent lighting.(see note 15)

....

Of course, no single study or studies may prove scientific fact. And as further studies are done, science will tell us more about the effects of sun exposure. But these studies emphasize that the sun may have positive as well as negative effects.

## REMEMBER!

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER. Moderate exposure, however, in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of over exposure and skin dehydration.

CALIFORNIA TAN®  
Heliotherapy™

ACHIEVE A SPECTACULAR DEEP DARK, TAN  
AND FEEL GOOD ABOUT IT

CAUTION

California Tan products are intended TO BE USED FOR TANNING AND MOISTURIZATION ONLY. They ARE NOT intended to produce any of the physiological and psychological benefits of the sun that the studies describe.

Studies provided by California Tan's Scientific Research Center  
(Exhibit G, Tropical Fury Heliotherapy™ Maximizer label)(references omitted)

H. Heliotherapy™ Update

CALIFORNIA TAN®

Heliotherapy™ The Positive Effects of the Sun™

Only California Tan's exclusive Heliotherapy™ formulas are the precise scientifically proven combination of extraordinary skin care and tanning ingredients to help you maximize a proven positive effects of the sun ... your tan. While overexposure to the sun and burning are bad for you, medical studies demonstrate that, in moderation, exposure to sunlight is crucial for the maintenance of good physical and psychological health.

Besides making you feel good about how you look, numerous studies demonstrate that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.

Did You Know That?

\*Sunlight is the only reliable source of vitamin D and provides the vitamin D requirement for most of the world's population. (Boston University, 1989)

....

\*Exposure to sunlight increases the body's ability to metabolize cholesterol, leading to a 13% decrease in blood cholesterol levels. (New England Medical Journal, 1953)<sup>4</sup>

\*Studies indicate that exposure to UV light may have similar affects [sic] as exercise: decreased blood pressure, lower resting heart rate and a 39% increase in output of blood. (University of Frankfurt, Germany, 1992)<sup>5</sup>

\*Seasonal Affective Disorder (SAD), with symptoms such as as [sic] sadness, insomnia, carbohydrate cravings, anxiety and irritability, is commonly found in northern areas where exposure to sunlight in winter months is significantly decreased. (National Institute of Mental Health, 1985)<sup>6</sup>

....

\*Studies indicate that people with the lowest risk of skin cancer are those whose main occupation is outdoors. (Lancet, 1982)<sup>9</sup>

\*Significant seasonal bone loss, as a result of inadequate vitamin D formation, occurs in people who live in areas with reduced winter sunlight. Bone loss can lead to Osteoporosis and Osteomalacia, a softening of the bones. (University of Maine, 1993)<sup>11</sup>

\*Colon and breast cancer deaths are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona. (University of California, San Diego, 1986)<sup>12</sup>

....

Of course, no single study or studies may prove scientific fact. As further studies are done, science will tell us more about the effects of sun exposure. However, as these studies emphasize, the sun may have positive effects as well as negative effects.

Complaint

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**Remember!!**

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER. However, moderate exposure in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of overexposure and dehydration.

.....

**CAUTION:**

California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to promote any of the reported physiological and psychological benefits of the sun that are described above.

Studies provided by California Tan's  
Scientific Research Center

(Exhibit H, Tropical Sizzle Heliotherapy™ Maximum Strength Intensifier label)(citations omitted)

**I. Heliotherapy™ . . . The Positive Effects of the Sun™**

California Tan's Scientific Research Center, a panel of the world's most renowned scientists, reviews thousands of studies relating to light and health which inspired California Tan to create its exclusive Heliotherapy™ three step system that contains the precise combination of proven tanning and skin care ingredients to help you maximize a positive effect of the sun - your tan. Burning and overexposure are bad for you. But sunlight is essential for your psychological and physiological good health.

**HELIO THERAPY™ REFERENCE CHART**

CONDITION	MEDICAL EFFECT
AIDS	Preliminary studies indicate that phototherapy may be beneficial in treating patients with AIDS-related complex.
AIDS is a fatal and incurable epidemic.	
Cancer Prevention	Sunlight exposure may prevent certain types of cancer: colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona.
Breast and colon cancer can be fatal if not detected early.	
.....	
Fitness	Exposure to sunlight may have similar effects as exercise: decreased blood pressure, lower resting heart rate, a 39% increase in the output of blood.
Fitness increases energy and reduces risk of heart disease.	
.....	

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Complaint

**Osteoporosis**

Osteoporosis is a growing epidemic of weak bones in the U.S.

....

**CONDITION**

Seasonal Affective Disorder (SAD)  
More than 25 million Americans suffer from SAD each year.

....

**Skin Cancer**

....

Significant seasonal bone loss due to lack of sunlight produced vitamin D is prominent in areas with reduced winter sunlight and can lead to Osteoporosis.

**MEDICAL FACT/BENEFIT**

A 1993 study shows that 70% of patients with SAD show improvement after light treatment, the only known cure for the "winter blues."

Skin cancer has been linked to non-UV causes: diet, genetics and alcohol.

[each "EFFECT" or "BENEFIT" accompanied by citation]

Studies provided by California Tan's Scientific Research Center

While these studies indicate a wealth of benefits may result from sun exposure, no single study or studies may prove scientific fact. As research continues, science will reveal more about the effects of the sun. These studies emphasize that the sun may have positive as well as negative effects.

**Remember!**

To maximize the benefits of sun exposure you must achieve balance and determine the best amount of sun exposure for you based on your skin type and how easily you burn. Consult your physician if you have any doubt and don't ever allow yourself to burn.

**REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER.**

However, moderate exposure in combination with the use of California Tan's exclusive Heliotherapy™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of skin dehydration.

**Caution:**

California Tan® products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above and California Tan® does not represent that such benefits result from use of its products. (Exhibit I, Tan & Tone Legs Maximum Strength Heliotherapy™ Maximizer- VT Contouring Cream label)(sources for each medical benefit omitted)

**J. MORE ABOUT HELIOTHERAPY™**

Promoting Heliotherapy™

**CAN INCREASE YOUR LOTION SALES**

Let your customers know that....

\*Let your clients know that lotions can help them reap the positive effects of the sun and UV-light (a tan, increased immunity, lower cholesterol, etc.) while protecting

**FAST FACTS ON HELIOTHERAPY™**

Did you know that the sun produces many of the same benefits as exercise?

Such as:

Complaint

123 F.T.C.

themselves from and/or preventing the negative effects.

\*Say to clients when they're signing in -- "Did you know that the sun has some of the same effects on your body as exercise, like lower cholesterol and and more oxygen going into your cells?"

\*Put up a Heliotherapy™ poster at eye-level in each changing room.

\*Make it a point to post one new positive effect of UV-light exposure per week in an area where salon employees will be most likely to read it. (See box-right).

\*Lowering blood cholesterol levels

\*Lowering your resting heart rate

\*Increasing your oxygen intake into cells

\*Increasing your energy level

From Dr. Zane Kime's book;  
Sunlight

Tape this on the outside of your cash register where all your clients will see it and watch your membership sales soar!

(Exhibit J, salon owner newsletter)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that:

A. The negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by overexposure or burning and not by moderate exposure, over a period of years, including exposure sufficient to cause tanning.

B. Tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin.

C. Use of California Tan Heliotherapy products prevents or minimizes the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging.

D. Exposure to sunlight or indoor UV radiation reduces the risk of skin cancer.

PAR. 6. In truth and in fact:

A. The negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are not caused only by overexposure or burning, but also can be caused by cumulative moderate exposure, over a period of years, including exposure sufficient to cause tanning.

B. Tanning as a result of exposure to sunlight or indoor UV radiation is harmful to the skin.

C. Use of most California Tan Heliotherapy products in conjunction with exposure to sunlight or indoor UV radiation does not reduce the risk of skin cancer or premature skin aging, because most California Tan Heliotherapy products do not contain sunscreen.

D. Exposure to sunlight or indoor UV radiation does not reduce the risk of skin cancer.

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

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

A. Exposure to sunlight or indoor UV radiation prevents or reduces the risk of colon and breast cancer.

B. Exposure to sunlight or indoor UV radiation lowers elevated blood pressure.

C. Exposure to sunlight or indoor UV radiation has benefits similar to those of exercise, including decreased blood pressure and lower heart rate.

D. Exposure to sunlight or indoor UV radiation significantly reduces serum cholesterol.

E. Exposure to indoor UV radiation is an effective treatment for Seasonal Affective Disorder.

F. Exposure to sunlight or indoor UV radiation is an effective treatment for AIDS.

G. Exposure to sunlight or indoor UV radiation enhances the immune system.

H. For the general population, reduced winter sunlight can lead to bone disorders such as osteoporosis and osteomalacia, and increased exposure to sunlight or indoor UV radiation is necessary to reduce the risk of such disorders.

I. California Tan Heliotherapy MAXIMIZERS help users achieve up to 42% better tanning results.

J. California Tan Heliotherapy products that contain 2% VITATAN improve users' ability to tan by up to 67%.

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-J, respondents have represented, directly or by implication, that:

A. Scientific studies demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits set forth in paragraphs five and seven.

B. The American Medical Association has endorsed exposure to sunlight or indoor UV radiation as an effective medical treatment.

PAR. 7. In truth and in fact,

A. Scientific studies do not demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits set forth in paragraphs five and seven.

B. The American Medical Association has not endorsed exposure to sunlight or indoor UV radiation as an effective medical treatment.

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

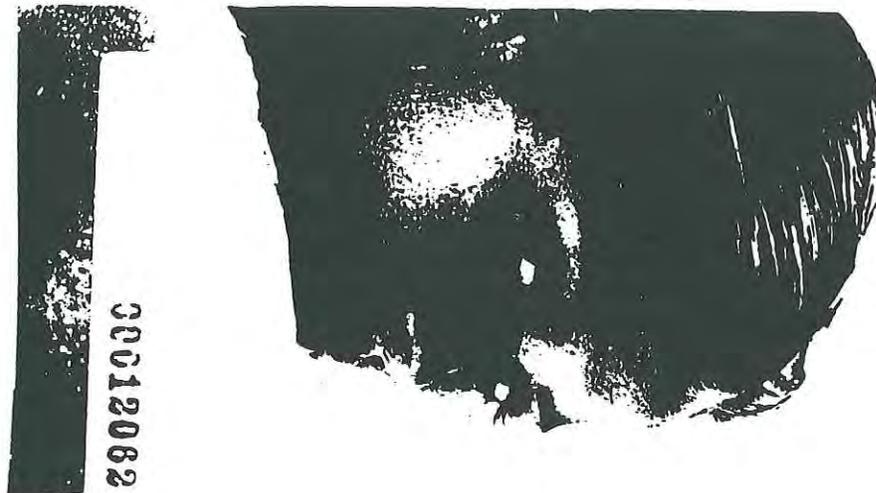
PAR. 12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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Complaint

EXHIBIT A

Exhibit A



CT 001827

The Complete

Three-Step

Tanning

System With

Exceptional

Care For

Your Skin

CALIFORNIA  
 TAN 

Five Effects of The Sun™

EXHIBIT A

Exhibit A (cont)



00612063

**California Tan's®  
Quick Reference Tanning Guide\***

Tanning Need	Solution	Result
Developing a base tan	Step 1 Heliotherapy™ Moisturizers™	Up to 42% better tanning results with exceptional care for your skin
Developing a base tan but concerned about burning	Step 1 SPF Heliotherapy™ Moisturizers™	Up to 42% better tanning results with protection 2, 4, 8 or 15 times longer in the sun without burning
Don't want to tan	Step 1 SPF 25 Sublact	Total sun protection
Unable to get any darker	Step 2 Heliotherapy™ Intensifiers	Breaks through your Tanning Plateau for the deepest, darkest tan possible
Sunburn	Step 3 Insurance™	Soothes sunburn pain, takes you from a red tan to a brown tan overnight
Feeling and feeling and/or dry skin	Step 3 Heliotherm™	12 hours of intensive moisturization, helps restore wrinkles, depth and firmness by up to 64% when used regularly!
Don't want to tan, but want the appearance of a tan	Self-Action Tanning Gel	Creates a natural, golden brown tan without the sun
Want to protect lips from burning	Lip Defense™ SPF 25	Pumps lips for silly moisturization and 25 times longer protection in the sun without burning

\*If your skin does not tan easily, please use extreme caution when using any product that does not contain a high SPF level. Burning and long-term overexposure to the sun may cause premature aging, wrinkling and skin cancer.



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EXHIBIT B

Exhibit B

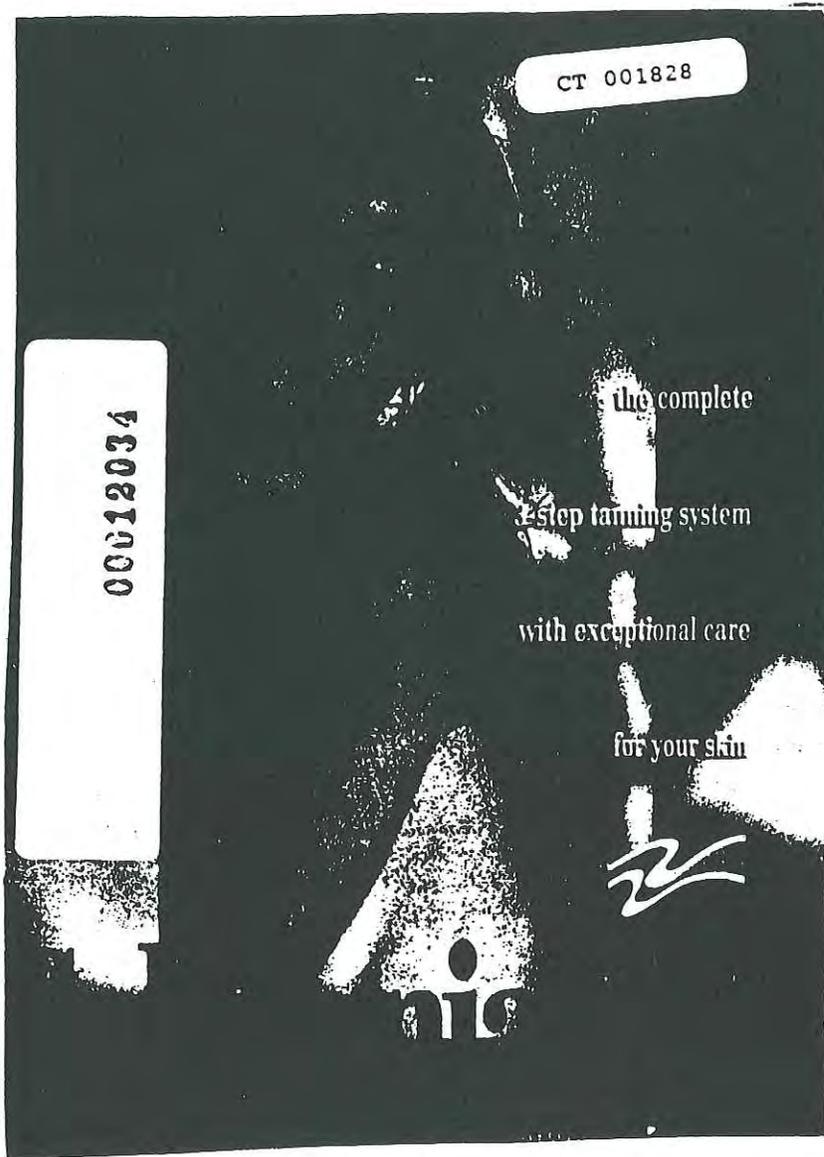


EXHIBIT B

**Climax™  
Private Reserve™  
Limited Edition**

00012038

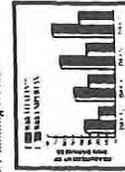
For those who choose only the best, money can buy, the laboratories of California Tan™ have created the ultimate tanning experience - Limited Edition Climax™. Combining years of research with private reserve levels of our revolutionary new VITATAN™ (patent pending) technology, Climax™ is scientifically proven to help improve your natural ability to develop a base tan by up to 67%, while minimizing the signs of aging.

**VITATAN™**

**The Tanning Technology of The Future**

- VITATAN™ is incorporated in the most technologically advanced, multi-level liposomal system, delivering up to 50% more of the actives in the tanning source for rich, golden brown results.
  - VITATAN™ contains a revolutionary DNA enzyme that helps to minimize sun damage and reduce the appearance of fine lines and wrinkle depth by up to 64%.
  - Through the use of anti-oxidants, such as Vitamins A, C, E, and F, VITATAN™ works to neutralize the free radicals that can cause lines and wrinkles.
  - VITATAN™ delivers an additional molecule of oxygen to the surface of the skin which significantly enhances the oxidation of melanin for faster tanning results.
- When compared to Uniperion, products containing 2% VITATAN™ help improve your natural ability to develop a golden brown base tan by up to 67%.

Exhibit B (cont)



**STEP 1**  
The Soft Trap Maximizer - V

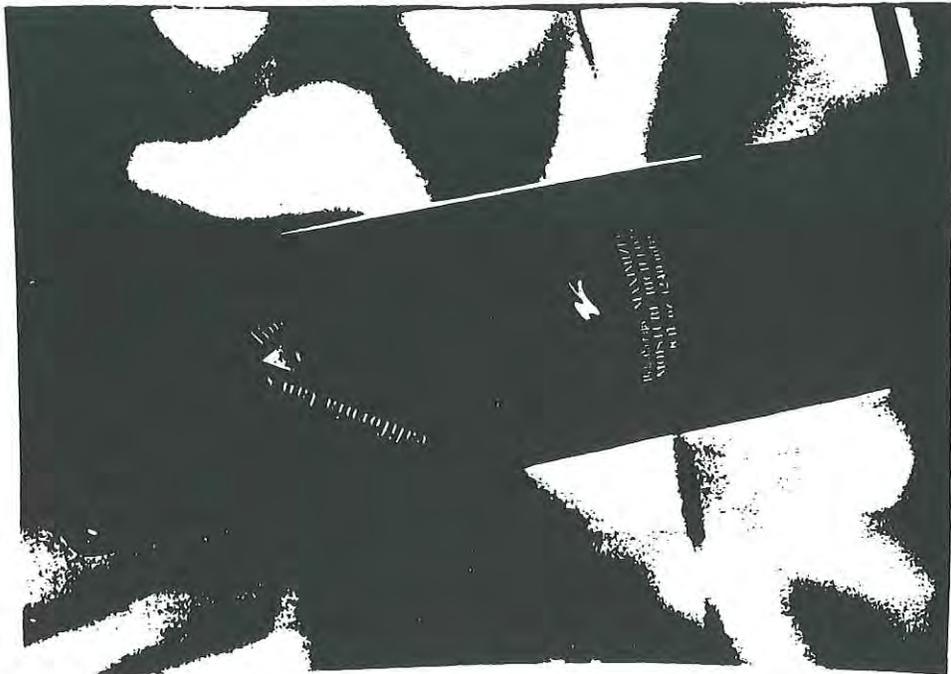


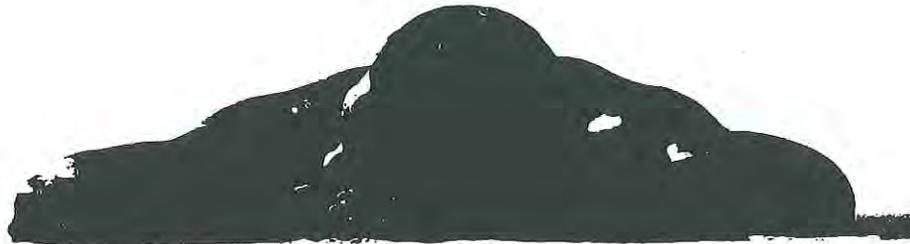


EXHIBIT C

Exhibit C

# Heliotherapy™...The Positive Effects of The Sun™

90612127



## 2 • What Is Heliotherapy ?

*He-li-o-ther-a-py (he li ò ther a pi) a. (HELIO- + THERAPY)  
the treatment of disease by exposing the body to sunlight*

Heliotherapy is a science, documented by thousands of scientific studies which have been conducted on the benefits of sun exposure. Acknowledged and practiced by the American Medical Association, heliotherapy is the treatment of disease by means of the sun's electromagnetic waves. Red, orange, yellow, green, blue, indigo, violet, and mid and near ultraviolet waves are used either collectively or independently to treat and cure everything from acne to jaundice.

### Did you know that?

- Dermatologists use heliotherapy for the treatment of acne, psoriasis and other skin disorders.
- Heliotherapy is a therapeutic treatment used for muscular stimulation and relaxation.
- Heliotherapy is the only known cure for Seasonal Affective Disorder, a cyclic mood disorder caused by sunlight deprivation during fall and winter months.
- Currently, AIDS research clinics use heliotherapy as an effective tool for boosting the body's immune system.
- Heliotherapy used in hospital operating rooms reduces the bacteria count by as much as 50%. As a result, patients have been found to recover faster and have fewer post-operative infections.
- Scientists at the Baylor University Medical Center have successfully used heliotherapy to destroy the AIDS virus and other infectious diseases and are developing heliotherapy to decontaminate blood for transfusions.

• Heliotherapy is practiced in Cancer Research Institutes for successful DNA repair. Within hours of light treatments, the cancer cells begin to die, leaving the normal tissue unharmed. 70% to 80% of the tumors treated responded positively after just one treatment.

• Heliotherapy is used as an effective tool for eradicating the blood of cancer patients.

• The maternity wards of most major hospitals use heliotherapy for the treatment of hyperbilirubinemia (neonatal jaundice), a condition found in over 60% of prematurely born infants.

While fully recognizing that long term overexposure to the sun and burning can result in skin cancer, premature aging and wrinkling in some cases, the science of heliotherapy supports that the sun also offers many benefits. In the months to come, California Tan's Scientific Research Center will uncover the FACTS about Heliotherapy™. The Positive Effects of The Sun™.

Studies provided by California Tan's Scientific Research Center

For more information on Heliotherapy™ and a complete list of sources, please call

**1-800-SUN-CARE**  
CALIFORNIA  
TAN™

The science of heliotherapy has inspired the California Tan® Heliotherapy™ line of products. These products are intended to be used for tanning and moisturization only and not for any of the physiological or physiological benefits described in this advertisement.

SOLD IN SALONS

CT 0016

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## EXHIBIT D

Exhibit D

# Is Sunlight the Answer for cancer prevention?

New studies from the University of California, San Diego indicate that exposure to sunlight may play an important role in the prevention of certain types of cancer. While long-term overexposure to the sun and burning can be harmful, this research shows that the sun may have many properties that help prevent breast, colon and ovarian cancer.

As a leader in the study of heliotherapy, California Tan's Scientific Research Center has uncovered thousands of studies demonstrating the benefits of UV-exposure.

Studies by Dr. Edward Gorham at the University of California, San Diego, show that the incidence of breast cancer is lowest in countries nearest the equator where the opportunity for sunlight

**Vitamin D produced by exposure to sunlight is associated with a lower risk of fatal breast cancer.**

exposure is highest. Vitamin D produced by exposure to sunlight is associated with a lower risk of fatal breast cancer.

It's not surprising that within the U.S., colon and breast cancer rates are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona, according to research conducted by Dr. Frank Garfano at the University of California, San Diego.

In addition, the Melanoma Clinic at the University of Sydney, Australia, released new research showing that the lowest incidence of skin cancer occurs in those people whose main occupation is outdoors.

While the jury is still out on the true effects of sun exposure, the science of Heliotherapy indicates that the sun is necessary for our health and well-being. Experts agree that overexposure and burning can lead to skin cancer in some cases. However, with moderation, exposure to sunlight may bring us many benefits.

To find out more about Heliotherapy™ - The Positive Effects of The Sun™, please call 1-800-SUNCARE.

... The Positive Effects of The Sun™



30012136



## EXHIBIT E

Exhibit E

From high blood pressure to AIDS . . .

## Is Sunlight the Cure of the '90's?

Although the experts warn against long-term over-exposure to the sun and burning, new research points to the healing powers of the sun. As Dr. Jacob Liberman suggests, with over 100 biological functions affected by exposure to sunlight, it's not surprising that the sun plays such a vital role in our health and well-being.

Today, people are looking for more natural cures for everything from common ailments to serious diseases. As a major contributor to the science of Heliotherapy™, California Tan's Scientific Research Center has uncovered hundreds of studies demonstrating the positive effects of sun exposure.

• In a recent study by Dr. Zane Kime, patients with high blood pressure experienced a dramatic decrease in blood pressure lasting five to six days after just one treatment of UV-light.

• The National Psoriasis Foundation has released studies stating that 80% of psoriasis sufferers show improvement with exposure to UV-light.

• According to studies conducted by Dr. Norman Rosenthal at the National

Institute of Mental Health, light treatment is the most effective cure for Seasonal Affective Disorder (SAD), or the winter blues.

• UV-light treatment is on the forefront of the search for an AIDS cure. Scientists at Baylor University Medical Center have used light to destroy the AIDS virus and other infectious diseases.

Even though the jury is still out on the true effects of sun exposure, we are now discovering that the sun plays an important role in the maintenance of good health. Through the science of Heliotherapy™, we are learning that balance is most important. Overexposure and burning can lead to skin cancer in some cases. However, in the right amounts, we can benefit from the sun's healing powers.

To find out more about Heliotherapy™...The Positive Effects of the Sun™ attend one of California Tan's Heliotherapy™ Symposia hosted by distributors across America. Please call 1-800-SUNCARE or your local authorized California Tan® distributor for the Symposium nearest you ■

CALIFORNIA  
TAN®

30612154

Heliotherapy™ . . . The Positive Effects of The Sun™

©1991 California Tan's Scientific Research Center. Please send comments to Donna J. Cirrus, Product, 270 N. Casco Dr., Ste. 129, Beverly Hills, CA 90210

Circle Reader Service No. 82

CT 001648



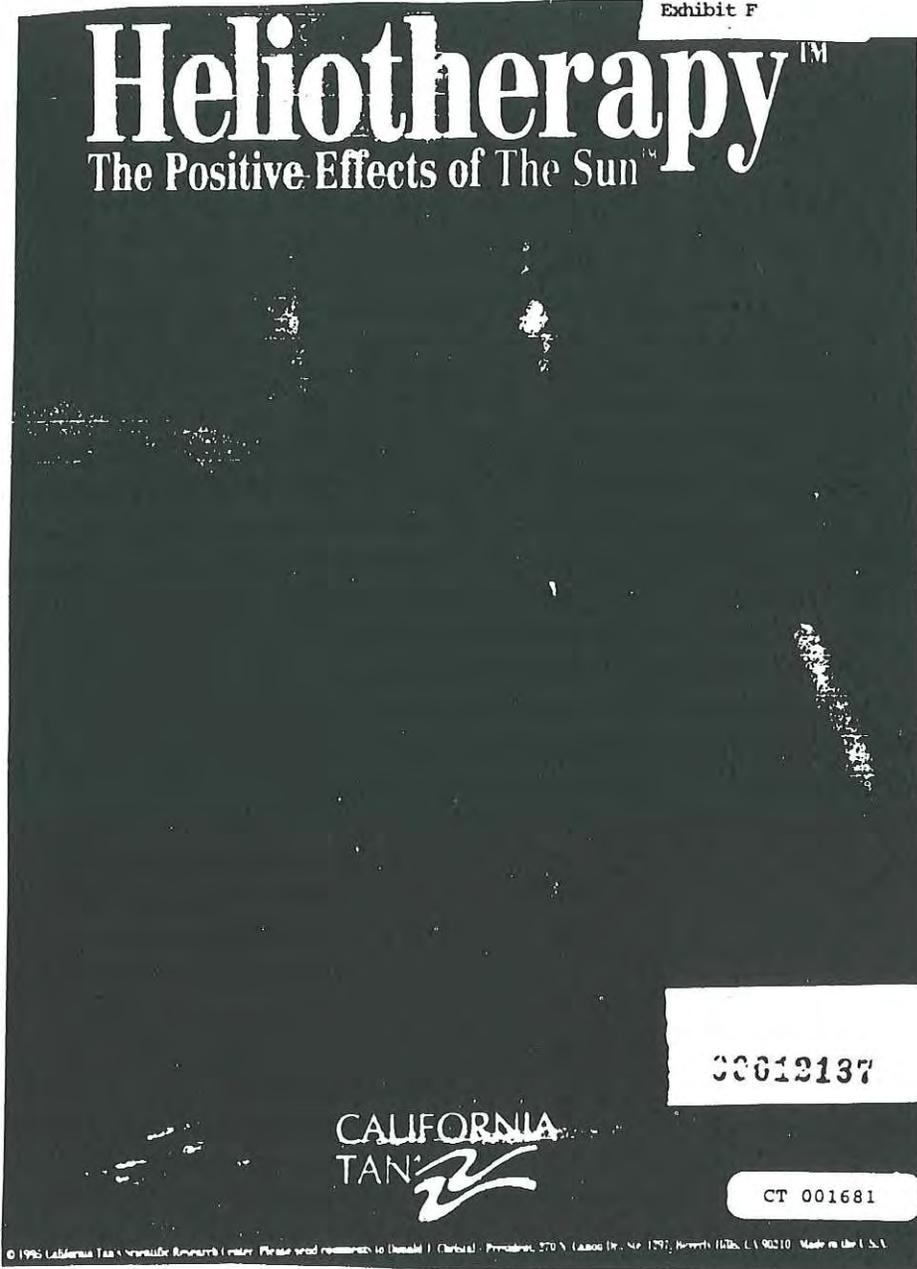
Complaint

123 F.T.C.

EXHIBIT F

Exhibit F

**Heliotherapy™**  
 The Positive Effects of The Sun™



33612137

CALIFORNIA  
 TAN 

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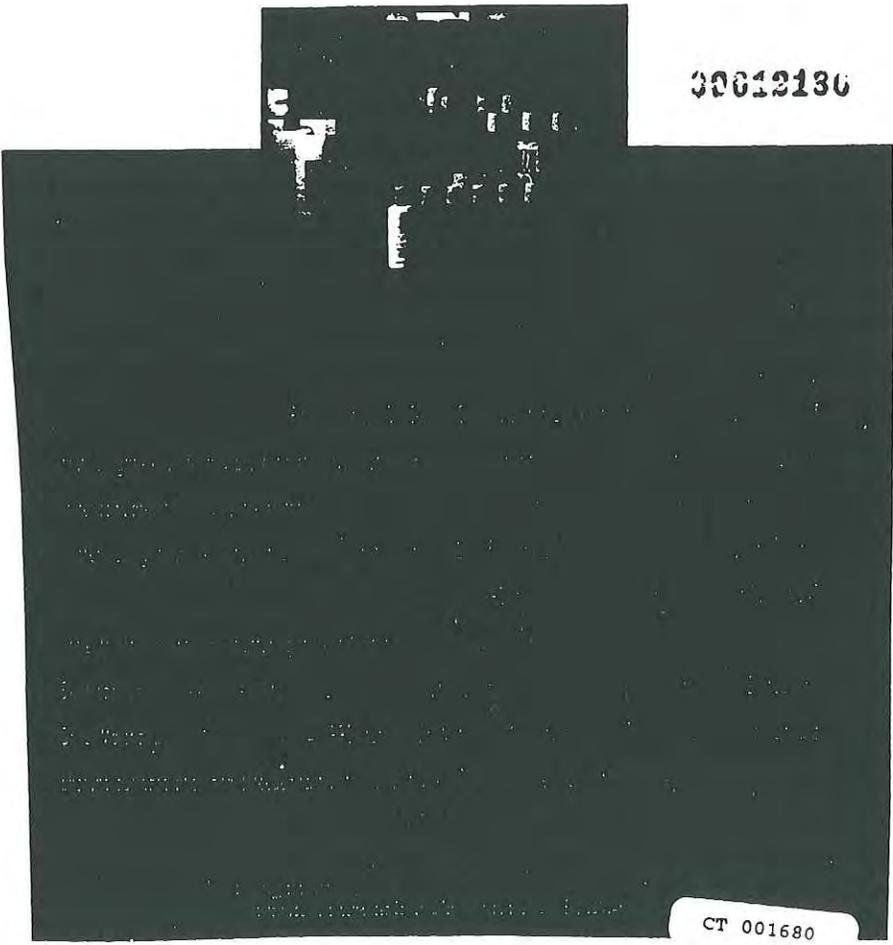
© 1995 California Tan & Sunbath, Inc. All rights reserved. Please send requests to (800) 451-1234. Product # 570 N (Lanoc Tan, No. 123) Item # 123. L1 90210 Made in the U.S.A.

Complaint

EXHIBIT F

Exhibit F (cont)

*C* California Sun's Scientific Research Center, a panel of renowned doctors, researchers and dermatologists reviews thousands of studies each year about the positive and negative effects of UV light. Overexposure and burning are bad for you and may lead to premature aging and skin cancer. However, medical evidence shows that sunlight is connected to everything from osteoporosis prevention to vitamin D synthesis.



00012130

CT 001680

Complaint

123 F.T.C.

EXHIBIT G

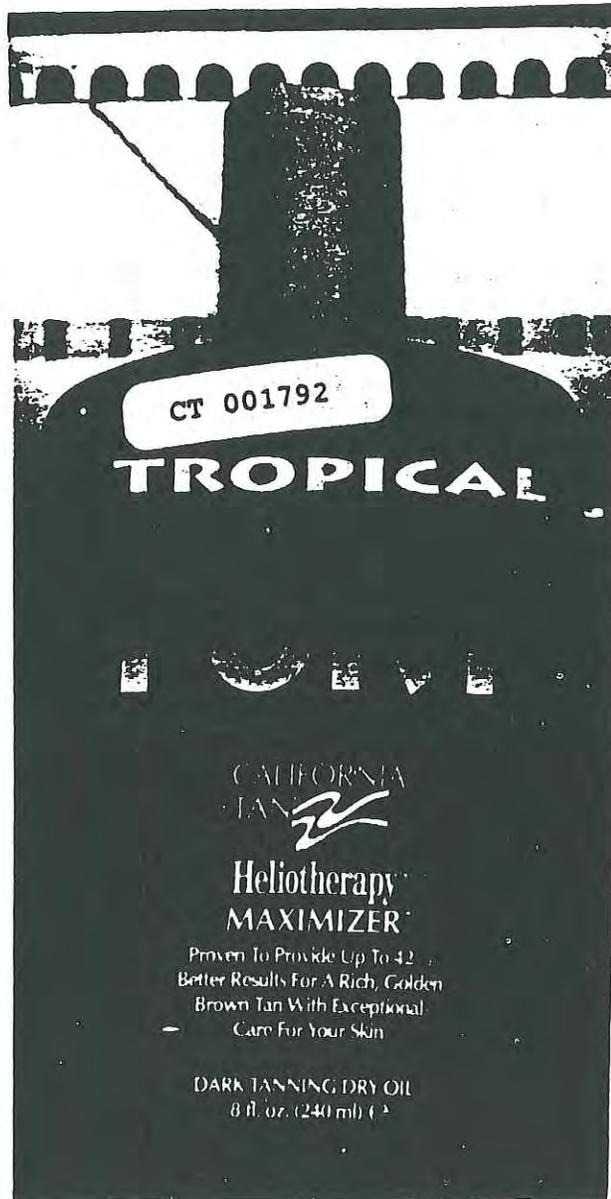


Exhibit G

Complaint

EXHIBIT G



Exhibit G (cont)

Complaint

123 F.T.C.

## EXHIBIT G

Exhibit G (cont)

CALIFORNIA TAN  
TROPICAL FURY™**Heliotherapy™ MAXIMIZER™***Maximize The Positive Effects of The Sun*

With California Tan's exclusive **Heliotherapy™** formula, Tropical Fury is the first dry oil that actually provides you with all the tanning and moisturizing benefits of a real oil without the greasy after-feel and absolutely no mineral oils. The most effective, rare, exotic oils combined with the most precise blend of tanning and skin care ingredients provide up to 42% better tanning results for a deep, dark, **luminous** tan with exceptional care for your skin.

- A unique, scientifically proven blend of California Tan's **Heliotherapy™ MAXIMIZER** Complex provides the most effective moisturization to help you achieve up to 42% better tanning results and counteract the drying effects of the sun for a spectacular, golden brown tan.
- The most effective combination of rare, exotic oils provide all the tanning and moisturizing benefits of an oil for the deepest, richest tan possible without the greasy after-feel.
- Shea Butter combined with the exact level of Vitamin C helps restore your skin's optimum moisture balance and neutralize the free radicals that can cause lines and wrinkles.
- Scientifically proven Uvitriol dramatically helps reduce the appearance of wrinkle depth and fine lines by up to 64% when used regularly.
- Cruelty-Free. Contains no mineral oils, sunscreens, animal by-products, dyes or artificial colorations.

PULL HERE TO OPEN  
PRESS TO RESEAL

## EXHIBIT G

## Exhibit G (cont)

## CALIFORNIA TAN Heliotherapy™ . . .

### The Positive Effects of The Sun

California Tan's exclusive Heliotherapy™ formulas are a precise, scientifically proven combination of state-of-the-art skin care and tanning ingredients that help you maximize a proven positive effect of the sun - your tan!

While it's true that over exposure to the sun and burning are bad for you, medical science has also discovered that, in moderation, exposure to the sun is crucial to the maintenance of good physical and psychological health.

In addition to the fact that a tan makes you feel good about how you look, a number of studies have noted that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.

#### DID YOU KNOW THAT?

\*According to a study conducted by the University of Sydney and Melanoma Clinic in 1982, the people with the lowest risk of skin cancer were those whose main outdoor activity was sunbathing. (see note 1)

\*The same study also found that the highest incidence of skin cancer occurred in those who spent most of their time indoors under fluorescent lighting which is deficient of the ultraviolet portion of the sun spectrum. (see note 2)

\*The findings of the above study were confirmed in 1985 by Dr. F. Alan Anderson, a physicist with the Food and Drug Administration at the New York University of Medicine, who found that over a period of time, fluorescent lights alone emit enough radiation to cause skin cancer. (see note 3)

\*Mice living under natural unfiltered sunlight have been proven to live more than twice as long as mice living under fluorescent lights. (see note 4)

\*According to Dr. Jacob Liberman, exposure to the sun is necessary to the maintenance of over 100 vital biological functions. (see note 5)

\*In a 1980 study, it was concluded that exposure to sunlight produces the same benefits as

## Complaint

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## EXHIBIT G

## Exhibit G (cont)

Exercise: increases in strength, energy, endurance, tolerance to stress, and the ability of the blood to absorb and carry oxygen; and decreasing the resting heart rate, blood pressure, respiratory rate, blood sugar and lactic acid. (see note 6)

• Massachusetts General Hospital reported that exposure to UV light is essential for a healthy level of vitamin D in the body. Vitamin D is necessary for the absorption of calcium and other vital minerals from the diet. (see note 7)

• Researchers also found that the dietary vitamin D found in milk and vitamin supplements is not a sufficient replacement to the vitamin D that is produced by exposure to the sun for the maintenance of healthy bones and teeth and at high levels, dietary vitamin D has been found to be very toxic. (see note 8)

• Studies indicate that exposure to ultra-violet light is an effective tool for lowering elevated blood pressure. (see note 9)

• According to a recent study conducted at the Tulane University, the heart became stronger and pumped more blood when the subjects were exposed to ultra-violet light. (see note 10)

• A recent study reports that light plays an important role in how effectively certain enzymes can regulate vital bodily functions. (see note 11)

• Sunlight has been scientifically proven in numerous studies to reduce serum cholesterol levels. (see note 12)

• In a study conducted by The American Society for the Study of Arteriosclerosis, 97% of the subjects had a 13% decrease in the level of cholesterol within two hours after the first exposure. (see note 13)

• According to the University of Carolina, exposure to sunlight is necessary to the production of Solitrol (an important hormone found within the skin). (see note 14)

• In 1987, the Wall Street Journal reported that chickens raised under full-spectrum lighting, the closest match to natural sunlight, lived twice as long, laid more eggs, were less aggressive, and laid eggs that were 25% lower in cholesterol than chickens raised under fluorescent lighting. (see note 15)

• Medical findings indicate that the sex hormones are most efficient when a woman or man is exposed to sunlight. (see note 16)

• The pineal gland located in the deep center of the brain regulates the numerous biological functions by processing the body's exposure to regular day and night cycles. (see note 17)

• In many northern European countries, stud-

## Complaint

## EXHIBIT G

Exhibit G (cont)

ies have found that a direct correlation exists between decreased exposure to sunlight and a higher incidence of insomnia, irritability, alcoholism, depression, and suicide. (see note 18)

•The National Psoriasis Foundation reports that 80% of the people suffering from Psoriasis improve when exposed to sunlight. (see note 19)

Of course, no single study or studies may prove scientific fact. And as further studies are done, science will tell us more about the effects of sun exposure. But these studies emphasize that the sun may have positive as well as negative effects.

**REMEMBER!**

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. **REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER.** Moderate exposure, however, in combination with the use of California Tan's exclusive **Heliotherapy** formulas can help you optimize the beneficial aspect of having a spectacular, golden brown tan while minimizing the negative effects of over exposure and skin dehydration.

**CALIFORNIA TAN**  
**Heliotherapy™**  
 ACHIEVE A SPECTACULAR  
 DEEP, DARK TAN AND FEEL  
 GOOD ABOUT IT

**CAUTION**

California Tan products are intended TO BE USED FOR TANNING AND MOISTURIZATION ONLY. They ARE NOT intended to produce any of the reported physiological and psychological benefits of the sun that the studies describe.

Studies provided by California Tan's Scientific Research Center

**SOURCES**

1. Beral, Valerie, et al., "Malignant Melanoma and Exposure to Fluorescent Lighting at Work," *Lancet*, 7 Aug 1982; p. 290-291
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## Complaint

123 F.T.C.

## EXHIBIT G

## Exhibit G (cont)

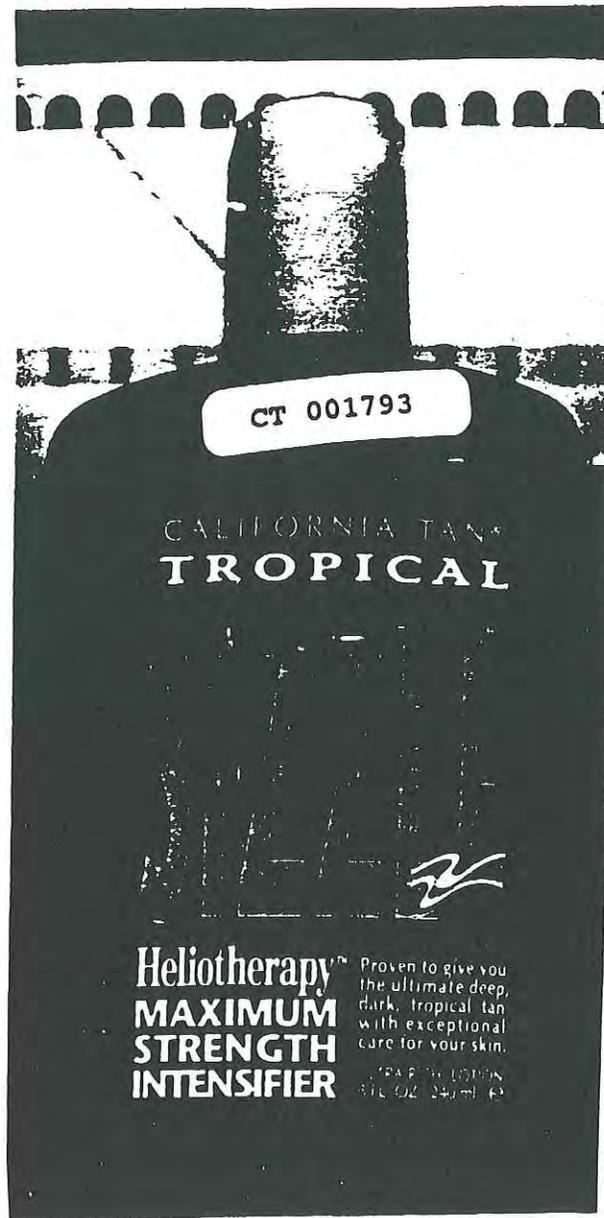
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For more information  
on Melanotherapy, please write to:  
California Tan's Scientific Research Center,  
Donald J. Christal - President  
270 N. Canon Dr., Ste. 129  
Beverly Hills, CA 90210  
Made In The U.S.A.

EXHIBIT H

Exhibit H



Complaint

123 F.T.C.

EXHIBIT H

Exhibit H (cont)

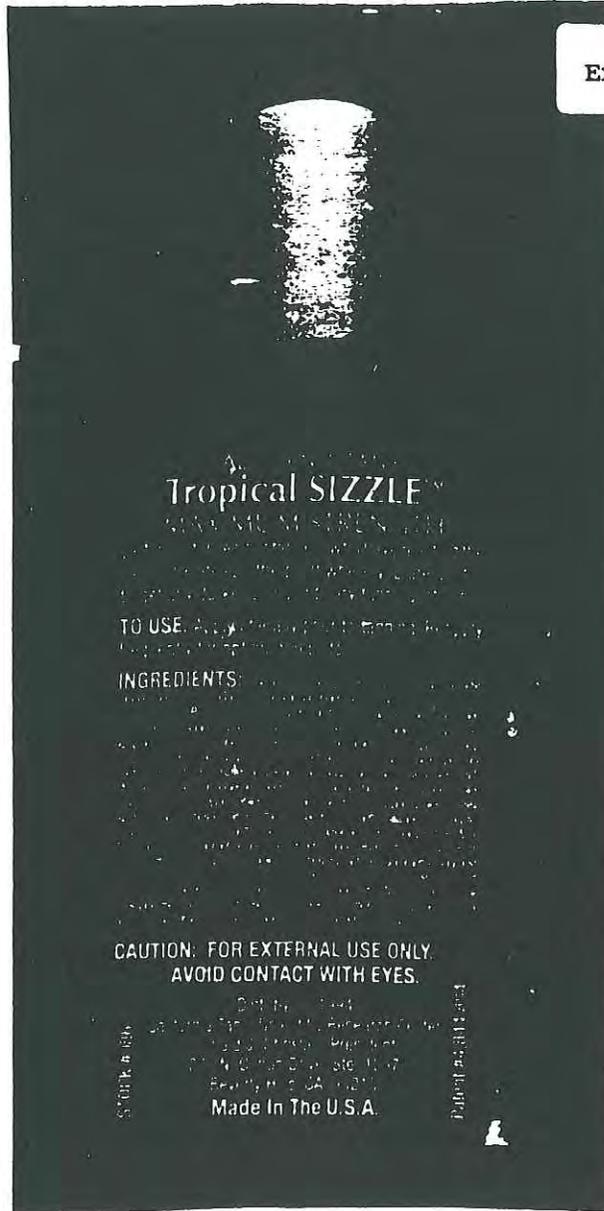


EXHIBIT H

Exhibit H (cont)

**STEP 2**  
 Heliotherapy INTENSIFIER  
 Takes You Beyond Your  
 Tanning Plateau

*Designed for serious  
 tanners who have reached  
 the Tanning Plateau*

CALIFORNIA TAN®  
**Tropical SIZZLE™**  
 MAXIMUM STRENGTH

What is the Tanning Plateau?  
 Studies conducted by International Research  
 Labs show that after a period of tanning,  
 your skin begins to thicken, blocking ultra-  
 violet (UV) exposure and reducing further  
 tanning. This is known as the Tanning Plateau.



Continued inside...

PULL GENTLY HERE

## Complaint

## EXHIBIT H

## Exhibit H (cont)

Tropical SIZZLE's exclusive Heliotherapy™ formula contains a powerful combination of scientifically proven tanning and skin care ingredients. This maximum strength blend is designed to help you break through your Tanning Plateau faster than ever before, giving you the deep, dark, intensified tan you've always wanted.

- Maximum levels of micro-encapsulated Tissue Respiratory Factors (TRF) react to the areas of your skin that are most in need where they work to return your skin back to its natural, healthy state. As a result, optimum UV penetration is restored, allowing you to achieve a greater level of darkness than you ever thought possible.
- Maximum levels of Copper Peptide nanospheres zone in on the areas of your skin that are copper deficient, resulting in a heightened level of skin darkening.
- Maximum levels of Unifrenol drastically reduce the appearance of fine lines and wrinkles by up to 64%.
- Maximum levels of California Tan's 12-Hour Hydration Complex help prevent peeling and flaking and prolong the life of your tan.

## Heliotherapy™ Update

CALIFORNIA TAN®  
**Heliotherapy™**  
 The Positive Effects  
 of the Sun™

Only California Tan's exclusive Heliotherapy™ formulas are the precise scientifically proven combination of extraordinary skin care and tanning ingredients to help you maximize a proven positive effect of the sun ... your tan.

While over exposure to the sun and burning are bad for you, medical studies demonstrate that, in moderation, exposure to sunlight is crucial for the maintenance of good physical and psychological health. Besides making you feel good about how you look, numerous studies demonstrate that little to no exposure to the sun may be equally as bad, if not worse, to your overall health as too much sun.

## Did You Know That?

- Sunlight is the only reliable source of vitamin D and provides the vitamin D requirement for most of the world's population. (Boston University, 1989) 1
- According to Dr. Cedric Garland, just 15 minutes of exposure to natural sunlight per day on your hands and face is sufficient, in most cases, for the Recommended Daily Allowance of vitamin D. (University of California, San Diego 1993) 2
- Tanning beds that emit UVB may be useful for the production of vitamin D. (Boston University, 1992) 3
- Exposure to sunlight increases the body's ability to metabolize cholesterol, leading to a 13% decrease in blood cholesterol levels. (New England Medical Journal, 1953) 4
- Studies indicate that exposure to UV light may have similar effects as exercise: decreased blood pressure, lower resting heart rate and a 39% increase in output of blood. (University of Frankfurt, Germany, 1992) 5
- Seasonal Affective Disorder (SAD), with symptoms such as sadness, insomnia, carbohydrate cravings, anxiety and irritability, is commonly found in northern areas where exposure to sunlight in winter months is significantly decreased. (National Institute of Mental Health, 1985) 6
- When the chest and back are exposed to sunlight, the male sex hormones may increase by 120%. (Dr. Z. Kirme, 1980) 7
- Reports indicate that 80% of people suffering from psoriasis improve when exposed to sunlight. (The National Psoriasis Foundation, 1986) 8
- Studies indicate that people with the lowest risk of skin cancer are those whose main occupation is outdoors. (Lancet 1982) 9
- Sunlight affects over 100 vital biological functions. (Lieberman, 1991) 10

## Complaint

## EXHIBIT H

## Exhibit H (cont)

• Significant seasonal bone loss, as a result of inadequate vitamin D formation, occurs in people who live in areas with reduced winter sunlight. Bone loss can lead to Osteoporosis and Osteomalacia, a softening of the bones. (University of Maine, 1993) 11

• Colon and breast cancer deaths are three times higher in northern states like New Hampshire and Vermont compared to sunny states like New Mexico and Arizona. (University of California, San Diego, 1986) 12

• Ozone levels naturally fluctuate up to 5% daily based on weather, time of day and time of year. (Reading University, England, 1990-91) 13

Of course, no single study or studies may prove scientific fact. As further studies are done, science will tell us more about the effects of sun exposure. However, as these studies emphasize, the sun may have positive as well as negative effects.

## Remember!!

The key to maximizing the positive effects of the sun is to achieve the perfect balance. Take care to get just the right amount of sun to maintain your health, but don't ever allow yourself to burn. REPEATED OVEREXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING AND SKIN CANCER. However, moderate exposure in combination with the use of California Tan's exclusive "Helioltherapy"™ formulas can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of overexposure and skin dehydration.

**No Animal Testing • No Animal By-Products  
No Mineral Oils • No Artificial Dyes or  
Colorations • Won't Clog Pores**

## CAUTION:

California Tan® products are intended to be used for tanning and moisturization only. They are NOT intended to produce any of the reported physiological and psychological benefits of the sun that are described above.

Studies provided by California Tan's  
Scientific Research Center

## Sources

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Complaint

123 F.T.C.

EXHIBIT I

Exhibit I





Complaint

123 F.T.C.

## EXHIBIT I

Exhibit I (cont)



OPEN

CALIFORNIA TAN

Tan & Tone  
LFGS

## MAXIMUM STRENGTH

*Dark Tanning And  
Contouring Cream Gel*

**Tan & Tone Legs**™ maximum strength dark tanning and slimming formula contains our exclusive VT™ technology and proven firming agents to diminish the appearance of unsightly cellulite while achieving spectacular tanning results. Maximum strength levels of VITATAN™ (patent pending) deliver up to 53% better tanning results while minimizing the signs of aging. Plus, Legs lifts and tightens for visibly toned thighs, hips and buttocks.

**Continued inside...**

Complaint

EXHIBIT I

Exhibit I (cont)



When compared to Uniperlan, products containing 1% VITATAN™ help improve your natural ability to develop a golden brown tan by up to 53%.

International Dermatol. Soc. Oct. 11-14/94, NY

- VITATAN™ delivers up to 50% of the actives to the tanning source through the most technically advanced multi-level liposome system.
- Specialized liposomes encapsulate the proven contouring complex and target cellulite to smoothen the appearance of sponginess after just one use.
- Scientifically-proven skin care ingredients maintain optimum moisture balance, leaving skin soft, supple and silky smooth.
- Fast-acting cream gel formula absorbs quickly without the sticky after-feel of ordinary gels.
- Ideal for every day use.

**Heliotherapy™**  
The Positive Effects of the Sun™

California Tan's Scientific Research Center, a branch of the world's most renowned scientists, reviews

CONDITION

HELIO-THERAPY™ REFERENCE CHART

MEDICAL EFFECT

SOURCE

<b>AIDS</b>	AIDS is a fatal and incurable epidemic.	Preliminary studies indicate that photo-therapy may be beneficial in treating patients with AIDS-related complex.	Taylor, A. et al. "Extracorporeal Photocoagulation for Cutaneous T-Cell Lymphoma and Other Diseases - Successes in Hematology," 29:2732, 1992
<b>Cancer Prevention</b>	Breast and colon cancer can be fatal if not detected early.	Sunlight exposure may prevent certain types of cancer. Colon and breast cancer rates in the New Hampshire and Vermont counties to sunny states like New Mexico and Arizona	Garland, Dr. C. et al. "Calcium and Colon Cancer," <i>Clinical Nutrition</i> , July/August 191-6, 1989
<b>Common Cold</b>	Symptoms include: runny nose, sneezing, sore throat, coughing, muscle aches.	10 minute exposure to ultraviolet light one to three times a week results in a reduction of frequency of colds up to 40.3%	King, Dr. Z. Sunlight, Penryn, CA World Health Publications, 1980
<b>Fitness</b>	Fitness increases energy and reduces risk of heart disease.	Exposure to sunlight may have similar effects as exercise: decreased blood pressure, lower resting heart rate, a 39% increase in the output of blood.	Falkenbach, Dr. A. et al. "Heart Rate Variability," <i>Biological Effects of Light</i> , New York, Walter de Gruyter, 1992
<b>Obesity</b>	Obesity is one of the leading causes of death in the U.S.	Sunlight stimulates the thyroid gland which boosts your metabolism	Hollwich, Fritz, "The Influence of Ocular Light Perception on Metabolism in Man and in Animals," New York, Springer-Verlag, 1979
<b>Osteoporosis</b>	Osteoporosis is a growing epidemic of weak bones in the U.S.	Significant seasonal bone loss due to lack of sunlight produced vitamin D is prominent in areas with reduced winter sunlight and can lead to Osteoporosis	Rosen, Dr. C. et al. "Seasonal Effects of Sunlight on Bone Mass in Elderly Women," <i>Biological Effects of Light</i> , New York, Walter de Gruyter, 1994
<b>Psoriasis</b>	Psoriasis is a chronic condition with no known cure	80% of Psoriasis sufferers show improvement with UV exposure	"PUVA Myths" Pharmacy News, vol 6:1, 1994

Chart Continues (In Reverse)

EXHIBIT I

Exhibit I (cont)

CONDITION	MEDICAL FACT/BENEFIT	SOURCE
<b>Seasonal Affective Disorder (SAD)</b> More than 25 million Americans suffer from SAD each year	A 1993 study shows that 70% of patients with SAD show improvement after light treatment, the only known cure for the winter blues.	Wirz-Justice, A. et al. "Light Therapy in Seasonal Affective Disorder: A Dependent on Time of Day or Circadian Phase Arch Gen Psychiatry, 50:929, 1993.
<b>Sex Drive</b>	When the chest and back are exposed to sunlight, the male sex hormones may increase by up to 120%.	Kane, Dr. Z. Sunlight, Penryn, CA World Health Publications, 1980.
<b>Skin Cancer</b>	Skin Cancer has been linked to non-UV causes diet, genetics and alcohol.	Marchand, Dr. L. "Dietary Factors in the Etiology of Melanoma," Clinics In Dermatology, 10:79, 1992.
<b>Stress</b> Stress increases the risk of illness two to four times	Sunlight exposure decreases adrenaline and noradrenaline levels for an "anti-stressing" effect and releases endorphins for the feeling of "well-being."	Greiner, F. et al. "UV-Conditioning: Physical and Physiological Impact," Current Problems In Dermatology, Vol. 15:282-9, 1986.
<b>Vitamin D Deficiency</b> Vitamin D regulates calcium, magnesium and phosphorus absorption.	Sunlight is the most responsible source of vitamin D. During the process of tanning, vitamin D is also produced.	Holick, Dr. M. et al. "Sunlight Regulates Vitamin D Metabolism," 68:882, 1989. Matsuoka, L. et al. "Sunlight and Cutaneous Synthesis of Vitamin D3," Journal of Clinical Medicine, 116:87, 1990.

Studies provided by California Tan's Scientific Research Center

While these studies indicate a wealth of benefits may result from sun exposure, no single study or studies may prove scientific fact. As research continues, stronger will reveal more about the effects of the sun. These studies emphasize that the sun may have positive as well as negative effects.

**Remember!**  
To maximize the benefits of sun exposure, you must achieve balance and determine the best amount of sun exposure for you based on your skin type and how easily you burn. Consult your physician if you have any skin condition and don't ever allow yourself to burn.

**REPEATEDLY OVER EXPOSURE TO THE SUN CAN LEAD TO PRE-MATURE AGING, WRINKLING, AND SKIN CANCER.**  
However, moderate exposure in combination with the use of California Tan's exclusive "Heliobright" formula can help you optimize the beneficial aspects of having a spectacular, golden brown tan while minimizing the negative effects of skin dehydration.

**Caution:**  
California Tan products are intended to be used for tanning and moisturization only. They ARE NOT intended to produce any of the reported possible physiological and psychological benefits of the sun that are described above and California Tan does not represent that such benefits result from use of its products.

EXHIBIT J

# California Tan<sup>®</sup> Heliotherapy REPORT



FEBRUARY ■ 1994

Exhibit J

**Advertising**  
**Salons**  
**Spotlight**  
**Salon Success**

- 1-800-222-SALON (Toll-Free Referral Number) How it Works
- Heliotherapy<sup>™</sup>
- Product Parade

## FREE ADVERTISING For Preferred Salons Begins February 8th

Through an intense consumer advertising campaign in *People* and *YM* magazines, California Tan<sup>®</sup> will do for tanning in the '90s what Nexus and Paul Mitchell did for hair care in the '80s. For the first time ever, consumers who currently purchase Hawaiian Tropic and Coppertone from the multi-billion industry will look to salons for higher quality products.

California Tan<sup>®</sup> profit center, salons automatically qualify for...  
...of the...  
...California...  
...every week...



### ADVERTISING SCHEDULE

In addition to the 30 million Americans who read *People* magazine, California Tan<sup>®</sup> is aggressively targeting the all-important teen market through *YM* magazine advertisements. Our research shows that teens are into tanning and love trying new products!

32 million people will see our ads and the toll-free Preferred Salon referral number every week throughout the height of the tanning season.

MAGAZINE	ISSUE	ON SALE	WHY
<i>YM</i>	March	2/8	It's the Prom Issue (Need we say more?)
	April	3/8	It's the height of the season!
	May	4/12	
<i>People</i>	Special 20th Annv. Issue	2/28 - 3/15	Everyone reads it!
	4/4	3/28	It's the height of the season!
	4/11	4/4	
	4/18	4/11	

EXHIBIT J

(c)

### Know What's In Your Lotion



Ingredients such as melanin, keratin, and Protovanol are fine for bronzers and sunless tanning lotions. But, these ingredients are showing up in products labeled "accelerators." The resulting color (as with all dyes and self-tanners) is streaky and fades in a day or two. Clients who use these products and get disappointed may blame your bulbs — never to return to your salon. Your salon's reputation is at risk when you sell a product that makes claims and does not deliver the expected results. Read labels carefully to protect yourself and your clients. Make sure you are selling "real" tanning in a bottle (see box).

California Tan has been approached by major chemical companies to buy these dyes and skin reddening agents for our products. We have steadfastly refused to use them. California Tan uses only ingredients that maximize real tanning.

READ THE LABELS		
Beware of so-called tanning "accelerators" with these ingredients:		
INGREDIENT	WHAT IT DOES	PRODUCTS THAT USE IT
✓ Keratin or Beta Carotene	Temporary Dye	Swedish Beauty Australien Gold
✓ Melanin	Temporary Dye	Body Drench's Boost & Source Supre's Jam and Extreme Island Heat
✓ Protovanol	Irritant that makes skin warm and red	Island Heat Bronz Tan

Look for ingredients that maximize and promote real tanning:  
Unipertan P-242  
Cancer Protection

## MORE ABOUT HELIOTHERAPY™

### Promoting Heliotherapy™ CAN INCREASE YOUR LOTION SALES

#### Let your customers know that ....

- Let your clients know that lotions can help them reap the positive effects of the sun and UV-light (a tan, increased immunity, lower cholesterol, etc.) while protecting themselves from and/or preventing the negative effects.
- Say to clients when they're signing in — "Did you know that the sun has some of the same effects on your body as exercise, like lower cholesterol and more oxygen going into your cells?"
- Put up a Heliotherapy™ poster at eye-level in each changing room.
- Make it a point to post one new positive effect of UV-light exposure per week in an area where salon employees will be most likely to read it. (See box-right).

#### FAST FACTS ON HELIOTHERAPY™

Did you know that the sun produces many of the same benefits as exercise? Such as:

- ♥ Lowering blood cholesterol levels
- ♥ Lowering your resting heart rate
- ♥ Increasing your oxygen intake into cells
- ♥ Increasing your energy level

From Dr. Zane Kime's book, *Sunlight*

Tape this on the outside of your cash register where all your clients will see and watch your membership sales soar!

## NOW AVAILABLE HELIOTHERAPY™ SYMPOSIUM VIDEO

In response to heavy demand, California Tan is making available the 90-minute Heliotherapy™ Product Symposium Video. If you can't make it to one of the symposiums, or if you've attended and need a refresher — the Heliotherapy™ Product Symposium Video is just the thing. Like the live symposiums, the video covers heliotherapy, selling techniques and easy-to-remember information about the product line in an entertaining format. \$9.95 plus postage and handling. Call: 1-800-STAN-CARE to order.



Heliotherapy™... The Positive Effects of The Sun™

AT 000760

EXHIBIT J

# CALIFORNIA TAN<sup>®</sup> EXPERTS OF THE MONTH

*These tanning salon suppliers are certified experts on Heliotherapy<sup>™</sup> and have made California Tan<sup>®</sup> their premier product line. Feel free to call the one nearest you.*



**Ronnie and Johnie Allen**  
Four Seasons Sales  
and Service  
Paris, TN  
(800) 326-2769



**Andy and Tom Kuhn**  
Island Sun Burst  
Naples, FL  
(800) 462-0333

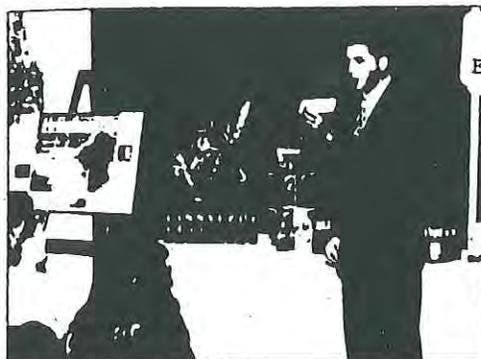


**Mary Beth Simons**  
PC Marketing  
Ridgefield, NJ  
(800) 247-4301

**Pat Vincent**  
Vincent Sunbed Supply  
Salt Lake City, UT  
(801) 272-4100

**Martha Quigg**  
Sunbelievable  
Distributors  
Huron, OH  
(800) 686-8826

**Cindy Austin**  
Tan Systems  
Huron, OH  
(800) 999-8266



## California Tan<sup>®</sup> Heliotherapy<sup>™</sup> Product Symposium

*IS COMING TO YOUR AREA  
FOR ONE ENGAGEMENT ONLY*

*Distributors across America will be hosting a national series of California Tan<sup>®</sup> Heliotherapy<sup>™</sup> Product Symposiums to educate salons on various aspects of the tanning business. Guest speaker, Mike Brady, will show salons how to increase lotion sales by as much as 400%. Topics of discussion include:*

- Comprehensive product knowledge
- Successful merchandising and sales techniques
- The facts about Heliotherapy<sup>™</sup> ... The Positive Effects of the Sun<sup>™</sup>
- The importance of point-of-purchase displays and educational literature
- How to expand your customer base and sell more sessions

### SCHEDULE

DATE	PHONE #	LOCATION
02-17-94	800-727-8266	PHOENIX, AZ
02-23-94	800-99-0031	VIRGINIA BEACH, VA
02-27-94	704-522-1752	CHARLOTTE, NC
03-08-94	800-845-3749	WILLIAMSBURG, VA
03-07-94	800-776-4247	DETROIT, MI
03-08-94	800-776-4247	INDIANAPOLIS, IN
03-09-94	800-776-4247	CLEVELAND, OH
03-19-94	412-744-4844	JEANETTE, PA

## OVERHEARD

Salon owners are talking about California Tan's Heliotherapy<sup>™</sup> Product Symposiums:

"My sales really did increase 4 times after attending one of Cal Tan's Heliotherapy<sup>™</sup> Symposiums!"

"The speaker was fabulous!"

"I'm very glad I came. I learned a lot!"

"I've heard the presentation before and every time I learn something new!"

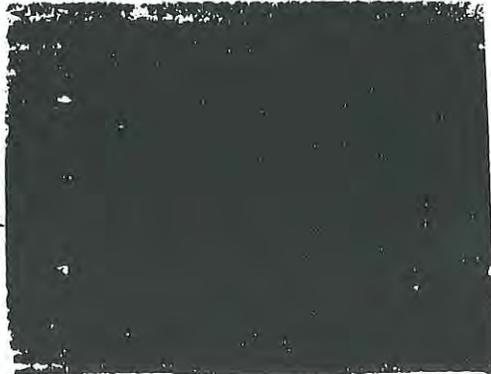


EXHIBIT J

SAISON VERSION

Exhibit J (cont)

Postage and  
Fees Paid  
Permit No. 1750  
Beverly Hills, CA

California Tan  
REPORT  
1100 Gleason Avenue, Suite 1250  
Los Angeles, CA 90024

NEW PRODUCT PARADE

HELIX  
#1 SELLER

In over 100 clinical tests, Helix™ out-performs, out-tans and out-moisturizes its leading competitors (even the other California Tan® products) by up to 63%.

Once customers know about the exclusivity of Helix™ and its phenomenal tanning results they are gladly paying the premium price.

FEVER  
TAKES OFF

This Step-1 CREME GEL Maximizer® is taking the industry by storm.

Tropical Fever™ is great for getting those building a base tan hooked on lotions.

It simultaneously maximizes tanning results, optimizes exposure time and reduces the appearance of fine lines and wrinkles.

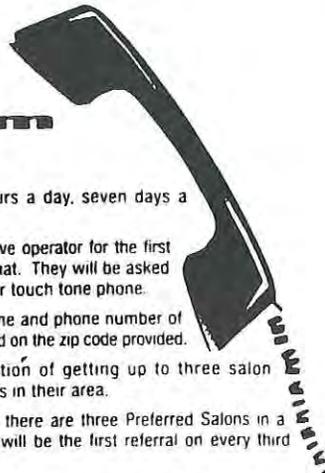
FUSION  
EXPLODES

Tropical Fusion™ is already the fastest growing gel on the market. This Step-2 Intensifier should be prominently displayed — its fun packaging and bright purple gel can't be ignored. The Fusion™ ultra-light gel gets you beyond the "tanning plateau" to a rich, deeper tan faster than ever.

How it works

The toll-free Salon referral number in People and *you* magazine advertising:

- The number will be operational 24-hours a day, seven days a week and, even during holidays.
- Callers to the toll-free number will get a live operator for the first few months, and an automated one after that. They will be asked to give their zip code or enter it from their touch tone phone.
- The computer system will pull up the name and phone number of the Preferred Salon in the caller's area based on the zip code provided.
- The callers will also be given the option of getting up to three salon listings if there are three Preferred Salons in their area.
- To maximize individual retailer benefit, if there are three Preferred Salons in a given zip code, then each salon's name will be the first referral on every third call to the toll-free number.



The Heliotherapy™ Report is a timely newsletter containing the latest scientific facts about the positive effects of the sun and sun-care products for sun-care specialists and their salons.

Published By  
California Tan®  
1100 Gleason Ave., Suite 1250  
Los Angeles, CA 90024  
1-800-SUN-CARE

Cheryl Stone  
Editor

Carla Swartz  
Art Director

CT 000763

## DECISION AND ORDER

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

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

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

1. Respondent California Suncare, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1100 Glendon Avenue in the City of Los Angeles, State of California.

Respondent Donald J. Christal is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

## ORDER

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

1. "*California Tan Heliotherapy products*" shall mean the Heliotherapy™ line of skin care products for use in connection with tanning as a result of exposure to sunlight or indoor UV radiation sold under the brand name California Tan®.

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

3. "*Purchaser for resale*" shall mean any person that has bought any California Tan Heliotherapy products to sell to another business or members of the public including, but not limited to, wholesalers, distributors, tanning salons, beauty parlors, health spas, and gyms.

## I.

*It is ordered*, That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, that the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by overexposure and burning or are not caused by cumulative moderate exposure, over a period of years, including exposure sufficient to cause tanning;

B. Representing, in any manner, directly or by implication, that tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin;

C. Misrepresenting, in any manner, directly or by implication, that the use of such product or service prevents or minimizes the negative effects of exposure to sunlight or indoor UV; or

D. Representing, in any manner, directly or by implication, that exposure to sunlight or indoor UV radiation reduces the risk of skin cancer.

## II.

*It is further ordered,* That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Exposure to sunlight or indoor UV radiation prevents or reduces the risk of cancer, including but not limited to colon or breast cancer;

B. Exposure to sunlight or indoor UV radiation lowers blood pressure;

C. Exposure to sunlight or indoor UV radiation has benefits similar to those of exercise, including but not limited to decreased blood pressure or lower heart rate;

D. Exposure to sunlight or indoor UV radiation reduces serum cholesterol;

E. Exposure to indoor UV radiation is an effective treatment for Seasonal Affective Disorder;

F. Exposure to sunlight or indoor UV radiation is an effective treatment for AIDS;

G. Exposure to sunlight or indoor UV radiation enhances the immune system;

H. For the general population, reduced winter sunlight leads to bone disorders such as osteoporosis and osteomalacia and increased exposure to sunlight or indoor UV radiation is necessary to reduce the risk of such disorders; or

I. Exposure to sunlight or indoor UV radiation has any health benefit,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### III.

*It is further ordered,* That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That the use of such product or service prevents or minimizes the negative effects of exposure to sunlight or indoor UV radiation, including but not limited to skin cancer or premature aging;

B. That the use of such product or service will improve users' ability to tan; or

C. Regarding the performance, safety, benefits, or efficacy of such product or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

## IV.

*It is further ordered,* That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication:

A. The existence, contents, validity, results, conclusions, or interpretations of any test or study; or

B. That any person, firm, organization, or government agency approves or endorses any such product or service or exposure to sunlight or indoor UV radiation.

## V.

*It is further ordered,* That respondents, California SunCare, Inc., a corporation, its successors and assigns, and its officers, and Donald J. Christal, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any California Tan Heliotherapy product or any other product or service for use in connection with tanning, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to display, clearly and prominently, in any advertising or promotional material for any such product(s), one or more of which does not contain a sunscreen ingredient providing a minimum of SPF 2, the following disclosure:

CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging -- even if you don't burn.

The disclosure requirements set forth in this subparagraph shall terminate at such time as respondents have expended at least one million, five hundred thousand dollars (\$1,500,000) on the dissemination to consumers of advertising and promotional material for the product(s) specified above.

For purposes of this subparagraph "advertising or promotional material" shall include such material that is disseminated to consumers either directly, or indirectly through any purchaser for resale, but shall not include television advertising, billboards, or advertising appearing in any periodical sold only by subscription for which fifty percent (50%) or more of the readership is comprised of tanning or beauty salon professionals. Provided, however, that in the event that respondents have not expended at least one million, five hundred dollars (\$1,500,000) on the dissemination of the advertising and promotional material defined above within two (2) years and six (6) months after the date of service of this order, the exclusions contained in that definition shall terminate and all advertising and promotional material for any such product(s) shall be subject to the disclosure requirements of this subparagraph.

In calculating the amount of expenditures on the dissemination to consumers of the advertising and promotional materials specified above, the costs of distributing, publishing, or broadcasting the advertising and promotional material shall be included, but the costs of developing, designing, creating, or producing the advertising or promotional material (other than printing) shall not be included.

B. Making any representation in any advertising or promotional material for any such product(s), in any manner, directly or by implication, about the safety or any health benefits of exposure to sunlight or indoor UV radiation unless respondents disclose, clearly and prominently, the following:

**CAUTION:** Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging.

For purposes of this subparagraph, "advertising or promotional material" shall include television advertising, billboards, or advertising appearing in any periodical sold only by subscription for which fifty percent (50%) or more of the readership is comprised of tanning or beauty salon professionals, and, once the requirements of subparagraph A above have been satisfied, all other advertising and promotional material.

C. Making any representation on the labeling or package of any such product that does not contain a sunscreen ingredient providing a minimum of SPF 2, in any manner, directly or by implication, about the safety or any health benefits of exposure to sunlight or indoor UV radiation unless respondents disclose, clearly and prominently, the following:

**CAUTION:** Tanning in sunlight or under tanning lamps can cause skin cancer and premature skin aging.

This product does not contain a sunscreen and does not protect against sunburn.

For purposes of the display of the disclosure or the corrective statement required by this part ("required information"), "clearly and prominently" shall mean as follows:

1. In a television, broadcast, or video advertisement, the required information shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

2. In a radio advertisement, the required information shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

3. In a print advertisement or other printed promotional material, the disclosure shall be displayed in a manner sufficient for an ordinary consumer to see and read it, considering factors including but not necessarily limited to type size and style, location, layout, and contrast with the background against which it appears. No other elements in the advertisement including but not necessarily limited to the layout, graphics, other copy, or depictions, shall detract from or obscure the prominence of the disclosure. In multipage documents, the disclosure shall appear on the cover or first page.

4. On product labeling, the required information shall be set out in the same format in which it appears in subparagraph C above, in at least ten (10) point Times New Roman Bold, in a location on the principal display panel that is sufficiently noticeable for an ordinary consumer to read and comprehend it, and in a print that contrasts sharply with the background against which it appears.

5. On a product package, the required information shall be set out in the same format in which it appears in subparagraph C above, in at least twelve (12) point Times New Roman Bold, in a location on the principal display panel that is sufficiently noticeable for an ordinary consumer to read and comprehend it, and in a print that contrasts sharply with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the required information shall be used in any advertising, promotional material, labeling, or packaging.

## VI.

*It is further ordered*, That respondents, California SunCare, Inc., its successors and assigns, and Donald J. Christal shall:

A. Within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of any California Tan Heliotherapy product with whom respondents have done business since January 1, 1993, an exact copy of the notice attached hereto as Attachment A. The mailing shall include no other document;

B. In the event that respondents receive any information that subsequent to receipt of Attachment A any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, respondents shall immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisements and promotional materials; and

C. Terminate any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use advertisements or promotional materials that contain any representation prohibited by this order after receipt of the notice required by subpart B of this part.

## VII.

*It is further ordered*, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondents to purchasers for resale prior to one hundred (100) days after service of this order; provided,

however, that any multipage fold-out labels that contain claims that violate Parts I through IV of this order shall be removed from all products in respondents' inventory prior to shipping after the date of service of this order.

### VIII.

*It is further ordered*, That respondents, California SunCare, Inc., its successors and assigns, and Donald J. Christal shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VI of this order; and

B. Copies of all communications with purchasers for resale pursuant to subparagraphs B and C of part VI of this order.

### IX.

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

### X.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers or government organizations.

## XI.

*It is further ordered*, That respondent California SunCare, Inc., its successors and assigns, shall:

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

B. For a period of ten (10) years from the date of service of this order, provide a copy of this order to each of respondent's future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

## XII.

*It is further ordered*, That respondent Donald J. Christal shall for a period of ten (10) years from the date of service of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and his affiliation with any new business or employment. Each such notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

## XIII.

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

## XIV.

This order will terminate on February 11, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

## XV.

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

## ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED  
[To be printed on California SunCare, Inc., letterhead]

[date]

Dear [purchaser for resale]:

This letter is to inform you that California SunCare, Inc. ("California Tan"), recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims for our Heliotherapy™ line of skin care products. As part of that settlement, we are required to notify our distributors and others who sell our products to consumers to stop using or distributing any advertisements or promotional materials containing any such claims.

**Allegations of the FTC complaint.**

The FTC alleged that certain advertisements and promotional materials for California Tan Heliotherapy products made false and/or unsubstantiated claims, expressly or by implication, that tanning as a result of exposure to sunlight or indoor UV radiation:

- \* reduces the risk of certain cancers;
- \* has cardiovascular benefits, such as lowering blood pressure and serum cholesterol or providing the benefits of exercise;
- \* is an effective treatment for Seasonal Affective Disorder and AIDS;
- \* enhances the immune system; and
- \* reduces the risk of bone disorders for members of the general population.

In addition, according to the FTC's complaint, the advertising and promotional materials made false and/or unsubstantiated claims, expressly or by implication, that:

- \* the negative effects of exposure to sunlight or indoor UV radiation, including skin cancer and premature skin aging, are caused only by burning and overexposure and not moderate exposure and tanning;
- \* tanning as a result of exposure to sunlight or indoor UV radiation is not harmful to the skin;
- \* use of the products prevents or minimizes the negative effects of exposure to sunlight and UV radiation, including skin cancer and premature skin aging;
- \* the MAXIMIZER products help users achieve up to 42% better tanning results; and
- \* the products that contain VITATAN improve users' ability to tan by up to 67%.

Finally, the complaint charges that advertising and promotional materials falsely represented, expressly or by implication, that scientific studies demonstrate that exposure to sunlight or indoor UV radiation provides the health benefits stated above and that the American Medical Association endorses exposure to sunlight or indoor UV as a medical treatment.

**Our settlement with the FTC.**

Our settlement with the FTC prohibits us from making the above listed claims for California Tan Heliotherapy products or any other product for use in connection with tanning, unless the claims are supported by competent and reliable evidence. The settlement also requires us to substantiate any claims about the health benefits of exposure to sunlight or indoor UV radiation and the performance and safety of our skin care products for use in connection with tanning. The settlement also precludes us from making misrepresentations about scientific studies or endorsements.

Under the terms of our settlement with the FTC, all of our advertising for tanning products, with the exception of billboards, television advertising, and advertisements in magazines for salon professionals, for a period of time, must contain a disclosure to the effect that tanning without burning, either with tanning lamps or in sunlight, can cause skin injury. Even after that period ends, if in the future we make any claim about the safety or health benefits of exposure to sunlight or indoor UV radiation in our advertising, labeling or packaging, we must disclose that tanning is associated with skin damage.

We deny the FTC's allegations, but in order to avoid protracted litigation we have entered into a settlement agreement with the FTC. As part of that settlement, we have agreed to send this letter. We request your assistance by asking you to discontinue using, relying on or distributing any California Tan advertising or promotional material currently in your possession that makes any of the claims the FTC challenged as listed above. More specifically, we are asking you not to display any California Tan posters, cash register notices, or other materials that contain any of the claims challenged by the FTC and to remove magazines that contain California Tan advertisements that make the challenged claims from places where they may be seen by any of your customers. We are also asking our distributors to notify their retail or wholesale customers who have any California Tan materials that contain any of the challenged claims to discontinue using them as described above. If you continue to use materials that contain any of the challenged claims, we are required by the FTC settlement to stop doing business with you.

Thank you for your assistance. If you have any questions about this letter, please call 1 800 \_\_\_\_.

Sincerely,

Donald J. Christal  
President  
California SunCare, Inc.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III,  
CONCURRING IN PART AND DISSENTING IN PART

I have voted to issue the complaint and final consent order against California SunCare, Inc. (CSI) because, for the most part, it provides appropriate relief for the extremely serious misrepresentations alleged in the complaint about the health and safety effects of ultraviolet radiation (UVR) exposure and the benefits and efficacy of the company's tanning products. However, I do not support including the "untriggered" disclosure in Part V.A of the consent order.<sup>1</sup> In my

<sup>1</sup> Part V.A requires CSI to include the following statement in any advertising and promotional materials disseminated directly to consumers or through purchasers for resale (except television advertising, billboards and advertising in magazines sold only by subscription for which half or more of the readership is comprised of tanning or beauty salon professionals): "CAUTION: Tanning in sunlight or under tanning lamps can cause skin cancer and premature aging -- even if you don't burn." This disclosure is applicable to all of respondent's products that contain a sunscreen ingredient providing a sun protection factor (SPF) of less than 2 and must be made until CSI spends \$1.5 million on dissemination. If CSI does not expend this amount within 2½ years after the service of the order, the untriggered disclosure then becomes applicable to all forms of advertising until the required amount is spent.

view this remedy constitutes corrective advertising, and I am not convinced that the evidence here meets the standard for imposing corrective advertising set forth in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

Both the characteristics and the scope of the untriggered disclosure lead me to conclude that it is actually corrective advertising in disguise. The disclosure requirement has certain characteristics usually associated with corrective advertising: it runs until a specific time period expires and a specific sum of money is exhausted, and it must be made regardless of the representations CSI makes about its products. *See, e.g., American Home Products Corp. v. FTC*, 695 F.2d 681, 700 (3d Cir. 1982) ("[A] genuine corrective advertising requirement . . . demand[s] disclosure in future advertisements regardless of the content of those advertisements."). Most significant, however, the scope of the untriggered disclosure far exceeds its rationale. The disclosure must appear in CSI's general advertising as well as in all promotional materials distributed directly to consumers for any tanning product that does not contain a sunscreen with a minimum SPF of 2. Yet the rationale advanced for this untriggered disclosure is that it is necessary to protect prospective purchasers from being misled by future misrepresentations about the effects of UVR exposure, particularly misrepresentations that might occur at "the point of sale" -- the tanning salons where consumers purchase CSI products. I see no reason for the untriggered disclosure to appear in general advertising if the disclosure's true intent is to prevent possible future deception of consumers at the point of sale.

The disparity between the scope of the disclosure and its rationale suggests that its primary purpose is more consistent with corrective advertising than with an affirmative disclosure. The purpose of corrective advertising is to dispel false beliefs in the public mind created or reinforced by a challenged ad that are likely to endure (and thus to influence purchase decisions) even after the ad stops running. In contrast, the purpose of an affirmative disclosure remedy is to prevent deception from future claims like or related to those challenged.<sup>2</sup> I recognize that the untriggered disclosure might have some impact on potential future deceptive claims about UVR exposure at the point of sale, but it is overbroad for this particular

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<sup>2</sup> It is difficult to draw bright lines between these possible forms of fencing-in relief, and I am not suggesting that the Commission forgo ordering affirmative disclosures in all circumstances in which the disclosures, while targeted primarily at the prevention of deception from future claims, may also incidentally affect a possible lingering public misimpression created by past advertising. This situation is not the case presented here.

purpose, and the need for it seems minimal in light of the extensive other relief provided by the final order.<sup>3</sup> Thus, the main purpose of this untriggered disclosure seems to be to ameliorate lingering false beliefs that may have been created or reinforced by CSI's past claims that UVR exposure not only is not harmful but is positively beneficial.

Although both corrective advertising and affirmative disclosures are forms of fencing-in relief that are well within the Commission's remedial authority, the standard for imposing corrective advertising is significantly more stringent than that for an affirmative disclosure. In imposing corrective advertising, the Commission normally relies on extrinsic evidence of the existence of lingering false beliefs created by past advertising. In certain cases, however, it may be possible to presume the existence of such false beliefs based on the nature and extent of the advertising campaign. *Warner-Lambert*, 562 F.2d at 762-63.<sup>4</sup> An affirmative disclosure remedy, on the other hand, requires only that the disclosure be "reasonably related" to the alleged violations. In my view, it is important to distinguish between corrective advertising and affirmative disclosures because the Commission should not evade the more demanding standard for corrective advertising where it is clearly applicable.

There appears to be little basis for Part V.A of the order when it is viewed as corrective advertising. There is no direct evidence that CSI's ads and sales materials created or contributed to a lingering false impression that UVR exposure through sunlight and tanning has the health and safety benefits represented by the company. Moreover, I am not persuaded that it would be appropriate to presume that the company's message -- that UVR exposure is beneficial -- would endure in light of pervasive messages to the contrary.

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<sup>3</sup> In addition to prohibiting misrepresentations about the effects of UVR exposure and tanning and unsubstantiated claims about the performance, safety, benefits, or efficacy of products or services used in connection with tanning, the consent order requires two additional affirmative disclosures (Parts V.B and V.C) that are triggered by claims about the safety or health benefits of exposure to sunlight or indoor UVR. The language of these triggered disclosures is similar to that of the untriggered disclosure. The triggered disclosures apply to labeling and packaging --forms of advertising exempted from the untriggered disclosure -- and, after the untriggered disclosure requirement runs out, to all other advertising and promotional material. The order (Part VI) also requires CSI to send a letter to distributors and retailers of the company's tanning products that describes the Commission's enforcement action and advises them to stop using ads and promotional materials that contain any of the representations prohibited by the order or face losing CSI's business.

<sup>4</sup> See, e.g., *Eggland's Best, Inc.*, Docket No. C-3520 (Aug. 15, 1994) (Statement of Roscoe B. Starek, III).

Statement

123 F.T.C.

By issuing this consent order against CSI, the Commission comes perilously close to lowering its standard for imposing corrective advertising by erasing the already blurred dividing line between that form of fencing-in relief and affirmative disclosures. Such a change is one that I cannot endorse.

IN THE MATTER OF

## TRANS UNION CORPORATION

*Docket 9255. Interlocutory Order, Feb. 11, 1997*ORDER DIRECTING GENERAL COUNSEL  
TO ENFORCE THIRD-PARTY SUBPOENA

On February 5, 1997, pursuant to Section 3.38(c) of the Commission's Rules of Practice, 16 CFR 3.38(c) (1996), Administrative Law Judge Lewis F. Parker certified to the Commission a motion by Trans Union Corporation ("Trans Union") for enforcement of a third-party subpoena to First National Bank of Omaha ("FNBO"). Judge Parker's certification included a recommendation that the Commission grant the motion. Also before the Commission were the subpoena, the motion to quash, Trans Union's response thereto and the Judge's order denying the motion to quash.

On October 29, 1996, the respondent Trans Union served on FNBO a *subpoena duces tecum* seeking deposition testimony of "a person or persons with knowledge to respond to questions regarding . . . (1) the factors that influence [the bank's] decisions regarding a consumer's eligibility for credit;" and "(2) if and how [the bank] use[s] credit scorer data in [its] decisions regarding credit eligibility." The subpoena directed that documents pertaining to those topics be made available at the deposition.<sup>1</sup>

On December 16, 1996, FNBO filed a motion to quash the subpoena, stating that Trans Union "is attempting to use the Subpoena as a means for gaining an advantage in an unrelated multi-million dollar litigation brought by FNBO against Trans Union in the State of Nebraska ('Nebraska Litigation')." Motion at 1. The bank also argued that the subpoena should be quashed because "the discovery sought is obtainable from other sources that are less burdensome and is otherwise overly broad." *Id.* at 5. FNBO contended further that "the information sought by Trans Union is oppressive to FNBO in that it will permit Trans Union to evade a discovery order in the Nebraska Litigation" (*Id.* at 7) and that the subpoena "unnecessarily commands disclosure of confidential information at the heart of FNBO's

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<sup>1</sup> Trans Union also served subpoenas seeking similar or identical information from nine other banks. Order Denying Motin To Quash at 1.

business." *Id.* at 9. The bank urged the Administrative Law Judge to "enter an appropriate order allowing Trans Union to select another bank from whom to take the discovery it seeks from FNBO." *Id.* at 10.

Trans Union supported its subpoena to FNBO arguing that the information sought is relevant to Trans Union's defenses in the instant proceeding (Response at 2-4), that negotiations between Trans Union and FNBO have limited the scope of the request and irrelevance are vastly overblown." *Id.* at 6. Trans Union also noted its willingness to negotiate "a protective order to guard against unnecessary disclosure of [the bank's] proprietary information" (*Id.* at n.2). Finally, Trans Union argued that the motion to quash should be denied because even if the subpoena "seeks out-of-time-discovery in connection with the Nebraska litigation[,] . . . this should not serve as a basis for quashing the Subpoena" because "federal courts as a general matter will not limit the use of discovery obtained in one forum from use in another forum, or proceeding, provided the discovery being sought is relevant." *Id.* at 7.

Citing Section 3.31(c) of the Commission's Rules, the Administrative Law Judge denied the motion to quash. He stated that FNBO's motion "does not establish that respondent has fashioned its discovery request in this proceeding solely to gain an advantage in the Nebraska litigation." Order at 1. Judge Parker concluded that FNBO had not shown that Trans Union "should be forced to withdraw the subpoena and issue one to another bank, simply to avoid inconvenience to FNBO," that the subpoena "seeks relevant information, is not too broad or excessively burdensome, and was not designed to harm FNBO or to gain an unfair advantage in the Nebraska litigation." *Id.* at 2. He, therefore, recommends that the Commission direct enforcement of the subpoena.

The Commission has a strong interest in ensuring the integrity of its adjudicative process. In addition, the Commission is satisfied that the information and documentation specified in the subpoena are relevant for discovery purposes in the current proceeding, and that the burden on FNBO is not unreasonable. That the respondent might have obtained, or be able to obtain, from another banking institution the same or similar information to that which it seeks from FNBO is not reason to deny the respondent the right to conduct its defense in this matter as it deems best. Accordingly,

*It is ordered,* That, the General Counsel promptly take appropriate action to enforce Trans Union's subpoena to FNBO.

## IN THE MATTER OF

## PHASEOUT OF AMERICA, INC., ET AL.

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

*Docket C-3716. Complaint, Feb. 12, 1997--Decision, Feb. 12, 1997*

This consent order requires, among other things, the New York-based firms to send a postcard to identifiable past purchasers of PhaseOut, a purported stop-smoking device, notifying them of the Commission's action. The order also requires the respondents to have scientific substantiation for claims that PhaseOut or any other smoking-cessation product reduces the amount of nicotine, tar, and carbon monoxide smokers receive. In addition, the consent order prohibits the respondents' misrepresentations concerning any test, study or endorsement.

*Appearances*

For the Commission: *Shira D. Modell, Lesley Anne Fair and Michael Ostheimer.*

For the respondents: *David Clanton, Baker & McKenzie, Washington, D.C. and David Levy, Kraver & Levy, New York, N.Y.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Phaseout of America, Inc. and Products & Patents, Ltd., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Phaseout of America, Inc. is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

2. Respondent Products & Patents, Ltd., is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the PhaseOut device ("PhaseOut"), which punches one or more small holes in cigarettes and is intended to reduce the amount of tar,

nicotine, and carbon monoxide smokers get from their cigarettes and aid in smoking cessation. PhaseOut is a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

5. At the time the acts and practiced alleged in this complaint occurred, respondents were under common management and control. Respondent Phaseout of America, Inc. advertised and sold PhaseOut. Respondent Products & Patents, Ltd. owned the patents to PhaseOut, licensed and sold the device to Phaseout of America, Inc., and was a substantial shareholder of Phaseout of America, Inc.

6. Respondents have disseminated or caused to be disseminated advertisements for PhaseOut, including but not necessarily limited to the attached Exhibits A through J. These advertisements contain the following statements and depictions:

#### INFOMERCIAL #1

A. MASON ADAMS: You're going to see some unprecedented findings and hear some remarkable stories about a breakthrough device that can help you phase cigarettes out of your life without expensive therapies, patches or drugs. . . . Its name is PhaseOut and its effectiveness in reducing the most harmful components of cigarette smoke has been scientifically confirmed in research conducted at such prestigious institutions as the Johns Hopkins University School of Medicine. . . . It creates an additional filter within the existing filter but it doesn't change the taste or the draw of your cigarette. (Exhibit A, p. 1).

B. CONSUMER ENDORSER: There's no point not to use it if you're a smoker. It's not as if you can tell a difference in your cigarette. It's not as if you have to switch to a disgusting tasting cigarette with lower nicotine. It's the same thing that you've always done, only it's less harmful. (Exhibit A, pp. 2 and 18).

C. CONSUMER ENDORSER: PhaseOut is good, it's gradual, you're not even aware that it's working. Then all of a sudden, you realize you're smoking a lot less. (Exhibit A, pp. 2 and 18).

D. MASON ADAMS: If you're like most people, you'll start feeling better right away, while you're preparing to quit. Indeed, PhaseOut's impact is so definite, that even if you don't quit, you'll be significantly reducing the harmful effects of every cigarette. (Exhibit A, p. 2).

E. FIRST CONSUMER ENDORSER: At least you're eliminating a lot of the irritants that are caused by the tars and nictines. And you start feeling better, I think, almost from the beginning.

SECOND CONSUMER ENDORSER: I'm not as winded. I just feel, even though I'm still smoking, yes, I feel a little bit healthier. (Exhibit A, p. 2).

F. MASON ADAMS: Now, were you a very heavy smoker?

DR. ARNOLD BENSON: I was a heavy smoker. I smoked for forty years exactly, and smoked not less than two packages of cigarettes a day.

ADAMS: And you attribute your quitting to PhaseOut?

BENSON: I stopped smoking because of PhaseOut. PhaseOut did it gradually for me.

ADAMS: And you're still not smoking today?

BENSON: Well, it's two-and-a-half years since I quit. Forty years of smoking and I have gone two-and-a-half-years without smoking and I don't miss it. (Exhibit A, p. 3).

G. MASON ADAMS: Doctor, I understand that there's a medical study which confirms that PhaseOut reduces the amount of nicotine in a regular cigarette.

DR. ROBERT BRANDSTETTER: At Johns Hopkins University, volunteers who smoked for a considerable period of time were enrolled in a study which demonstrated that PhaseOut actually reduced the amount of nicotine in their blood over the period of time of the study.

Depiction: Front cover of journal Pharmacology, Biochemistry and Behavior

Graphic: The Johns Hopkins University School of Medicine

"Smoking exposure reductions of 30% to 80% were obtained for both nicotine and carbon monoxide."

ADAMS: So, the idea is then that if you reduce the amount of addictive nicotine, you'll thereby be reducing the addiction. Is that correct?

BRANDSTETTER: Exactly. And at the same time, you'll be actually reducing the possibility of withdrawal symptoms. And it is these withdrawal symptoms which cause people not to be able to stop smoking. (Exhibit A, pp. 3-4).

H. VOICE-OVER: It works without having to change your cigarette brand, without changing the taste or enjoyment, and, best of all, it works without patches, painful clips or expensive counseling. (Exhibit A, p. 5).

I. CONSUMER ENDORSER: I've been smoking these for about two or three years, it tastes like the same thing. (Exhibit A, p. 5).

J. VOICE-OVER: There is medical evidence that PhaseOut lets you do something good for yourself. The April 1992 issue of Pharmacology, Biochemistry and Behavior published results of a research study conducted at the Johns Hopkins University School of Medicine. This prestigious journal reports that PhaseOut significantly reduced human exposure to tobacco smoke constituents. Reductions of 30% to 80% were observed for both nicotine and carbon monoxide. The report concluded that the use of the PhaseOut device could be particularly useful as a weaning method prior to smoking cessation. (Exhibit A, p. 6).

K. MASON ADAMS: If you follow the PhaseOut plan, over a period of several weeks you will gradually reduce the levels of damaging substances in every cigarette you smoke.

Graphic: Three cigarettes, labeled 'Nicotine,' 'Tar' and 'Carbon Monoxide,' each shrinking in size PhaseOut is a four-step program where you control your progress.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase four

Nicotine	81%
Tar	92%
Carbon Monoxide	89%

Here's how it works. Take any standard size pack of cigarettes, hard or soft, kings or 100's, put it into the PhaseOut device and press down. Microfine, almost invisible perforations now create a condensation screen that cuts nicotine levels by

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26%, the levels of tar by almost 41%, and the levels of toxic gasses like carbon monoxide by 58%.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase one	
Nicotine	26%
Tar	41%
Carbon Monoxide	58%

Phase two reduces nicotine nearly in half and further reduces the levels of tar and toxic gasses.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase two	
Nicotine	47%
Tar	66%
Carbon Monoxide	73%

Phase three cuts levels of nicotine by nearly 64%, tar by 80%, and carbon monoxide by 83%.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase three	
Nicotine	64%
Tar	80%
Carbon Monoxide	83%

By the time you reach phase four, your nicotine consumption is reduced by nearly 81%. You're also taking in 92% less tar and 89% less toxic gasses.

Graphic: Three cigarettes shown shrinking and labeled as follows:

Results after Phase four	
Nicotine	81%
Tar	92%
Carbon Monoxide	89%

(Exhibit A, pp. 6-7).

L. MASON ADAMS: You can stay on each phase as long as you like until you're ready to move on. You're in control. You know that with each phase, you're doing more good for your health. And when you get to phase four, you can quit whenever you're ready. PhaseOut has helped many smokers quit cigarettes for good and thousands of others to smoke less damaging cigarettes. (Exhibit A, pp. 7-8).

M. CONSUMER ENDORSER: You wake up in the morning, you're not as congested, you don't have to wait for your chest to clear. I can run up and down the stairs and I can go to the park and I can play ball and I can, you know, run around with the kids and not be winded and not have to sit down and say "Mommy's tired. I can't do this." (Exhibit A, p. 8).

N. BOBBY RYDELL: I've gone from over two-and-a-half packs a day to a pack a day, and I know I'm on my way to quitting because PhaseOut makes it easy. (Exhibit A, p. 8).

O. VOICE-OVER: Nobody has to tell you the damage smoking causes. But many people still enjoy smoking. And even if you want to want to cut back or quit, most methods are annoying, painful, or expensive. But now, there's PhaseOut, a breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure. You don't have to change brands to get all the benefits of reduced nicotine, tar, and other harmful substances. PhaseOut works on any standard pack. With a simple punch, it forms a

condensation filter within your cigarette, which traps more harmful substances before they ever reach your body. By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gasses. (Exhibit A, pp. 9, 13 and 17).

P. VOICE-OVER: PhaseOut is a real smoker's solution. You keep smoking until you're ready to cut down or quit. And because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

Graphic: PHASEOUT

\* Smoke less harmful cigarettes

\* Cut down

\* Quit for good

\* No withdrawal symptoms

(Exhibit A, pp. 9, 13 and 17).

Q. CONSUMER ENDORSER: We, we asked her, we ultimatumed her, everything we could do, we couldn't get her to stop. But she found the PhaseOut program, luckily, and she stopped, and we're extremely happy about it. (Exhibit A, p. 10).

R. VOICE-OVER: With PhaseOut, you're not hit with agonizing withdrawal symptoms. The changes are so gradual, so subtle, you won't feel any negative physical effects. (Exhibit A, p. 10).

S. FIRST CONSUMER ENDORSER: With PhaseOut, you can cut back, you don't have to quit, and you're still a lot better off than before.

SECOND CONSUMER ENDORSER: With the use of PhaseOut, the system, I could only come out ahead. I would either stop, cut down, or whatever I smoked, I would have eliminated most of the poisons, tars, nictines, carbon monoxides. So you couldn't lose. (Exhibit A, p. 12).

T. MASON ADAMS: We've been looking at a major development in the move to end smoking, called PhaseOut, which seems to be producing some remarkable results, by giving people the tool they need to cut down or eliminate their addiction to smoking. (Exhibit A, p. 14).

U. VOICE-OVER (quoting Dr. Robert Brandstetter): "In the late 1970's the Surgeon General acknowledged that one of the most difficult aspects in the cessation of smoking was avoiding withdrawal symptoms. And it is the withdrawal symptoms that discourage people from actually stopping smoking. A method had to be devised that would gradually reduce the amount of nicotine in the blood and therefore avoid withdrawal symptoms. By using PhaseOut appropriately you can avoid withdrawal symptoms." (Exhibit A, p. 15).

## INFOMERCIAL #2

V. CONSUMER ENDORSER: When I got the, um, PhaseOut product I was concerned that because of the reduced nicotine and tar and all the other poisons that I would immediately increase my intake of cigarettes. However that wasn't the case, I went, I started on phase one, um, the first day I got it, I was all excited, and then went immediately, within two days to phase two because I didn't notice a difference at all. (Exhibit B, p. 6).

W. CONSUMER ENDORSER: I thought that I would want to smoke more cigarettes but I didn't, in fact I smoked less cigarettes and I wasn't thinking about it. (Exhibit B, p. 6).

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## TELEVISION COMMERCIAL ("Stop Smoking Or Your Money Back")

X. VOICE-OVER: Introducing PhaseOut, the stop smoking system that actually lets you continue to smoke until you don't need to anymore.

Place your favorite brand of cigarettes inside the PhaseOut device and press down, that's all you have to do. PhaseOut actually eliminates up to 92% of tar and 89% of carbon monoxide. PhaseOut reduces up to 81% of nicotine to help break the cigarette addiction.

\* \* \*

Yes with PhaseOut you can actually keep smoking, because smoking is less harmful until you're ready to quit. 100% guaranteed or your money back. (Exhibit C).

## RADIO ADVERTISEMENT ("Advertorial")

Y. VOICE-OVER: Here's an announcement smokers everywhere have been waiting to hear: Tests at Johns Hopkins University prove a revolutionary new system called PHASEOUT eliminates up to 80% of the nicotine and carbon monoxide in any brand of cigarettes. It doesn't change the flavor or satisfaction of your favorite brand, doesn't require patches or prescriptions. . . . Smoke a pack a day? With PHASEOUT that's like cutting down to just 4 cigarettes. And as PHASEOUT gradually eliminates the nicotine it gradually eliminates your "need" for cigarettes. Now you can quit easily, without cold turkey, or continue smoking cigarettes that are far less dangerous to your health. (Exhibit D).

## PRINT ADVERTISEMENT #1

Z. STOP SMOKING FOREVER -- WITH PHASEOUT® Guaranteed or your money back

NEW EASY WAY -- Clinically tested and validated by Johns Hopkins University School of Medicine to reduce up to 80% of nicotine and carbon monoxide in cigarette smoke.

- \* Works automatically -- no will power needed
- \* Virtually no change in taste or draw
- \* Ends nicotine craving forever
- \* No cravings or urges \* 100% safe
- \* No side effects or unpleasant withdrawal symptoms
- \* Recommended by doctors and health organizations
- \* Eliminates up to 80% of the tars, nicotine and poison in cigarette smoke -- so even if you decide to keep smoking, you will no longer face the same danger of cancer and heart disease (Exhibit E).

## PRINT ADVERTISEMENT #2

## AA. PHASEOUT

NEW Proven new device shown to reduce the dangers of cigarettes while helping even hardcore smokers quit.

PhaseOut is a scientifically designed and patented mechanical device that eliminates toxins in cigarette smoke. Tests conducted at the U.S. Testing Company

and confirmed in recent studies at the Johns Hopkins School of Medicine show that PhaseOut lets smokers gradually and easily withdraw from [sic] nicotine addiction without the stress and irritation of "cold turkey."

Simply place an unopened pack of cigarettes in PhaseOut and press. PhaseOut instantly puts tiny perforations into your filtered or unfiltered cigarette. This allows cool air to mix with the hot gases created when you smoke. The resulting condensation traps up to 90% of the tars, nicotine and other poisons, and keeps them from reaching your lungs.

Use the simple 8-week PhaseOut program (included) to stop smoking entirely, or just use PhaseOut to create safer cigarettes. Either way, your health will benefit. Try fast, simple and effective PhaseOut now. (Exhibit F).

#### PRINT ADVERTISEMENT #3

BB. Would you spend the price of two cartons of cigarettes to protect your unborn child?

Maternal smoking is one of the most significant causes of serious risk in pregnancy and is linked with complications including miscarriages, pre-term birth, low birth weight, and respiratory distress syndrome. If you're pregnant, you owe it yourself and your unborn child to stop smoking!

If you haven't been able to stop smoking before, the four-step PHASEOUT<sup>®</sup> SYSTEM will help win this important battle for you, your baby, and all your other family members who are affected by your second-hand smoke.

\* \* \*

PHASEOUT prevents up to 80% of the deadly tar, nicotine, and other poisons from ever entering your body.

And the taste, flavor and draw of your cigarettes aren't changed!

\* \* \*

With PHASEOUT you'll successfully wean yourself of smoking at your own pace, with your own timetable. (Emphasis in original) (Exhibit G).

#### PRINT ADVERTISEMENT #4

CC. PRACTICE SAFE SMOKING.

\* \* \*

Clinical research by Johns Hopkins University and tests by US Testing Company prove PHASEOUT's patented microperforation system significantly reduces all harmful substances in the cigarette brand you're lighting up right now.

It won't noticeably affect the taste or draw and you will still enjoy the pleasure and satisfaction of smoking your favorite brand. But by gently and gradually eliminating up to 80% of your nicotine intake, PHASEOUT makes it easier to quit. Without cold turkey withdrawal symptoms or side effects.

\* \* \*

Protect yourself with PHASEOUT. Because what you don't smoke can't harm you. (Exhibit H).

#### PROMOTIONAL FLYER

DD. PHASEOUT MAKES IT SAFER TO SMOKE, EASIER TO QUIT.  
The amazing scientific breakthrough that makes cigarettes 80% less harmful.

\* \* \*

PHASEOUT lets you smoke cigarettes that are over 80% less harmful. You still get the taste, pleasure and satisfaction without changing brands. You just don't get the nicotine, tars, carbon monoxide and other toxins. PHASEOUT's patented micro-perforations block them right out. So you should feel better almost immediately and you enjoy a healthier lifestyle, because what you don't smoke can't harm you!

\* \* \*

Until today, the odds were against you: 9 out of 10 people who try to quit fail. No wonder. The withdrawal symptoms that come with the abrupt elimination of nicotine can be brutal.... PHASEOUT helps eliminate these withdrawal symptoms. PHASEOUT gently and gradually blocks out the nicotine, enabling your body to slowly detoxify. You're in total control. You set your own pace. For the first time, you can end your nicotine addiction completely without the symptoms of "cold turkey" withdrawal. So you will succeed . . . guaranteed!

#### PHASEOUT IS SCIENTIFICALLY AND CLINICALLY PROVEN

Research confirms the benefits of the PHASEOUT System. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories confirm that PHASEOUT gradually eliminates over 80% of the nicotine, tars, carbon monoxide and all other tobacco toxins found in cigarette smoke. (Exhibit I).

#### WORLD WIDE WEB HOME PAGE

#### EE. PHASEOUT THE WEAN-MACHINE TO HELP YOU QUIT SMOKING

The amazing scientific breakthrough that gradually reduces NICOTINE and other unwanted substances from cigarette smoke

\* \* \*

Depiction: Four bar graphs of shrinking cigarettes labeled "LEVELS OF TAR," "LEVELS OF NICOTINE," "LEVELS OF CARBON MONOXIDE," and "TOTAL PARTICULATE MATTER."

Illustrated are the reductions of nicotine and other toxins during each phase. (Exhibit J).

#### FF. STOP SMOKING THE SAME WAY YOU STARTED...GRADUALLY

\*\*\*

Try PHASEOUT yourself, or share it with someone you love.

You may be surprised at just how easy it is to kick the habit for good.

PHASEOUT is a treatment for your cigarettes, not you. Its patented design allows you to punch tiny, undetectable holes in your cigarettes, causing condensation...a natural filtering process that traps over 80% of the toxins.

Each phase adds more perforations, further decreasing the levels of nicotine, tar and carbon monoxide. It's a safe, effective method approved by doctors and validated by Johns Hopkins University School of Medicine. (Exhibit J).

#### GG. PHASEOUT IS SCIENTIFICALLY PROVEN

Research confirms the effectiveness of PHASEOUT. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories conclude that PHASEOUT gradually eliminates up to 80% of the nicotine, tar, carbon monoxide and total particulate matter found in cigarette smoke. (Exhibit J).

HH. "I've been a two pack a day (and more) smoker for twenty years. I have tried almost every way to quit over the past fifteen years. None of the programs could deal with my major challenge...staying quit. I am in the third phase of the (PHASEOUT) program which means I am reducing tar by 77% and the nicotine

by 66% but miraculously I am smoking less than ever. To me it is a miracle because I am trying to cut down. I want to thank everyone involved."

Donna . . . .

Akron, Ohio (Exhibit J).

7. The Johns Hopkins University research to which the advertisements attached as Exhibits A through J refer is a study that has been reported as Stitzer, Brigham and Felch, Phase-Out Filter Perforation: Effects on Human Tobacco Smoke Exposure, 41 Pharmacology, Biochemistry and Behavior 748 (1992) (hereinafter, the "Johns Hopkins study").

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. The Johns Hopkins study proves that PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide smokers get under normal smoking conditions.

B. The Johns Hopkins study proves that PhaseOut is effective in enabling smokers to quit smoking.

C. The Johns Hopkins study proves that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems.

9. In truth and in fact:

A. The Johns Hopkins study does not prove that PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide smokers get under normal smoking conditions. Among other reasons, that study was conducted under carefully controlled conditions that did not reflect how smokers actually smoke, in part because they did not take into account such behavior as compensatory smoking -- the tendency of some smokers who switch to lower yield cigarettes to smoke more cigarettes or smoke each one more intensively.

B. The Johns Hopkins study does not prove that PhaseOut is effective in enabling smokers to quit smoking.

C. The Johns Hopkins study does not prove that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems.

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

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

A. On Phase One of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 26 percent, the amount of tar they get by 41 percent, and the amount of carbon monoxide they get by 58 percent.

B. On Phase Two of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 47 percent, the amount of tar they get by 66 percent, and the amount of carbon monoxide they get by 73 percent.

C. On Phase Three of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 64 percent, the amount of tar they get by 80 percent, and the amount of carbon monoxide they get by 83 percent.

D. On Phase Four of the PhaseOut program, smokers will reduce the amount of nicotine they get from smoking a cigarette by 81 percent, the amount of tar they get by 92 percent, and the amount of carbon monoxide they get by 89 percent.

E. PhaseOut is effective in enabling smokers to quit smoking.

F. PhaseOut significantly reduces the risk of smoking-related health problems, including lung cancer and heart disease, for smokers who continue to smoke.

G. PhaseOut significantly reduces the amount of tar, nicotine, and carbon monoxide that smokers get without changing a cigarette's taste or draw.

H. Smokers using PhaseOut will not compensate for the product's effects by increasing the number of cigarettes they smoke per day.

I. PhaseOut is effective in enabling smokers to quit smoking without withdrawal symptoms.

J. PhaseOut provides immediate health benefits, including reduced congestion, coughing, and windedness, for smokers who continue to smoke.

11. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph ten, at the time the representations were made.

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

13. Through the means described in paragraph six, respondents have represented, expressly or by implication, that testimonials from consumers appearing in the advertisements for PhaseOut reflect the typical or ordinary experience of members of the public who use the product.

14. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph thirteen, at the time the representation was made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph thirteen, at the time the representation was made. Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

16. 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.

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## EXHIBIT A

## PHASEOUT: THE SMOKER'S SOLUTION

EXHIBIT A

## PHASEOUT: THE SMOKER'S SOLUTION

VOICE-  
OVER:  
(male)

This program length advertisement is brought to you by the Regal Group, Incorporated.

Regal logo with superimposed text: This program length advertisement is brought to you by Regal Group, Inc.

VOICE-  
OVER:  
(male)

Do you need an inexpensive, painless and easy solution to your smoking problem? If you want a healthier lifestyle without sacrificing anything, please pay close attention to the following information about Phaseout, the smoker's solution.

Pictures of hands holding cigarettes, an ashtray filled with lit cigarettes. The words 'Inexpensive,' 'Painless,' and 'Easy' move across the screen.

Graphic: PHASEOUT  
The  
Smoker's  
Solution

MASON  
ADAMS:  
(V/O)

You're going to see some unprecedented findings and hear some remarkable stories about a breakthrough device that can help you phase cigarettes out of your life without expensive therapies, patches or drugs.

Video montage of testimonialists, people on the street.

Superimposed text:  
This program is a paid advertisement for PhaseOut.

MASON  
ADAMS:

I'm Mason Adams and I'm a pretty good example of what I've just been talking about. Twenty years ago, I was finally able to quit smoking for good. But I remember all too vividly what an agonizing struggle it was. So when I was asked to be the host of this program, I jumped at the chance. Its name is Phaseout and its effectiveness in reducing the most harmful components of cigarette smoke has been scientifically confirmed in research conducted at such prestigious institutions as the Johns Hopkins University School of Medicine. The idea is this: Phaseout accurately applies microfine perforations to the filter of each cigarette. This simple perforation has a remarkable effect. It creates an additional filter within the existing filter but it doesn't change the taste or the draw of your cigarette. As warm air is drawn through the cigarette, cool air is drawn in through the perforation. The hot air hits the cold air and a trace of condensation forms. That's the additional filter which traps more of the toxins before you can inhale them into your body.

Picture of Phaseout device, with its accompanying box

Graphic: image of Phaseout device punching pack of cigarettes

Graphic: representation of cigarette with perforation; diagram shows direction of air movement, condensation

Complaint

EXHIBIT A

CONSUMER ENDORSER A: Because it's done so gradually, I didn't miss anything going from phase to phase, I didn't feel I was being deprived of anything.

CONSUMER ENDORSER B: There's no point not to use it if you're a smoker. It's not as if you can tell a difference in your cigarette. It's not as if you have to switch to a disgusting tasting cigarette with lower nicotine. It's the same thing that you've always done, only it's less harmful.

Consumer Endorser C: Phaseout is good, it's gradual, you're not even aware that it's working. Then all of a sudden, you realize you're smoking a lot less.

MASON ADAMS: If you're like most people, you'll start feeling better right away, while you're preparing to quit. Indeed, Phaseout's impact is so definite, that even if you don't quit, you'll be significantly reducing the harmful effects of every cigarette.

CONSUMER ENDORSER D: At least you're eliminating a lot of the irritants that are caused by the tars and nictines. And you start feeling better, I think, almost from the beginning.

CONSUMER ENDORSER E: I'm not as winded. I just feel, even though I'm still smoking, yes, I feel a little bit healthier.

CONSUMER ENDORSER F: I'm doing something good for me with the Phaseout.

MASON ADAMS: The Phaseout program is receiving some very interesting attention in the medical community. With me is pulmonary specialist Dr. Robert Brandstetter, Associate Director of Medicine at New Rochelle Hospital Medical Center, and distinguished cardiologist Dr. Arnold Benson, former Chief of Medical Services to the Pentagon.

Dr. Benson, as a cardiologist, what stimulated your professional interest in Phaseout?

Superimposed text:  
 Dr. Robert Brandstetter  
 Pulmonary Specialist  
 Associate Director of Medicine  
 New Rochelle Hospital Medical Center

Dr. Arnold Benson  
 Former Chief, Medical Services  
 The Pentagon

## Complaint

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## EXHIBIT A

DR. ARNOLD BENSON: Well, here I was, a physician and a cardiologist and a smoker. And I was embarrassed. I have taken care of many sick people, who I had to recommend that they stop immediately the habit of smoking, and yet they would walk into my office and the smell of smoke was ever present. I was afraid of stopping smoking, I didn't want to go through the withdrawal phase.

ADAMS: Now, were you a very heavy smoker?

DR. BENSON: I was a heavy smoker. I smoked for forty years exactly, and smoked not less than two packages of cigarettes a day.

ADAMS: And you attribute your quitting to Phaseout?

DR. BENSON: I stopped smoking because of Phaseout. Phaseout did it gradually for me.

ADAMS: And you're still not smoking today?

DR. BENSON: Well, it's two-and-a-half years since I quit. Forty years of smoking and I have gone two-and-a-half-years without smoking and I don't miss it.

ADAMS: Doctor, I understand that there's a medical study which confirms that Phaseout reduces the amount of nicotine in a regular cigarette.

DR. ROBERT BRAND-STETTER: At Johns Hopkins University, volunteers who smoked for a considerable period of time were enrolled in a study which demonstrated that Phaseout actually reduced the amount of nicotine in their blood over the period of time of the study.

Depiction:  
Front cover of journal  
Pharmacology, Biochemistry and Behavior

Graphic:  
The Johns Hopkins University School of Medicine

"Smoking exposure reductions of 30% to 80% were obtained for both nicotine and carbon monoxide."

ADAMS: So, the idea is then that if you reduce the amount of addictive nicotine, you'll thereby be reducing the addiction. Is that correct?

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## EXHIBIT A

DR.  
BRAND-  
STETTER

Exactly. And at the same time, you'll be actually reducing the possibility of withdrawal symptoms. And it is these withdrawal symptoms which cause people not to be able to stop smoking.

VOICE-  
OVER:  
(male)

Let's face it, one of the things that drives smokers mad is being lectured about it, particularly from people they don't even know.

*Video montage of people on the street*

CONSUMER  
ENDORSER  
G:

I live in California and people in California really hate smoking.

CONSUMER  
ENDORSER  
H:

Even my 13 grandchildren try to stop me.

Voice:

What do they do?

H:

Take my cigarettes and throw them away.

CONSUMER  
ENDORSER  
I:

A lot of my friends are nonsmokers and I have to not smoke in the car.

VOICE-  
OVER:  
(male)

Nonsmokers don't know how physically and psychologically difficult it is to stop and how many smokers have tried and failed using all kinds of methods.

CONSUMER  
ENDORSER  
J:

It's not like I started and I don't want to quit. I really do, would like to quit. It's just, it's very hard, it's very addicting.

CONSUMER  
ENDORSER  
K:

All efforts have failed.

CONSUMER  
ENDORSER  
L:

I had almost kind of resigned myself to the fact that I was going to be a smoker until the day that I died. And I knew that if I continued that that my life would be shorter, and you see all the warnings and hear things and know of people who actually have lost their, shortened their lives by doing this stupid thing. And still you don't stop.

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## EXHIBIT A

VOICE-OVER: (male) We're here on the streets of New York City to talk to smokers about Phaseout, the smoker's solution. It works without having to change your cigarette brand, without changing the taste or enjoyment, and, best of all, it works without patches, painful clips or expensive counselling.

Words 'New York City' move across screen, over pictures of people on the street

Graphic: PHASEOUT  
The  
Smoker's  
Solution

Graphic:  
PHASEOUT  
• Without Changing Brands  
• Without Changing Taste  
• Without Patches, Clips or  
Counselling

CONSUMER ENDORSER M: I don't feel any different

CONSUMER ENDORSER N: Well, it doesn't taste any different.

K: I've been smoking these for about two or three years, it tastes like the same thing.

CONSUMER ENDORSER O: Yeah, you couldn't even tell, I mean it tastes exactly the same.

CONSUMER ENDORSER P: It's hard to believe.

Voice: Really? Why is it hard to believe?

CONSUMER ENDORSER Q: Can't tell.

Voice: You can't tell at all?

Q: You can't.

CONSUMER ENDORSER R: Tastes like a Marlboro.

Voice: What if I told you that in that one drag, in the one thing we just did, you cut down 30% on the nicotine and some of the other toxins that are in the cigarette?

Superimposed text:  
The Complete Program  
Reduces Nicotine by 81%

M: Really? Well, I would like to see proof, some kind of data showing that. And if so, then I would buy it and I would punch every pack.

Complaint

EXHIBIT A

VOICE-  
OVER:  
(male)

There is medical evidence that Phaseout lets you do something good for yourself. The April 1992 issue of Pharmacology, Biochemistry and Behavior published results of a research study conducted at the Johns Hopkins University School of Medicine. This prestigious journal reports that Phaseout significantly reduced human exposure to tobacco smoke constituents. Reductions of 30% to 80% were observed for both nicotine and carbon monoxide.

Depiction: Cover of journal Pharmacology, Biochemistry and Behavior

Depiction: Journal is opened, pages turned

Depiction: Close-up of title page of journal article

Superimposed text (full screen):  
"significantly reduced human exposure to tobacco smoke constituents. Reductions of 30% to 80% were observed for both nicotine and carbon monoxide."

The report concluded that the use of the Phaseout device could be particularly useful as a weaning method prior to smoking cessation.

Superimposed text (full screen):  
"The use of the PhaseOut device . . . could be particularly useful as a weaning method prior to smoking cessation."

More favorable comments come from Jack E. Henningfield, Ph.D., of the National Institute on Drug Abuse. "The Johns Hopkins study is exciting because it showed that by using the PhaseOut device with regular cigarettes, the volunteers obtained progressively lower amounts of nicotine and carbon monoxide. This suggests that the PhaseOut device might provide a practical and useful means for smokers to wean themselves from nicotine and their addiction to tobacco."

Superimposed text (full screen):  
Jack E. Henningfield, Ph.D., Chief  
Clinical Pharmacology Branch  
Research Branch  
National Institute on Drug Abuse  
"The Johns Hopkins study. . . is exciting because it showed that by using the PhaseOut device with regular cigarettes, the volunteers obtained progressively lower amounts of nicotine and carbon monoxide."

Superimposed text (full screen):  
Jack E. Henningfield, Ph.D., Chief  
Clinical Pharmacology Branch  
Research Branch  
National Institute on Drug Abuse  
This suggests that the PhaseOut device might provide a practical and useful means for smokers to wean themselves from nicotine and their addiction to tobacco."

VOICE-  
OVER:  
(male)

That's proof that Phaseout can work for you, whether you want to smoke less harmful cigarettes or whether you want to stop for good.

Depiction: Clouds moving across sky  
Depiction: PhaseOut device with its accompanying box  
Superimposed text:  
Smoke Less  
Or  
Stop For Good

MASON  
ADAMS:  
(V/O)

If you follow the Phaseout plan, over a period of several weeks you will gradually reduce the levels of damaging substances in every cigarette you smoke.

Graphic: Three cigarettes, labelled 'Nicotine,' 'Tar' and 'Carbon Monoxide,' each shrinking in size

Graphic: Three cigarettes shown

## Complaint

123 F.T.C.

## EXHIBIT A

Phaseout is a four-step program where you control your progress.

Here's how it works. Take any standard size pack of cigarettes, hard or soft, kings or 100's, put it into the Phaseout device and press down. Microfine, almost invisible perforations now create a condensation screen that cuts nicotine levels by 26%, the levels of tar by almost 41%, and the levels of toxic gasses like carbon monoxide by 58%.

Phase two reduces nicotine nearly in half and further reduces the levels of tar and toxic gasses.

Phase three cuts levels of nicotine by nearly 64%, tar by 80%, and carbon monoxide by 83%.

By the time you reach phase four, your nicotine consumption is reduced by nearly 81%. You're also taking in 92% less tar and 89% less toxic gasses.

And it's easy. It's completely natural, no expensive prescriptions, no attachments, no trading one drug for another. Best of all, you continue to enjoy the taste and draw of your own cigarette brand. By waiting at least two weeks between phases, you gradually reduce your body's need for nicotine without the agony of going cold turkey. You can stay on each phase as long as you like until you're ready to

shrinking and labelled as follows:

Results after Phase four  
 Nicotine 81%  
 Tar 92%  
 Carbon Monoxide 89%

Depiction: Man at desk punching a pack of cigarettes with Phaseout

Graphic: cigarette with perforation

Graphic: Three cigarettes shown shrinking and labelled as follows:

Results after Phase one  
 Nicotine 26%  
 Tar 41%  
 Carbon Monoxide 58%

Graphic: Three cigarettes shown shrinking and labelled as follows:

Results after Phase two  
 Nicotine 47%  
 Tar 66%  
 Carbon Monoxide 73%

Graphic: Three cigarettes shown shrinking and labelled as follows:

Results after Phase three  
 Nicotine 64%  
 Tar 80%  
 Carbon Monoxide 83%

Graphic: Three cigarettes shown shrinking and labelled as follows:

Results after Phase four  
 Nicotine 81%  
 Tar 92%  
 Carbon Monoxide 89%

Depiction: Various endorsers smoking cigarettes

395

## Complaint

## EXHIBIT A

move on. You're in control. You know that with each phase, you're doing more good for your health. And when you get to phase four, you can quit whenever you're ready. Phaseout has helped many smokers quit cigarettes for good and thousands of others to smoke less damaging cigarettes.

*Pictures of cityscape with following phrases moving across the screen: 'The Time is Now' 'To Quit' 'Or Smoke Less.' Followed by picture of clouds in sky, with words 'The Answer Is,' and then a picture of the Phaseout device with its accompanying box*

CONSUMER  
ENDORSER  
S:

You wake up in the morning, you're not as congested, you don't have to wait for your chest to clear. I can run up and down the stairs and I can go to the park and I can play ball and I can, you know, run around with the kids and not be winded and not have to sit down and say "Mommy's tired. I can't do this."

BOBBY  
RYDELL:

Hi, I'm Bobby Rydell and I want to talk to you about Phaseout because I know it really works. It works for me, and I'll tell you how I discovered Phaseout. I was working on a television show for Regal, and as I was lighting up another cigarette, I turned to a stage hand and said, "Boy, would I really love to stop smoking." The stage hand said to me, "I was working on another show for Regal a while ago called "Phaseout." It's a stop smoking device. I took it home and it worked. As a matter of fact, it worked so well, I'm a nonsmoker now. I really don't need it anymore. Why don't I give it to you, Bobby, and you try it. He showed me how to use it, and all I can say is, it works. I can't thank that stage hand and Phaseout enough. I've gone from over two-and-a-half packs a day to a pack a day, and I know I'm on my way to quitting because Phaseout makes it easy. And I'll tell you, I've been smoking for over 30 years, and I've tried everything to quit smoking -- clinics, hypnosis, nicotine gum -- let me tell you, nothing's worked for me except

## Complaint

## EXHIBIT A

Phaseout. Phaseout can change your life, but it's up to you. You just gotta take that first step, you gotta make that call.

Graphic: PHASEOUT  
The  
Smoker's  
Solution

## COMMERCIAL:

VOICE-  
OVER:  
(male)

Nobody has to tell you the damage smoking causes. But many people still enjoy smoking. And even if you want to want to cut back or quit, most methods are annoying, painful, or expensive. But now, there's Phaseout, a breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure. You don't have to change brands to get all the benefits of reduced nicotine, tar, and other harmful substances. Phaseout works on any standard pack. With a simple punch, it forms a condensation filter within your cigarette, which traps more harmful substances before they ever reach your body. By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gasses.

Pictures of hands holding cigarettes, ashtray filled with smoking cigarettes

Superimposed text:  
This program is a paid advertisement for Phaseout.

Depiction: Woman at desk punching a pack of cigarettes with Phaseout

Pictures of various endorsers smoking

Graphic: Phaseout device punching a pack of cigarettes

Graphic: Cigarette with created filter

Graphic: Three cigarettes shown shrinking and labelled as follows:

Nicotine	81%
Tar	92%
Carbon Monoxide	89%

Graphic:  
PHASEOUT

- Smoke less harmful cigarettes
- Cut down
- Quit for good
- No withdrawal symptoms

Graphic:  
PHASEOUT

- No invasive drugs
- No patches or gum

Graphic:  
PHASEOUT

- Go at your own pace

Depiction of Phaseout device w/accompanying box, framed by following ordering information:

\$39.95

Phaseout is a real smoker's solution. You keep smoking until you're ready to cut down or quit. And because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

With many other methods, you're simply trading one drug for another, but with Phaseout, you're allowing your body to slowly become more comfortable with less and less nicotine, without drugs.

Best of all, Phaseout lets you progress at your own pace. You decide when to move from one phase to the next. For one low cost, you get all the benefits and none of the pain or hassles that go with quitting. You simply can't lose with Phaseout. Whether you

Complaint

EXHIBIT A

quit or continue to smoke less damaging cigarettes, Phaseout is the only product you'll ever need.

Plus \$6 S&H  
Add sales tax  
Send check or money order to:  
PhaseOut  
P.O. Box 10441  
Waterbury, CT  
06725-0441

30 Day Money Back Guarantee

Superimposed text:  
If after 30 days, you are not completely satisfied with your results, return PHASEOUT for a full refund of your payment

Graphic (framed by ordering info):

- PHASEOUT
- Safe
- Effective
- Easy to Use
- Scientifically Proven

Depiction: Phaseout device with accompanying box (framed by ordering information)

It comes with a money-back guarantee, so you risk absolutely nothing to give Phaseout a try.

Join thousands of other smokers who have started on the road to better health with Phaseout. It's safe, effective, easy to use, and scientifically proven. It's the discovery smokers have been waiting for.

Give yourself or someone you love the gift of life. Order Phaseout today. Have your credit card ready and call the toll-free number now. Or send your check or money order to the address on your screen. But for fastest delivery, call the toll-free number now. Sorry, no COD's.

END COMMERCIAL

CONSUMER  
ENDORSER  
T:  
(with  
wife &  
kids)

We, we asked her, we ultimatemed her, everything we could do, we couldn't get her to stop. But she found the Phaseout program, luckily, and she stopped, and we're extremely happy about it.

VOICE-  
OVER:  
(female)

Phaseout lets you control your own progress. Stay on each phase for the recommended two weeks, or until you're ready to go on to the next phase. With each phase, you're gradually reducing your physical need to smoke. With Phaseout, you're not hit with agonizing withdrawal symptoms. The changes are so gradual, so subtle, you won't feel any negative physical effects.

D:

If it didn't work and I didn't really like what it was doing for me, I wouldn't continue to use it.

Photo montage, including graphic of three cigarettes shrinking.

The following words move across the screen:  
'NO WITHDRAWAL'  
'GRADUAL CHANGES'

Photo montage, with following

## Complaint

123 F.T.C.

## EXHIBIT A

VOICE-  
OVER:  
(female)

Phaseout's effects are immediate. Your progress begins when you punch your very first pack. With Phaseout, you're not trading one dependency for another. You won't need to have to rely on gums, filters, or other crutches. Phaseout contains no drugs or chemicals, and you don't need a doctor's prescription to get it.

words moving across the screen:  
'IMMEDIATE EFFECTS'  
'NO TRADING DEPENDENCIES'  
'DRUG FREE'

CONSUMER  
ENDORSER  
U:

I have it right with me, and as soon as I buy the cigarettes, I punch them, and that's it. [Where as?] any other method of quitting, like when I got the clips in my ears, I got infections.

Photo montage, against cityscape backdrop.

VOICE-  
OVER:  
(female)

With Phaseout, there are no uncomfortable, ugly patches on your body. No annoying computers beeping at you. No need to keep replacing filters. Just put your cigarette pack in the Phaseout device and punch it in seconds. And, finally, Phaseout saves you money. You buy it once and use it forever. You don't have to pay for a visit to a doctor or for expensive prescriptions or refills. Phaseout pays for itself as you feel the need to smoke fewer and fewer cigarettes.

The following words move across the screen:  
'NO PATCHES...COMPUTERS...FILTERS'  
'JUST PUNCH IT'  
'SAVES MONEY'  
'NO PRESCRIPTIONS'

Depiction: Phaseout device, with its accompanying box

VOICE-  
OVER:  
(male)

It seems like torture for a smoker not being able to smoke on airplanes, long meetings, or any nonsmoking environment. Phaseout can help you get through those times.

The following words move across a backdrop of clouds floating through the sky:  
'Airplanes,' 'Restaurants,' 'The Office,' 'Car Pools,' 'Hospitals,' 'No Smoking,' 'Long Meetings,' 'GETTING THROUGH THE DAY'

CONSUMER  
ENDORSER  
V:

With the Phaseout, as I got through the program, I found less and less, if I had to work through my break, I wouldn't miss the cigarette.

L:

You know, I figured, OK, I can wait three, four, five hours for my next cigarette, and I thought, my God, what am I doing, I'm waiting five hours for a cigarette. It was amazing.

CONSUMER  
ENDORSER  
W:

There wasn't that starvation feeling and that deprived feeling, because the Phaseout program works so slowly, and it weans you is what it does, it weans you. It's not, you know, cold turkey.

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## Complaint

## EXHIBIT A

VOICE-  
OVER:  
(male) It's unanimous. Phaseout offers smokers a real solution. It doesn't change the taste or draw of your cigarette.

N: Well, it doesn't taste any different.

O: Yeah, you couldn't even tell. I mean it tastes exactly the same.

K: I've been smoking these for about two or three years, it tastes like the same thing.

VOICE-  
OVER:  
(male) People love the idea of gradually getting control over cigarettes, because it removes the fear of withdrawal symptoms. And they know that with the Phaseout program, they're smoking less damaging cigarettes.

L: You're still doing yourself a tremendous favor, even if you do continue to smoke.

E: With Phaseout, you can cut back, you don't have to quit, and you're still a lot better off than before.

A: With the use of Phaseout, the system, I could only come out ahead. I would either stop, cut down, or whatever I smoked, I would have eliminated most of the poisons, tars, nicotines, carbon monoxides. So you couldn't lose.

CONSUMER  
ENDORSER  
X: It doesn't need much to do it. And you don't feel like you failed in any way, you never feel like you failed.

VOICE-  
OVER:  
(male) We asked smokers who tried Phaseout just once how much they'd pay to own this breakthrough device.

CONSUMER  
ENDORSER  
Y: I mean, there's no price on this, it's gonna cut your bad habits. So I'd pay up to, you know, hundreds of dollars.

CONSUMER  
ENDORSER  
Z: I would pay \$95 for it.

R: Fifty to a hundred dollars.

## Complaint

123 F.T.C.

## EXHIBIT A

K: Any amount of money would be worth it.

L: I would have paid anything, if I knew then what I know now, I would have paid almost anything. Because when your health is failing, all the money in the world doesn't bring it back.

## COMMERCIAL:

VOICE-  
OVER:  
(male)

Nobody has to tell you the damage smoking causes. But many people still enjoy smoking. And even if you want to want to cut back or quit, most methods are annoying, painful, or expensive. But now, there's Phaseout, a breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure. You don't have to change brands to get all the benefits of reduced nicotine, tar, and other harmful substances. Phaseout works on any standard pack. With a simple punch, it forms a condensation filter within your cigarette, which traps more harmful substances before they ever reach your body. By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gasses.

Phaseout is a real smoker's solution. You keep smoking until you're ready to cut down or quit. And because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

With many other methods, you're simply trading one drug for another, but with Phaseout, you're allowing your body to slowly become more comfortable with less and less nicotine, without drugs.

Best of all, Phaseout lets you progress at your own pace. You decide when to move from one phase to the next. For one low cost, you get all the benefits and none of the pain or hassles that go

*Pictures of hands holding cigarettes, ashtray filled with smoking cigarettes*

*Superimposed text:  
This program is a paid advertisement for Phaseout.*

*Depiction: Woman at desk punching a pack of cigarettes with Phaseout*

*Pictures of various endorsers smoking*

*Graphic: Phaseout device punching a pack of cigarettes*

*Graphic: Cigarette with created filter*

*Graphic: Three cigarettes shown shrinking and labelled as follows:*

Nicotine	81%
Tar	92%
Carbon Monoxide	89%

*Graphic:*

## PHASEOUT

- Smoke less harmful cigarettes
- Cut down
- Quit for good
- No withdrawal symptoms

*Graphic:*

## PHASEOUT

- No invasive drugs
- No patches or gum

*Graphic:*

## PHASEOUT

- Go at your own pace

*Depiction of Phaseout device w/accompanying box, framed by following ordering information:*

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Complaint

EXHIBIT A

with quitting. You simply can't lose with Phaseout. Whether you quit or continue to smoke less damaging cigarettes, Phaseout is the only product you'll ever need.

\$39.95  
Plus 5¢ S&H  
Add sales tax  
Send check or  
money order to:  
PhaseOut  
P.O. Box 10441  
Waterbury, CT  
06725-0441

10 Day Money Back Guarantee

Superimposed text:  
If after 30 days, you are not completely satisfied with your results, return PHASEOUT for a full refund of your payment

Graphic (framed by ordering info):

- PHASEOUT
- Safe
  - Effective
  - Easy to Use
  - Scientifically Proven

Depiction: Phaseout device with accompanying box (framed by ordering information)

It comes with a money-back guarantee, so you risk absolutely nothing to give Phaseout a try.

Join thousands of other smokers who have started on the road to better health with Phaseout. It's safe, effective, easy to use, and scientifically proven. It's the discovery smokers have been waiting for.

Give yourself or someone you love the gift of life. Order Phaseout today. Have your credit card ready and call the toll-free number now. Or send your check or money order to the address on your screen. But for fastest delivery, call the toll-free number now. Sorry, no COD's.

END COMMERCIAL

MASON  
ADAMS:

We've been looking at a major development in the move to end smoking, called Phaseout, which seems to be producing some remarkable results, by giving people the tool they need to cut down or eliminate their addiction to smoking. And its effectiveness in reducing the most harmful components of cigarette smoke is receiving some very interesting attention in the medical community.

Depiction: ashtray filled with smoking cigarettes

Depiction: close-up of title page of journal article

Superimposed text (full screen):  
Jack E. Henningfield, Ph.D. Chief  
Clinical Pharmacology Branch  
Research Branch  
National Institute on Drug Abuse

"The Johns Hopkins study... is exciting because it showed that by using the PhaseOut device with regular cigarettes, the volunteers obtained progressively lower

VOICE-  
OVER:  
(male)

Favorable comments from the medical community include these:  
"The Johns Hopkins study is exciting because it showed that by using the PhaseOut device with regular cigarettes, the volunteers obtained progressively lower

Complaint

123 F.T.C.

## EXHIBIT A

amounts of nicotine and carbon monoxide. This suggests that the PhaseOut device might provide a practical and useful means for smokers to wean themselves from nicotine and their addiction to tobacco."

"In the late 1970's the Surgeon General acknowledged that one of the most difficult aspects in the cessation of smoking was avoiding withdrawal symptoms. And it is the withdrawal symptoms that discourage people from actually stopping smoking. A method had to be devised that would gradually reduce the amount of nicotine in the blood and therefore avoid withdrawal symptoms. By using Phaseout appropriately you can avoid withdrawal symptoms."

MASON  
ADAMS:

Doctors, there's no doubt that society is determined to put an end to smoking. We know that it's bad for us, we know that it has to stop. People are quitting. But there are still so many people out there who just haven't been able to quit yet, as much as they may want to. It seems that the will alone just isn't enough to do it. Research tells us that many of them are failing because of withdrawal, because their bodies can't shake the need to keep smoking. Why exactly is that.

amounts of nicotine and carbon monoxide.

Superimposed text (full screen):  
Jack E. Reamingfield, Ph.D, Chief  
Clinical Pharmacology Branch  
Research Branch  
National Institute on Drug Abuse  
This suggests that the PhaseOut device might provide a practical and useful means for smokers to wean themselves from nicotine and their addiction to tobacco."

Superimposed text (full screen, over depiction of document):  
Dr. Robert Brandstetter  
Pulmonary Specialist

Associate Director of Medicine  
New Rochelle Hospital Medical Center  
"In the late 1970's the Surgeon General acknowledged that one of the most difficult aspects in the cessation of smoking was avoiding withdrawal symptoms. And it is the withdrawal symptoms that discourage people from actually stopping smoking."

Superimposed text (full screen, over depiction of document):  
Dr. Robert Brandstetter  
Pulmonary Specialist  
Associate Director of Medicine  
New Rochelle Hospital Medical Center  
A method has to be devised that would gradually reduce the amount of nicotine in the blood and therefore avoid withdrawal symptoms. By using Phaseout appropriately. . . you can avoid withdrawal symptoms."

Superimposed text:  
Dr. Arnold Benson  
Former Chief, Medical Services  
The Pentagon

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## Complaint

## EXHIBIT A

DR.  
BENSON: I had trepidation about stopping smoking for many years. In fact, I would've enjoyed not smoking, but I feared it because I was so addicted to the nicotine. But with Phaseout, I was able to continue smoking. I gradually phased out of the nicotine habit each time I added perforations to my cigarettes. I was lessening my nicotine addiction nicotine while I continued to smoke, until finally I no longer wanted to smoke.

Bobby  
Rydell: In today's show, you heard a variety of testimonials from people whose lives have been changed by Phaseout. Your life can be changed by Phaseout, too. Plus, you'll be thrilled by the amount of money you can save with Phaseout. Compared to the other stop-smoking programs, it's the least expensive method. But more importantly, it works.

CONSUMER  
ENDORSER  
AA: My wife was a smoker, but she quit the hard way. She went cold turkey. I took the easy road, the Phaseout road.

CONSUMER  
ENDORSER  
BB: Phaseout is something that everybody should try, because it works and it's easy, and I wouldn't say it if I didn't mean it.

L: It wasn't as hard as I thought it was going to be, and nobody was more surprised than me. I couldn't believe it.

CONSUMER  
ENDORSER  
CC: Try Phaseout, because you're not losing either way. If you try it and you stay on phase one for the rest of your life, you're still making an improvement. If you try it and you go to phase two and three and you're still smoking the same number of cigarettes that you smoked without Phaseout, you're making an improvement for yourself. And you might surprise yourself. You know, if you do it long enough, you may get to four, and like magic, just put it down and stop. And that's great.

MASON  
ADAMS: I urge you to try Phaseout. For you or someone you love, this may be the gift of life. This is

Superimposed text:  
(c) 1992 Regal Group, Inc.  
95 Scovill Street, Waterbury CT  
06706

## Complaint

123 F.T.C.

## EXHIBIT A

Mason Adams. Thank you for joining us. And to all of you, good health.

L: I would have paid anything. If I knew then what I know now, I would have paid almost anything. Because when your health is failing, all the money in the world doesn't bring it back.

## COMMERCIAL:

VOICE-OVER:  
(male)

Nobody has to tell you the damage smoking causes. But many people still enjoy smoking. And even if you want to want to cut back or quit, most methods are annoying, painful, or expensive. But now, there's Phaseout, a breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure. You don't have to change brands to get all the benefits of reduced nicotine, tar, and other harmful substances. Phaseout works on any standard pack. With a simple punch, it forms a condensation filter within your cigarette, which traps more harmful substances before they ever reach your body. By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gasses.

Phaseout is a real smoker's solution. You keep smoking until you're ready to cut down or quit. And because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

With many other methods, you're simply trading one drug for another, but with Phaseout, you're allowing your body to slowly become more comfortable with less and less nicotine, without drugs.

Best of all, Phaseout lets you progress at your own pace. You decide when to move from one phase to the next. For one low cost,

*Pictures of hands holding cigarettes, ashtray filled with smoking cigarettes*

*Superimposed text:  
This program is a paid advertisement for Phaseout.*

*Depiction: Woman at desk punching a pack of cigarettes with Phaseout*

*Pictures of various endorsers smoking*

*Graphic: Phaseout device punching a pack of cigarettes*

*Graphic: Cigarette with created filter*

*Graphic: Three cigarettes shown shrinking and labelled as follows:*

Nicotine	81%
Tar	92%
Carbon Monoxide	89%

*Graphic:*

**PHASEOUT**

- Smoke less harmful cigarettes
- Cut down
- Quit for good
- No withdrawal symptoms

*Graphic:*

**PHASEOUT**

- No invasive drugs
- No patches or gum

*Graphic:*

**PHASEOUT**

- Go at your own pace

*Depiction of Phaseout device w/accompanying box, framed by following ordering information:*

*\$19.95  
Plus \$6 S&H  
Add sales tax*

Complaint

EXHIBIT A

you get all the benefits and none of the pain or hassles that go with quitting. You simply can't lose with Phaseout. Whether you quit or continue to smoke less damaging cigarettes, Phaseout is the only product you'll ever need.

Send check or money order to:  
PhaseOut  
P.O. Box 10441  
Waterbury, CT  
06725-0441

30 Day Money Back Guarantee

Superimposed text:  
If after 30 days, you are not completely satisfied with your results, return PHASEOUT for a full refund of your payment

Graphic (framed by ordering info)

- PHASEOUT
- Safe
- Effective
- Easy to Use
- Scientifically Proven

Depiction: Phaseout device with accompanying box (framed by ordering information)

It comes with a money-back guarantee, so you risk absolutely nothing to give Phaseout a try.

Join thousands of other smokers who have started on the road to better health with Phaseout. It's safe, effective, easy to use, and scientifically proven. It's the discovery smokers have been waiting for.

Give yourself or someone you love the gift of life. Order Phaseout today. Have your credit card ready and call the toll-free number now. Or send your check or money order to the address on your screen. But for fastest delivery, call the toll-free number now. Sorry, no COD's.

Ordering information remains on the screen

END COMMERCIAL

A: I didn't miss anything going from phase to phase, I didn't feel I was being deprived of anything.

B: There's no point not to use it if you're a smoker. It's not as if you can tell a difference in your cigarette. It's not as if you have to switch to a disgusting tasting cigarette with lower nicotine. It's the same thing that you've always done, only it's less harmful.

C: Phaseout is good, it's gradual, you're not even aware that it's working. Then all of a sudden, you realize you're smoking a lot less.

Depiction: Telephone operators, warehouse, delivery person

## Complaint

123 F.T.C.

## EXHIBIT A

VOICE-  
OVER:  
(female)

When you call our toll-free number, you get fast, courteous service. We'll process your order quickly and ship it directly from our warehouse to your door. What's more, we stand behind all our products. Our customer service representatives can answer questions about any Regal Shop product. And naturally all our products are completely guaranteed, so you can order with confidence.

VOICE-  
OVER:  
(male)

This program-length advertisement has been brought to you by Regal Group, Incorporated.

*Graphic: Regal logo  
Superimposed text: This program-length advertisement has been brought to you by Regal Group, Inc.*

395

## Complaint

## EXHIBIT B

EXHIBIT B

"PhaseOut: The Smokers' Solution"

GRAPHIC: Blue screen: "PhaseOut: The Smokers' Solution"

Depiction: Anonymous people smoking

Superimposed text:

Disclaimer at bottom of screen that this is paid ad.

Voice-Over:

Like most smokers you're probably sick of hearing about the dangers of cigarettes, but now there's PhaseOut, a simple device that lets you keep smoking your old brand while it reduces the nicotine and other toxins you inhale by as much as 90%. Without changing the taste or pleasure of your cigarettes, PhaseOut gradually decreases their damaging effects without the expense, difficulty or side effects of other methods.

Superimposed text:

This program is a paid advertisement. All claims and representations made in this program-length advertisement are the sole responsibility of the sponsor.

Mason Adams:

I'm Mason Adams. And I'm a pretty good example of what I've just been talking about. Twenty years ago I was finally able to quit smoking for good. But I remember all too vividly what an agonizing struggle it was, so when I was asked to be the host of this program I jumped at the chance.

You're going to see some unprecedented findings and hear some remarkable stories about a breakthrough device that can help you phase cigarettes out of your life without expensive therapies, patches, or drugs.

Its name is PhaseOut and its effectiveness in reducing the most harmful components of cigarette smoke has been scientifically confirmed in research conducted at such prestigious institutions as the Johns Hopkins University School of Medicine.

GRAPHIC: Shows how to use product, punching down on pack of cigarettes. Then illustrated images of perforations and inflow and outflow of warm and cold air and toxins.

The idea is this, PhaseOut accurately applies micro fine perforations to the filter of each cigarette. This simple perforation has a remarkable effect, it creates an additional filter within the existing filter but it doesn't change the taste or the draw of your cigarette. As warm air is drawn through the cigarette, cool air is drawn in through the perforation, the hot air hits the cold air and a trace of condensation forms, that's the additional filter which traps more of the toxins before you can inhale them into your body.

There's no point not to use it if you're a smoker, it's not as if you can tell the difference in your cigarette, it's not as if you have to switch to a disgusting tasting cigarette with lower nicotine. It's the same thing you've always done, only it's less harmful.

## Complaint

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B: PhaseOut is good, it's gradual, you're not even aware that it's working and all the sudden you realize you're smoking a lot less.

C: Because it's done so gradually, I didn't miss anything going from phase to phase, I didn't feel I was being deprived of anything.

D: I was still able to smoke and get the satisfaction from, the psychological effect, or what ever, from doing something with my hands, but when I stopped to think about it, I thought I'm doing something for myself. I'm putting less toxins into my body and all it takes is two seconds to punch some holes in my cigarettes.

Adams: If you're like most people, you'll start feeling better right away while you're preparing to quit. Indeed, PhaseOut's impact is so definite that even if you don't quit, you'll be significantly reducing the harmful effects of every cigarette.

E: Makes me feel that I'm doing something good for me, with PhaseOut

F: At least you're eliminating a lot of the irritants that are caused by the tars and nicotine and you start feeling better, I think almost from the beginning

G: I'm not as winded, it gives, uh, I just feel, uh, even though I am still smoking, yes, I feel a little bit healthier (chuckle).

H: You wake up in the morning and you're not as congested, you don't have to wait for your chest to clear, I can run up and down the stairs and I can go to the park and I can play ball and, you know, I can run around with the kids and not be winded and not have to sit down and say, "Mommy's tired, I can't do this."

GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"

[COMMERCIAL:]

Depiction: Pictures people smoking, using product.  
Quick disclaimer that this is paid ad at bottom.

Voice-Over: Nobody has to tell you the damage smoking causes, but many people still enjoy smoking and, even if you want to cut back or quit, most methods are annoying, painful or expensive. But now there's PhaseOut, a breakthrough device that drastically reduces the harmful effects of cigarette smoking without changing the taste or the pleasure.

GRAPHIC: words overlay pictures of people smoking:  
PhaseOut works on:  
Filtered or Non Filtered  
Hard or Soft Pack  
Kings, 100's or Regular

## Complaint

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You don't have to change brands to get all the benefits of reduced nicotine, tar and other harmful substances. PhaseOut works on any standard pack.

*GRAPHIC: Shows illustrated image of punching pack, and inflow of air in perforated cigarette*

With a simple punch it forms a condensation filter within your cigarette which traps more harmful substances before they ever reach your body.

*GRAPHIC: Illustrated cigarettes shrink and respective labels notify viewer of reductions in:*

*"Nicotine 81%  
Tar 92%  
Carbon Monoxide 89%"*

By the end of the program, you're smoking 81% less nicotine, 92% less tar, and 89% less toxic gases.

*GRAPHIC: Shows people smoking with overlay of words:*

*"Smoke less harmful cigarettes  
Cut down  
Quit for good  
No withdrawal symptoms"*

PhaseOut is a real smokers' solution. You keep smoking until you are ready to cut down or quit, and because it gradually reduces the nicotine you inhale, you don't suffer the painful withdrawal symptoms associated with going cold turkey.

*GRAPHIC:  
No invasive drugs  
No patches or gum*

With many other methods, you're simply trading one drug for another, but with PhaseOut, you're allowing your body to become more comfortable with less and less nicotine without drugs.

*GRAPHIC:  
Go at your own pace*

Best of all PhaseOut lets you progress at your own pace, you decide when to move from one phase to the next.

*GRAPHIC: Shows product and "Only \$35.95"*

For one low cost, you get all of the benefits and none of the pain or hassles that go with quitting; you simply can't lose with PhaseOut. Whether you quit or continue to smoke less damaging cigarettes, PhaseOut is the only product you'll ever need.

*Superimposed text:  
If after 30 days, you are not completely satisfied with your results, return PhaseOut for a full refund of your payment.*

*It comes with a money back guarantee so you risk absolutely nothing to give PhaseOut a try.*

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*Depiction:*  
*Pictures all of the people that gave testimonials in the ad-program*

Join thousands of other smokers who have started on the road to better health with PhaseOut.

*GRAPHIC: Shows product w/superimposed text:*  
*Safe*  
*Effective*  
*Easy to use*  
*Scientifically proven*

It's safe, effective, easy to use, and scientifically proven. It's the discovery smokers have been waiting for.

*GRAPHIC: Shows product, phone number -- 1-800-257-8866, address -- P.O. Box 10441, Waterbury CT 06725-0441, price -- \$39.95 plus \$6.00 S&H . . .*

Give yourself or someone you love the gift of life, order PhaseOut today. Have your credit card ready and call the toll free number now or send check or money order to the address on your screen, but for fastest delivery call the toll free number now; sorry no COD's.

[END COMMERCIAL]

*GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"*

Reporter:

We're here on the streets of New York City to talk to smokers about a revolutionary new device that lets them keep smoking while cutting down on the nicotine and other toxins they inhale. It works without having to change your cigarette brand, without changing the taste or enjoyment, and best of all it works without drugs; it's great news for people who smoke.

I:

Well it doesn't taste any different

J:

I've been smoking these for about two or three years and it tastes like the same thing.

K:

Yea, you couldn't even tell, I mean it tastes exactly the same.

L:

Hard to believe

Reporter:

Why is it hard to believe?

L:

You can't tell

Reporter:

You can't tell at all?

L:

You can't

M:

It taste like a Marlboro

N:

I don't feel any different

Reporter:

Yea? Does it taste like the normal cigarette you have?

## Complaint

## EXHIBIT B

N: Yea

*Superimposed text:  
The Complete Program Reduces Nicotine by 81%*

Voice-Over: We asked if she realized she just inhaled 30% less nicotine and other damaging substances

N: Really, well I would like to see, um, proof, some kind of data showing that and, if so, then I would buy it and I would punch every pack

Adams: PhaseOut program has been receiving some very interesting attention in the medical community. With me is Pulmonary Specialist Dr. Robert Brandstetter, Associate Director of Medicine at New Rochelle Hospital Medical Center and distinguished Cardiologist Dr. Arnold Benson, former Chief of Medical Services at the Pentagon. Dr. Benson, as a cardiologist, what stimulated your interest in PhaseOut?

Dr. Benson: Well here I was a physician and a cardiologist and a smoker, and I was embarrassed. I have, uh, taken care of many sick people who I had to recommend that they stop immediately the habit of smoking, and, uh, yet they would walk into my office, the smell of smoke was ever present. I was afraid of stopping smoking, I didn't want to go through the withdrawal phase

Adams: Were you a very heavy smoker?

Dr. Benson: I was a heavy smoker, I smoked for 40 years exactly and I smoked not less than 2 packages of cigarettes a day

Adams: And you attribute your quitting to PhaseOut?

Dr. Benson: I stopped smoking because of PhaseOut, PhaseOut did it gradually

Adams: And your still not smoking today?

Dr. Benson: Well it's two and a half years since I quit, 40 years of smoking, and I have gone two and a half years without smoking and I don't miss it.

Adams: Now doctor, I understand there's a medical study which confirms that PhaseOut reduces the amount of nicotine in a regular cigarette

Dr. Brandstetter: At Johns Hopkins University, volunteers who smoked for a considerable period of time were enrolled in a study which demonstrated that PhaseOut actually reduced the amount of nicotine in their blood over the period of time of the study.

Adams: So, the idea is then if you can reduce the amount of addicting nicotine, you'll thereby be reducing the addiction is that correct?

Dr. Brandstetter: Exactly and at the same time you'll actually be reducing the possibility of withdrawal symptoms and it's these

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withdrawal symptoms which cause people not to be able to stop smoking

- A: When I got the, um, PhaseOut product I was concerned that because of the reduced nicotine and tar and all the other poisons that I would immediately increase my intake of cigarettes. However that wasn't the case, I went, I started on phase one, um, the first day I got it, I was all excited, and then went immediately, within two days to phase two because I didn't notice a difference at all.
- B: I had little faith in smoking devices to help me stop smoking and, um, after a while I definitely saw a change, like I was telling you before, now I'm down to one pack every three or four days where before it was a pack a day.
- O: I felt that PhaseOut helped me control how I was going to stop smoking, how long it was going to take me, and in stages I could handle.
- P: I thought that I would want to smoke more cigarettes but I didn't, in fact I smoked less cigarettes and I wasn't thinking about it
- Q: I feel great about not being controlled by the use of cigarettes
- GRAPHIC: Shows how to use product and illustration of perforations and shrinking cigarettes with words:
- Nicotine 26% Tar 41% Carbon Monoxide 58%  
 Phase Two: Nicotine 47% Tar 66% Carbon Monoxide 73%  
 Phase Three: Nicotine 64% Tar 80% Carbon Monoxide 83%  
 Phase Four: Nicotine 81% Tar 92% Carbon Monoxide 89%

Adams: If you follow the PhaseOut plan over a period of several weeks you will gradually reduce the levels of damaging substances in every cigarette you smoke. PhaseOut is a four step program where you control your progress. Here's how it works, take any standard size package of cigarettes hard or soft, kings or 100's, put it into the PhaseOut device and press down, micro fine almost invisible perforations now create a condensation screen that cuts nicotine levels by 26%, the levels of tar by almost 41% and the levels of toxic gases like carbon monoxide by 58%. Phase two reduces nicotine levels by nearly in half, and further reduces the levels of tar and toxic gases. Phase three cuts levels of nicotine by nearly 64%, tar by 80% and carbon monoxide by 83%. By the time you reach phase four, your nicotine consumption is reduced by nearly 81%, you're also taking in 92% less tar and 89% less toxic gases.

And its easy, its completely natural, no expensive prescriptions, no attachments, no trading one drug for another, best of all you continue to enjoy the taste and draw of your own cigarette brand. By waiting at least two weeks between phases you gradually reduce your body's need for nicotine without the agony of going cold turkey. You can stay on each phase as long as you like

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until you're ready to move on. You're in control, you know that with each phase you're doing more good for your health and when you get to phase four you can quit whenever you're ready. PhaseOut has helped many smokers quit cigarettes for good and thousands of others to smoke less damaging cigarettes.

- A: I think it's been very easy to use PhaseOut because it feels as if I'm not doing anything different and I get closer and closer to quitting, it's good that I've been able to stick with it through phase four because I know now, that the nicotine withdrawal is going to be so much less and so much easier to break having gone through this gradual reduction.
- Q: In using the PhaseOut program, it was after, I was in the last stage, I had been using it for a while, that I was beginning to feel, hey, I think I've really kicked this
- E: It helped me do it at my own pace, I kinda felt that I was in control.
- Q: I phased out a very bad habit and I did in my own way, in my own time and it was comfortable and it was easy and it worked.
- C: I've tried to stop smoking many, many times all unsuccessfully before PhaseOut, I think it was Groucho Marx that said, "it's easy to stop smoking, I know because I've done it dozens of times", but I never did successfully before PhaseOut.
- R: With this product, anybody can quit smoking, it's no big deal, I thought it was a big deal to quit smoking, but it was so easy.
- P: But it wasn't as tough as I'd built it up to be, and I really and honestly and truly believe that PhaseOut really helped me stop and that's what I needed, just a little help.
- Reporter: Let's face it, one of the things that drive smokers mad is being lectured about it, particularly from people they don't even know
- S: I live in California, and people in California really hate smoking
- T: Even my 13 grandchildren try to stop me
- Reporter: What do they do?
- T: Take my cigarettes and throw them away
- U: A lot of my friends are non-smokers and I have to not smoke in the car
- Reporter: Non-smokers just don't understand how physically and psychologically difficult it is to stop and they don't know how many smokers have tried and failed using all kinds of methods.

Complaint

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## EXHIBIT B

V: It's not like I started and I don't want to quit, I really do, would like to quit, it's just very hard, it's very addicting

J: All efforts have failed

W: I tried a billion times, by hiding cigarettes from myself, I told people I hold in great esteem that I quit smoking and I'm using a whole bottle of perfume not to smell like smoke, and I tried once taking care of cancer patients, volunteer, so that it scares me and I don't smoke for like a day or two, then I run back and pick up a cigarette.

Reporter: I used to be a smoker myself so I know what it's like to sit through a long flight and not be able to light up, it used to happen during long meeting or when I'd be out with a group of non-smokers. It's torture not being able to smoke, but PhaseOut can help you get through those times

X: With the PhaseOut, as I got through the program I found less and less, if I had to work through my break, I wouldn't miss the cigarette

P: I figured, well, I can wait three, four, five hours for my next cigarette, and I thought, My God, what am I doing waiting five hours for a cigarette, it was amazing

Reporter: PhaseOut is easy, effective and it's inexpensive, best of all it is good news for your health.

VO: We asked smokers who tried PhaseOut just once, how much they'd pay to own this breakthrough device

Y: There's no price on this, it's going to cut your bad habit, so I'd pay up to, you know, hundreds of dollars

Z: I would pay \$95. for it

J: Any amount of money would be worth it

M: I don't see \$25, \$50, or \$100 being a big ticket

P: I would of paid anything if I knew then what I know now, I would have paid almost anything, because when your health is failing, all the money in the world doesn't bring it back

**GRAPHIC:****PhaseOut**

Nicotine patch: 3 months=\$300

Hypnotism: each session=\$100

Nicotine gum: 2 months=\$72

Acupuncture: each session=\$50

based on average cost per recommended treatment

Think of the expense of most anti-smoking methods and then realize that none of them help you fight the psychological or emotional need to have a cigarette in your hand

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## Complaint

## EXHIBIT B

Reporter: With PhaseOut there's a one time low cost, you use the same device for as long as you wish to keep smoking. It gradually eliminates your physical need so you can take the time you need to break the emotional or psychological need. It even comes with a money back guarantee. People love the idea of gradually getting control over cigarettes because it takes away the fear of withdrawal symptoms and they know that as long as they are on the PhaseOut program, they're smoking less damaging cigarettes.

P: You're still doing yourself a tremendous favor even if you do continue to smoke

G: With PhaseOut you can cut back, you don't have to quit and you're still a lot better off than before

AA: If I just wanted to, like, smoke when I go out to a bar, and, like, when I'm having a drink with somebody, and if I want to smoke and do the whole thing I can still smoke and enjoy a cigarette but I'll be getting less bad things.

D: I pull out my cigarettes in my social situation and I feel better for it because I know it's reduced and maybe I'm a little smarter than everyone else here because my cigarette has been phased out and yours are normal and so right now I'm intaking less toxins into my body

C: With the use of the PhaseOut system I can only come out ahead, I would either stop, cut down or, whatever I smoke, I would have eliminated most of the poisons, tars, nicotine, carbon monoxides, so you couldn't lose.

Reporter: It's unanimous, PhaseOut offers smokers a real solution, it doesn't change the taste or draw of the cigarette, there are no side effects, it lets you decide if and when you want to quit, and here's the best part, PhaseOut it just a phone call away.

*GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"*

[BEGIN COMMERCIAL]  
[END COMMERCIAL]

*GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"*

Adams: And now I'd like you to meet our next guest who successfully quit smoking using PhaseOut. This is Rene Myer, welcome Rene. Let me ask first, how heavy a smoker were you?

Rene: I smoked a pack a day for eight or nine years

Adams: Well tell us now, if you can, what you experienced as you progressed through the phases of the PhaseOut program

Rene: PhaseOut was so gradual that with the first phase I didn't really notice any differences. The second phase the only thing I noticed was that I wasn't as anxious about getting breaks to have a cigarette. And the third

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phase, I wasn't overly concerned that I had to have my pack of cigarettes before I got to work. And phase four, I was ready to quit, I just wanted to stretch it for that special New Year's Eve occasion, and as of midnight that was it, I had my last cigarette.

Adams: Very, very good to hear, Rene, thank you for sharing your story with us

Rene: You're welcome

Reporter: Most smokers are pretty tired of being picked on for the damage they're doing to their health, and now there's strong evidence to back up the fact that PhaseOut lets you do something good for your self

*GRAPHIC: Shows book and flips to pages of study*

VOICE-OVER: The April 1992 issue of Pharmacology, Biochemistry and Behavior published results of a research study conducted at the Johns Hopkins University School of Medicine. This prestigious journal reports that PhaseOut,

VOICE-OVER  
w/superimposed  
text:

"significantly reduced human exposure to tobacco smoke constituents. Reductions of 30% to 80% were observed for both nicotine and carbon monoxide." The report concluded that, "the use of the PhaseOut device . . . could be particularly useful as a weaning method prior to smoking cessation." More favorable comments come from Jack E. Henningfield, Ph.D., of the National Institute on Drug Abuse, "The Johns Hopkins study . . . is exciting because it showed that by using the PhaseOut device with regular cigarettes, the volunteers obtained progressively lower amounts of nicotine and carbon monoxide. This suggests that the PhaseOut device might provide a practical and useful means for smokers to wean themselves from nicotine and their addiction to tobacco."

Reporter: That's proof that PhaseOut can work for you, whether you want to smoke less harmful cigarettes or whether you want to give up smoking for good

*Superimposed text:  
PhaseOut works: Reduces levels of:  
Nicotine up to 81%; Tar up to 92%; Carbon Monoxide and  
other toxins up to 89%*

Voice-Over: Medical evidence proves that PhaseOut works, it effectively reduces the levels of nicotine and toxins you smoke even if you are already smoking a low tar or nicotine brand.

*GRAPHIC: Overlay:  
"PhaseOut is easy; Smoke your own brand; Same taste;  
same draw"*

PhaseOut is easy to use, it works on your own brand of cigarettes, without changing the taste or the draw, you still get the same enjoyment from every cigarette.

*GRAPHIC: Overlay:*

## Complaint

## EXHIBIT B

*"You control your own progress; Go at your own pace;  
Stay on any phase as long as you like"*

PhaseOut lets you control your own progress, stay on each phase for the recommended two weeks or until you are ready to go on to the next phase.

*GRAPHIC: Overlay:  
"No Suffering: Gradually reduces the need to smoke;  
Virtually no withdrawal symptoms"*

With each phase you're gradually reducing your physical need to smoke. With PhaseOut, you're not hit with agonizing withdrawal symptoms, the changes are so gradual, so subtle, you won't feel any negative physical effects.

*GRAPHIC: Overlay:  
"Immediate results"*

PhaseOut's effects are immediate, your progress begins when you punch your very first pack.

*GRAPHIC: Overlay:  
No trading dependencies*

With PhaseOut, you're not trading one dependency for another, you won't have to rely on gums, filters, or other crutches.

*GRAPHIC: Overlay:  
No drugs or chemicals*

PhaseOut contains no drugs or chemicals, and you don't need a doctor's prescription to get it.

*GRAPHIC: Overlay:  
PhaseOut is hassle-free:  
No patches; No annoying alarms; No filters*

With PhaseOut, there are no uncomfortable, ugly patches on your body, no annoying computers beeping at you, no need to keep replacing filters, just put your cigarette pack in the PhaseOut device and punch it in seconds.

*GRAPHIC: Overlay:  
PhaseOut is a great value:  
No doctor's visits; No on-going prescriptions*

And finally, PhaseOut saves you money, you buy it once and use it forever. You don't have to pay for a visit to the doctor or for expensive prescriptions and refills, PhaseOut pays for itself in the money you'll save as you feel the need to smoke fewer and fewer cigarettes.

Reporter:

All in all it is clear PhaseOut is a solution, not a band-aid, a fad, or an invasive, expensive drug, with PhaseOut, you immediately start to smoke less harmful cigarettes, with no loss of flavor or satisfaction, you may even quit smoking for good. So now when someone says to you, you need to do something about your

## Complaint

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## EXHIBIT B

smoking, you can show them PhaseOut, the breakthrough device that is truly enriching the lives of smokers everywhere.

*GRAPHIC: Disclaimer: "This program is a paid advertisement for PhaseOut"  
Screen with people speaking and price, number and address to order*

BB: It doesn't take much to do it, you don't feel like you failed in any way, you never feel like you failed.

Q: There wasn't that starvation feeling, and that deprived feeling because the PhaseOut program works so slowly and, um, it weans you, is what it does, it weans you, it's not cold turkey.

R: My wife was a smoker, but she quit the hard way, she went cold turkey. I took the easy road, the PhaseOut road.

O: PhaseOut is something that everybody should try, because it works and it's easy and I wouldn't say it if I didn't mean it.

P: It wasn't as hard as I thought it was going to be, and nobody was more surprised than me, I couldn't believe it.

D: Try PhaseOut, because you're not losing either way. If you try it and you stay on PhaseOut for the rest of your life, you're still making an improvement. If you try it and go to phase two or three, and you're still smoking the same number of cigarettes that you smoked without PhaseOut, you're making an improvement for yourself, and you might surprise yourself, you know, if you do it long enough you may get to four, and you might as well just put it down and stop and that's great, you know, you've been PhasedOut, (laugh)

Adams: I urge you to try PhaseOut, for you or someone you love this may be the gift of life. This is Mason Adams, thank you for joining us and to all of you, good health.

P: If I knew then what I know now, I would have paid almost anything, because when your health is failing, all the money in the world doesn't bring it back

*GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"*

[BEGIN COMMERCIAL]  
[END COMMERCIAL]

*GRAPHIC: Blue Screen: "PhaseOut: The Smokers' Solution"*

EXHIBIT C

EXHIBIT C

**RADIO  
TV REPORTS**

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

PRODUCT: PHASEOUT  
TITLE: "STOP SMOKING OR YOUR MONEY BACK"  
PROGRAM: HOWARD STERN  
STATION: ETV

94-13957 M  
10/14/94 :60  
(NEW YORK) 11:08PM



(VARIOUS PEOPLE) ANNCR: Stop smoking or your money back.



(MUSIC IN) MAN: I'm just not ready to stop smoking.



ANNCR: Introducing PhaseOut, the stop smoking system



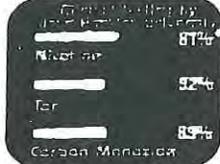
that actually lets you continue to smoke until you don't need to anymore.



ANNCR: Place your favorite brand of cigarettes inside the PhaseOut device and press down, that's all you have to do. PhaseOut actually



eliminates up to 92% of tar and 89% of carbon monoxide. PhaseOut reduces up to 81% of nicotine



to help break the cigarette addiction.



DR. A. BENSON: I'm a cardiologist, a former 2 pack per day smoker for over 40 years.



I haven't smoked in over 3 years.



MAN: Okay, I'll try it.



DR. A. BENSON: As a doctor, I must tell you the time to stop smoking is now.



ANNCR: PhaseOut, just 2 payments of \$19.95.



The doctor's choice to gradually



ease your addiction to cigarettes.



so it's easier to quit. Yes with PhaseOut you can actually keep smoking.



because smoking is less harmful until you're ready to quit. 100% guaranteed or your money back. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio TV Reports attempts to ensure the accuracy of material supplied by its sources, it is not responsible for mistakes or omissions. Errors, including those in Radio TV Reports, may be used by the advertiser without penalty. They may be used without limit or liability, reprinted or excluded.

Complaint

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## EXHIBIT D

PO-radio.djc

Client: PHASEOUT  
Title: "Advertorial"  
Code: Ad-A-J  
Phone #: 1-800-982-6800

ANNCR: Here's an announcement smokers everywhere have been waiting to hear: Tests at Johns Hopkins University prove a revolutionary new system called PHASEOUT eliminates up to 80% of the nicotine and carbon monoxide in any brand of cigarettes. It doesn't change the flavor or satisfaction of your favorite brand, doesn't require patches or prescriptions. As a matter of fact, you can order PHASEOUT simply by calling 1-800-982-6800. This is the one you've seen on national TV... the only system sold with an unconditional money back guarantee. Smoke a pack a day? With PHASEOUT that's like cutting down to just 4 cigarettes. And as PHASEOUT gradually eliminates the nicotine it gradually eliminates your "need" for cigarettes. Now you can quit easily, without cold turkey, or continue smoking cigarettes that are far less dangerous to your health. More good news: during this special introduction, you can order PHASEOUT for just \$39.95. But you must call now. 1-800-982-6800. You owe it to yourself and the people who love you. That's 1-800-982-6800. PHASEOUT makes it safer to smoke, easier to quit.

EXHIBIT E

**STOP SMOKING FOREVER  
—WITH PHASE OUT**  
*Guaranteed or your money back*

**NEW EASY WAY**—Clinically tested and validated by Johns Hopkins University School of Medicine to reduce up to 80% of nicotine and carbon monoxide in cigarette smoke.

- Works automatically—no will power needed
- Virtually no change in taste or draw
- Ends nicotine craving forever
- No cravings or urges • 100% safe
- No side effects or unpleasant withdrawal symptoms
- Recommended by doctors and health organizations
- Eliminates up to 80% of the tars, nicotine and poison in cigarette smoke—so even if you decide to keep smoking, you will no longer face the same danger of cancer and heart disease



EXHIBIT E

See what Dr's say:

"A boon to mankind" —Dr. C.C. Blumberg, NY  
"I strongly recommend" —Dr. S. Kartan, FL  
"Very impressed" —Dr. M. Greenbaum, NY

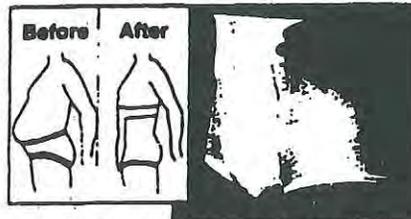
77840 Phaseout® \_\_\_\_\_ \$ 34.99 ✓

**SHARPENS vision** **BLUE-BLOCKING CLIP-ONS REDUCE PAIN & GLARE OF SUN**

- Blocks UV radiation
- Stops glare

Clip to your own prescription glasses and block out "Blue" light and painful glare that regular glasses can't. Makes everything look sharper and clearer.

30811 Amber-Optics Clip-ons \_\_\_\_\_ \$4.99, 2 for only \$8.99  
30810 Amber-Optics Frames \_\_\_\_\_ \$4.99, 2 for only \$8.99



**LOOK SLIMMER INSTANTLY (Best Value for Men)**

Now zip away tummy bulge *immediately!* "Magic Zipper" lets you slip in and out easily—no struggling. Instantly slims tummy, hips and upper thighs. Corrects posture and supports back muscles. You'll look slimmer, trimmer, younger. Machine washable. State sizes M (34-36), L (38-40), XL(42-44). C.P.R.P. \$29.99—ours \$15.99.

3017 Slenderizer for Men ..... \$ 15.99 ✓

**TOILET SEAT BOOSTER**

Add up to 5½ inches of height for easier sitting and rising. Ideal for bed-back or arthritis-sufferers. Fits over any toilet—no tools or installation needed. Competitor's published regular price \$49.99—our price only \$24.99.

**NEVER STRUGGLE AGAIN!**



Item #	Item Name	Your price
30732	5½" Booster w/arms (shown)	\$ 24.99 ✓
	SEE LISTING 2 only	\$44.99
30733	5" Booster w/hand grips	\$ 18.99 ✓
	SEE LISTING 2 only	\$34.99
30731	4½" Booster (standard)	\$14.99 ✓
	SEE LISTING 2 only	\$27.99

4

**BUY AT OUR LOW DR'S PRICES!**

We have only one price—you pay same low price we charge Dr.'s & customers on our own mailing list.

Complaint

123 F.T.C.

## EXHIBIT F

EXHIBIT F

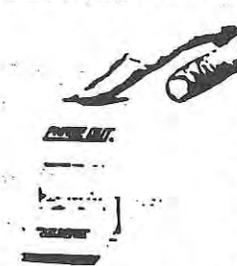
F A L L S A V I N G S I S S U E



First with the *New Ideas in Nutrition* for over 42 years

### PHASE OUT

**NEW** Proven new device shown to reduce the dangers of cigarettes while helping even hardcore smokers quit.



Phase Out is a scientifically designed and patented mechanical device that eliminates toxins in cigarette smoke. Tests conducted at the U.S. Testing Company and confirmed in recent studies at

the Johns Hopkins School of Medicine show that Phase Out lets smokers gradually and easily withdraw from nicotine addiction without the stress and irritation of "cold turkey".

Simply place an unopened pack of cigarettes in Phase Out and press. Phase Out instantly puts tiny perforations into your filtered or unfiltered cigarette. This allows cool air to mix with the hot gases created when you smoke. The resulting condensation traps up to 90% of the tars, nicotine and other poisons, and keeps them from reaching your lungs.

Use the simple 8-week Phase Out program (included) to stop smoking entirely, or just use Phase Out to create safer cigarettes. Either way, your health will benefit. Try fast, simple and effective Phase Out now.

No. 2-0101 \$29.95



Complaint

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EXHIBIT H

EXHIBIT H

P H A S E O U T

© PHASEOUT 1993



PRACTICE SAFE SMOKING.

**PHASEOUT® ELIMINATES UP TO 80% OF THE NICOTINE IN CIGARETTES.**

We all know that safe smoking is **NO** smoking. Everyone understands the nicotine, tars and carbon monoxide in cigarette smoke are hazardous to your health. But if you simply must smoke, or if you'd love to quit, PHASEOUT® can really help.

Clinical research by Johns Hopkins University and tests by US Testing Company prove PHASEOUT's patented microperforation system significantly reduces all harmful substances in the cigarette brand you're lighting up right now.

It won't noticeably affect the taste or draw and you will still enjoy the pleasure and satisfaction of smoking your favorite brand. But by gently and gradually eliminating up to 80% of your nicotine

intake, PHASEOUT makes it easier to quit. Without cold turkey withdrawal symptoms or side effects.

Unlike patches, PHASEOUT requires no prescriptions, contains no drugs or chemicals, has absolutely no health risks or side effects, there's nothing to wear, and it's only a fraction of the cost.

Plus, PHASEOUT is guaranteed to work for you, or your money back. So you've got nothing to lose but your smoking habit.

Protect yourself with PHASEOUT. Because what you don't smoke can't harm you.

**PHASEOUT.**  
MAKES IT SAFER TO SMOKE, EASIER TO QUIT.

**CREDIT CARD HOLDERS MAY ORDER BY PHONE 24 HOURS 7 DAYS A WEEK. 100% SATISFACTION GUARANTEED!**  
Please have credit card handy!

**1-800-822-9800** Dept. 5622

Please send me  PHASEOUT devices at \$39.95 (each)

Merchandise Subtotal	\$ _____
Shipping/Handling/Insurance at \$6 per unit	\$ _____
NY State residents, please add tax	\$ _____
<b>TOTAL</b>	<b>\$ _____</b>

Enclosed is my check or money order payable to PHASEOUT

Please bill my  VISA  Mastercard

Acct. # \_\_\_\_\_ Expiration Date \_\_\_\_\_

Signature \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Mail To: **PHASEOUT**  
507 Maple Leaf Dr., Nashville, TN 37210 Dept. 5622

EXHIBIT I

EXHIBIT I



EXHIBIT I

PHASEOUT NICOTINE IN CIGARETTE SMOKE

We know that for many smokers, cigarettes are enjoyable and quitting is tough. PHASEOUT lets you smoke your regular brand of cigarettes without any noticeable change in taste. You just phase-out up to 80% of the nicotine, tar, carbon monoxide and other unwanted substances from your cigarettes. You still enjoy the pleasure and satisfaction of smoking until you are ready to quit.

PHASEOUT'S GRADUAL WEANING COULD MAKE IT EASIER TO QUIT

Nine out of ten people who try to quit fail. By gently and gradually reducing the nicotine in your cigarettes, PHASEOUT can help you take control in your efforts to quit. You set your own pace and your own timetable, and you could make it easier to quit.

PHASEOUT IS SCIENTIFICALLY PROVEN

Research confirms the effectiveness of PHASEOUT. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories conclude that PHASEOUT gradually eliminates up to 80% of the nicotine, tar, carbon monoxide and total particulate matter found in cigarette smoke.

THIS IS WHAT THE JOHNS HOPKINS RESEARCH REPORTED

"Use of the Phase-Out filter perforation device may allow smokers to continue smoking their preferred brand of cigarettes while reducing their exposure to tobacco smoke constituents. This could have beneficial health effects and could be particularly useful as a weaning method prior to smoking cessation."

"In conclusion, this study showed that filter perforation achieved with the PHASEOUT device significantly reduced human exposure to tobacco smoke constituents when tested in an acute smoking protocol under controlled laboratory conditions."

Controlled laboratory test on smokers conducted by Johns Hopkins School of Medicine

MAJOR BENEFITS

- Reduces up to 80% of tar, nicotine, carbon monoxide and total particulate matter in cigarette smoke through a "gradual weaning" process.
- You quit at your own pace...your own timetable.
- Lets you continue to enjoy the flavor and taste of your favorite brand of cigarette.
- Inexpensive...one-time purchase.
- Easy to use.
- Non-invasive and thus risk-free.
- No drugs, chemicals or attachments.
- A progressive 4-step program that helps you gently phase out unwanted substances in cigarette smoke.

The Choice is Yours to Cut Down or Quit Either Way. You Win! You Are in Control.

HOW PHASEOUT WORKS

Here's how PHASEOUT works. Insert an unopened pack—hard or soft, large-size, or 100's—into the patented PHASEOUT and squeeze. It makes tiny, almost undetectable perforations in filtered or unfiltered cigarettes. These microfine openings let cool outside air mix with the hot air inside the cigarette forming a natural condensation filter that traps over 80% of these substances—without noticeably changing the taste, draw or pleasure of your cigarette.

HOW YOU BENEFIT

As you progress through phases I to IV, more and more nicotine is removed. This should make it easier for you to quit. The average smoker can spend over \$1,000 a year on cigarettes. You'll save a lot of money on the cost of cigarettes and cleaning bills. You can take that extra vacation, buy the extra clothes or dress you've longed for. You may even save money on life insurance. You won't be treated like a second class citizen anymore. Your friends and family will love you. Most important, you will feel like a winner.

You can continue to smoke until you feel ready to quit completely. Either way, from day one with Phase I, you benefit!



PHASE I

Place the top lip (left) end of an unopened pack of cigarettes into the recessed, pink-colored opening at the top of the Phase Out pack at the top. Squeeze the top and bottom together and then release (see figure 1). Remove the pack or box. Each cigarette is now protected with a precision perforation. You have reduced 35% of nicotine, 40% of tar and 51% of carbon monoxide.

Stay on Phase I for two weeks.

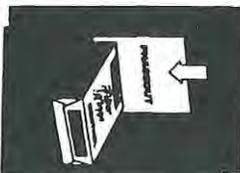


Figure 1

PHASE II

Repeat the procedure of Phase I. Then, insert the top lip of an unopened cigarette pack into the top (left) end of the recessed opening (see figure 2). Remove the pack or box. Each cigarette is now protected with two precision perforations. You have reduced 46.8% of nicotine, 65.8% of tar and 71% of carbon monoxide.

Stay on Phase II for two weeks.



Figure 2

PHASE III

Repeat Phases I and Phase II. Then push the Phase Out device into the rear bottom opening from the position to the bottom (see figure 3). If the switch is steady in the down position, remove the procedure. Place the unopened pack or box into the recessed opening and then release the top together and then release the pack or box. Each cigarette is now protected with three precision perforations. You have reduced 63.8% of nicotine, 80.1% of tar and 87.1% of carbon monoxide.

Stay on Phase III for two weeks.

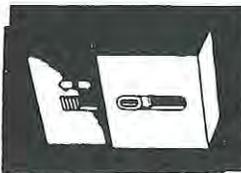


Figure 3

\*\*Subject based on independent lab data for 7/19/11. \*\*\*Average based on numerous new brands.

THE WEAN MACHINE, TO HELP YOU QUIT SMOKING

Complaint

EXHIBIT I

395

P H A S E O U T

**PHASE IV**

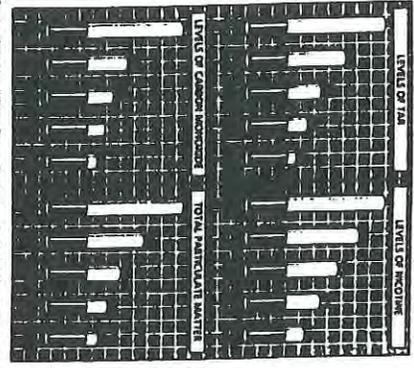
Repeat Phase I, Phase II and Phase III. When the "Phase" match is lit in place, turn the pack or box of unopened cigarettes (as in figure 2). Place the top (left) and bottom (right) filters over the top and bottom together and place the top filter over the bottom filter. Remove the pack or box. Each cigarette is now protected with four precision perforations. You have reduced 80.7% of nicotine, 91.6% of tar and 89.2% of carbon monoxide.

See on Phase IV for two weeks.



Figure 4

**UNITED STATES TESTING COMPANY RESULTS SHOW DRAMATIC REDUCTION OF NICOTINE AND OTHER POISONS!**



Results of the United States Testing Company on the PHASEOUT System using US Government methods. Reduced are the reduction of nicotine and other toxins during combustion. Percentage of all toxins reduced in controlled laboratory research by the Philip Hayslip University School of Medicine. US Patent No. 4,231,378 US Patent No. 5,218,978 Worldwide Patents Pending

THE WEAN-MACHINE, TO HELP YOU QUIT SMOKING

**WHAT'S BEING SAID**

"Before I knew it I had gone from a three pack a day habit down to about a half a pack a day. I strongly recommend PHASEOUT to anyone who wants to stop smoking."

**Dr. Sanford Kaler**  
Cooper City, FL

"I reviewed the test reports from the US Testing Laboratories regarding the reduction of nicotine, tar and carbon monoxide in cigarette smoke. The use of PHASEOUT and its program, will be of immediate benefit to smokers."

**Dr. Theodore Reich**  
NYU Medical Center, NY

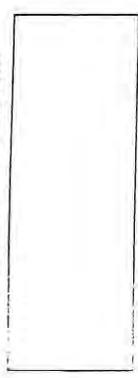
"This letter is being sent to you with my sincere gratitude and appreciation. I was amazed and could not believe the results from using PHASEOUT. The day I smoked my last cigarette was the last day I had any desire to do so. Your PHASEOUT really works. It is now more than one year since I have quit smoking. I am a true believer in what PHASEOUT can do and want to do everything possible to spread the word. This letter serves as my endorsement of your product which hopefully will induce others to take the big step."

**Dr. Arnold Benson**  
Former Chief of Medical Services  
Pennington, Washington, D.C.

"I have been a two pack a day (and more) smoker for twenty years. I have tried almost every way to quit over the past fifteen years. None of the programs could deal with my major challenge, staying quit. I am in the third phase of the (PHASE-OUT) program which means I am reducing tar by 77% and the nicotine by 65% but miraculously I am smoking less than ever. To me it is a miracle because I am trying to cut down. I want to thank everyone involved!"

**Donna Narducci**  
Aron, Ohio

Distributed by



**PHASEOUT of America, Inc.**  
(A Publicly Owned Company)  
Lynchbrook, New York, 11563  
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Complaint

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## EXHIBIT J

Phaseout Home Page

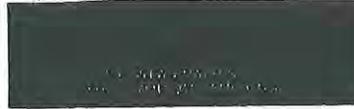
<http://www.unisworld.com/phaseout>

EXHIBIT J

**The amazing scientific breakthrough that  
gradually reduces NICOTINE and other  
unwanted substances from cigarette smoke**

---

COMPLETELY SAFE  
NO DRUGS  
NO ATTACHMENTS  
NEWLY PATENTED

---

**SMOKING RELATED ILLNESSES  
KILL MORE THAN 430,000  
AMERICANS EVERY YEAR...**

That's more than those caused by alcohol, cocaine, homicide, suicide, automobile accidents, fires and AIDS combined. It's a serious health issue, which makes it even more tragic because smoking is voluntary. And because high levels of nicotine make it hard to stop.

---

**PHASEOUT Goes After  
The Problem...Your Cigarettes**

PHASEOUT is a treatment for your cigarettes, not you. It uses a revolutionary approach called "filter perforation" that actually decreases levels of nicotine and other toxins. So you're able to reduce your craving, reduce the number of cigarettes smoked... and finally quit for good.

Another reason why PHASEOUT works is that its patented design allows you to treat your cigarettes without losing any of the flavor. PHASEOUT lets you stick with your own brand of cigarettes while trapping over 80% of the toxins...so it's convenient and less intrusive.

Plus it's backed by doctors, scientifically proven by the United States Testing Company, and validated by the Johns Hopkins University School of Medicine.

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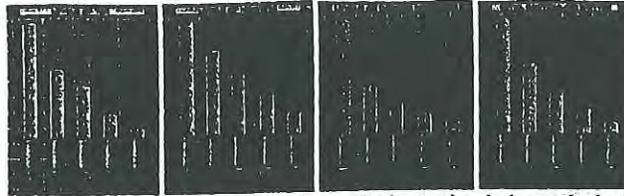
395

Complaint

EXHIBIT J

Phaseout Home Page

<http://www.imsworld.com/phaseout>



Illustrated are the reductions of nicotine and other toxins during each phase.

<b>HOME</b>	<b>STOP SMOKING GRADUALLY</b>	<b>HOW PHASEOUT WORKS</b>	<b>WHAT'S BEING SAID</b>	<b>ORDER PHASEOUT</b>
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Complaint

123 F.T.C.

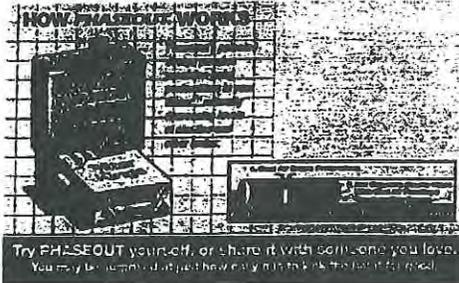
## EXHIBIT J



## STOP SMOKING THE SAME WAY YOU STARTED...GRADUALLY

PHASEOUT is a four-step program that slowly reduces the harmful and addictive effects of smoking, while allowing you to enjoy the full flavor of your favorite brand of cigarettes.

It uses a revolutionary approach called "filter perforation" that actually decreases levels of nicotine and other toxins from any brand of cigarettes. So you're able to reduce your craving, reduce the number of cigarettes smoked...and finally quit for good.



PHASEOUT is a *treatment for your cigarettes, not you*. Its patented design allows you to punch tiny, undetectable holes in your cigarettes, causing condensation...a natural filtering process that traps over **80%** of the toxins.

Each phase adds more perforations, further decreasing the levels of nicotine, tar and carbon monoxide. It's a safe, effective method approved by doctors and validated by John Hopkins University School of Medicine.

HOME	STOP SMOKING GRADUALLY	HOW PHASEOUT WORKS	WHAT'S BEING SAID	ORDER PHASEOUT
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## EXHIBIT J

PHASEOUT Works

<http://www.vyp.com/vphaseout/about>

## PHASEOUT NICOTINE IN CIGARETTE SMOKE

We know that for many smokers, cigarettes are enjoyable and quitting is tough. PHASEOUT lets you smoke your regular brand of cigarettes without any noticeable change in taste. You just phase-out up to 80% of the nicotine, tar, carbon monoxide and other unwanted substances from your cigarettes. You still enjoy the pleasure and satisfaction of smoking until you are ready to quit.

## PHASEOUT'S GRADUAL WEANING COULD MAKE IT EASIER TO QUIT

Nine out of ten people who try to quit fail. By gently and gradually reducing the nicotine in your cigarettes, PHASEOUT can help you take control in your efforts to quit. You set your own pace and your own timetable, and this could make it easier to quit.

## PHASEOUT IS SCIENTIFICALLY PROVEN

Research confirms the effectiveness of PHASEOUT. Tests conducted by Johns Hopkins University and U.S. Testing Laboratories conclude that PHASEOUT gradually eliminates up to 80% of the nicotine, tar, carbon monoxide and total particulate matter found in cigarette smoke.

## THIS IS WHAT THE JOHNS HOPKINS RESEARCH REPORTED

"Use of the Phase-Out filter perforation device may allow smokers to continue smoking their preferred brand of cigarettes while reducing their exposure to tobacco smoke constituents. This could have beneficial health effects and could be particularly useful as a weaning method prior to smoking cessations."

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## MAJOR BENEFITS

- Reduces up to 80% of tar, nicotine, carbon monoxide and total particulate matter in cigarette smoke through a "gradual weaning" process.
- You quit at your own pace...your own timetable.
- Lets you continue to enjoy the flavor and taste of your favorite brand of cigarette.
- Inexpensive...one-time purchase.
- Easy to use.
- Non-invasive and thus risk free.
- No drugs, chemicals or attachments.
- A progressive 4-step program that helps you gently phase out unwanted substances in cigarette smoke.

Complaint

123 F.T.C.

## EXHIBIT J

PHASEOUT Works

<http://www.vyp.com/phaseout/about.htm>

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### HOW YOU BENEFIT

As you progress through phases I to IV, more and more nicotine is removed...this should make it easier for you to quit. The average smoker can spend over \$1,000 a year on cigarettes. You'll save a lot of money on the cost of cigarettes and cleaning bills. You can take that extra vacation, buy the extra clothes or dress you've longed for. You may even save money on life insurance. You won't be treated like a second class citizen anymore. Your friends and family will love you. Most important, you will feel like a winner.

You can continue to smoke until you feel ready to quit completely. Either way, from day one with Phase I, you benefit!

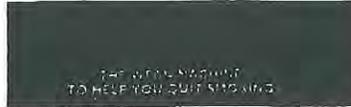
HOME	STOP SMOKING GRADUALLY	HOW PHASEOUT WORKS	WHAT'S BEING SAID	ORDER PHASEOUT
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Complaint

EXHIBIT J

ASEOUT Works

<http://www.vyp.com/phaseout/testimonial>



**WHAT'S BEING SAID**

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Cooper City, FL

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**Dr. Theodore Reich**  
NYU Medical Center, NY

"This letter is being sent to you with my sincere gratitude and appreciation. I was amazed and could not believe the results from using PHASEOUT. The day I smoked my last cigarette was the last day I had any desire to do so. Your PHASEOUT really works. It is now more than one year since I have quit smoking. I am a true believer in what PHASEOUT can do and want to do everything possible to spread the word. This letter serves as my endorsement of your product which hopefully, will induce others to take the big step."

**Dr. Arnold Benson**  
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"I have been a two pack a day (and more) smoker for twenty years. I have tried almost every way to quit over the past fifteen years. None of the programs could deal with my major challenge...staying quit. I am in the third phase of the (PHASEOUT) program which means I am reducing tar by 77% and the nicotine by 66% but miraculously I am smoking less than ever. To me it is a miracle because I am trying to cut down. I want to thank everyone involved."

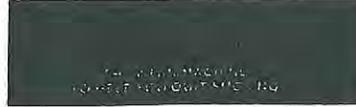
**Donna Narducci**  
Akron, Ohio

HOME	STOP SMOKING GRADUALLY	HOW PHASEOUT WORKS	WHAT'S BEING SAID	ORDER PHASEOUT
------	------------------------	--------------------	-------------------	----------------

Complaint

123 F.T.C.

EXHIBIT J

**PHASEOUT Order Form**

**If you would like to have a secure transaction and have a browser that supports it please click here.**

Order Phaseout for only \$39.95 + \$6.00 shipping and handling with a 30 day money-back guarantee.

**Name:**

**Address:**

**City:**

**State:**

**Zip:**

**Credit Card:**

**Credit Card Number:**

**Expiration Date:**

**Qty Price**

HOME	STOP SMOKING GRADUALLY	HOW PHASEOUT WORKS	WHAT'S BEING SAID	ORDER PHASEOUT
------	------------------------------	--------------------------	-------------------------	-------------------

## DECISION AND ORDER

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

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

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

1. Respondent Phaseout of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 140 Broadway, in the City of Lynbrook, State of New York.

Respondent Products & Patents, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 140 Broadway, in the City of Lynbrook, State of 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

## DEFINITIONS

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

1. "*Johns Hopkins study*" shall mean the study that has been reported as Stitzer, Brigham and Felch, Phase-Out Filter Perforation: Effects on Human Tobacco Smoke Exposure, 41 Pharmacology, Biochemistry and Behavior 748 (1992).

2. "*Smoking-cessation product*" shall mean any product or program designed to aid or assist the user to stop or reduce the cigarette urge, break the cigarette habit, or stop or reduce smoking.

3. "*Cigarette-modification product*" shall mean any product or program designed to reduce the amount of tar, nicotine, carbon monoxide or other substance that smokers get from cigarettes, or reduce their risk of smoking-related health problems.

4. "*Substantially similar product*" shall mean any smoking-cessation product or cigarette-modification product that punches one or more holes in a cigarette or pack of cigarettes.

5. "*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. Survey evidence may be appropriate depending on the representation made.

6. Unless otherwise specified, "*respondents*" shall mean Phaseout of America, Inc. and Products & Patents, Ltd., corporations, their successors, assigns, agents, representatives and employees.

7. "*Purchaser for resale*" shall mean any purchaser or other transferee of the PhaseOut device, or of the right or license to sell the PhaseOut device, other than respondents, who sells, or who has sold, the PhaseOut device to other purchasers or to consumers.

8. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division or other device, in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the PhaseOut device or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. The Johns Hopkins study proves that such product significantly reduces the amount of tar, nicotine, or carbon monoxide smokers get under normal smoking conditions;

B. The Johns Hopkins study proves that such product is effective in enabling smokers to quit smoking; or

C. The Johns Hopkins study proves that smokers who use such product and continue to smoke significantly reduce their risk of smoking-related health problems.

## II.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

1. The product reduces the amount of nicotine, tar, carbon monoxide, or any other component of cigarette smoke that smokers get from smoking a cigarette;

2. The product is effective in enabling or helping smokers to quit smoking;

3. The product reduces the risk of smoking-related health problems, including, but not limited to, lung cancer or heart disease, for smokers who continue to smoke;

4. The product reduces the amount of nicotine, tar, carbon monoxide, or any other component of cigarette smoke that smokers get without changing a cigarette's taste or draw;

5. Smokers using the product will not compensate for the product's effects by increasing the number of cigarettes they smoke per day;

6. The product is effective in enabling or helping smokers to quit smoking without withdrawal symptoms; or

7. The product provides immediate health benefits, including, but not limited to, reduced congestion, coughing or windedness, for smokers who continue to smoke;

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

### III.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the performance, benefits or efficacy of such product, unless, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### IV.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

### V.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-cessation product or cigarette-modification product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product

represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0 (b).

## VI.

*It is further ordered*, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall:

A. Within forty-five (45) days after the date of entry of this order, compile a current mailing list containing the names and last known addresses of all purchasers of the PhaseOut device since January 1, 1992. Respondents shall compile this list by:

1. Searching their own files for the names and addresses of such purchasers; and

2. Using their best efforts to identify any other such purchasers, including but not limited to sending by first class certified mail, return receipt requested, within five (5) days after the date of entry of this order, to all purchasers for resale with which respondents have done business since January 1, 1992, an exact copy of the notice attached hereto as Attachment A. The mailing shall not include any other documents. In the event that any such purchaser for resale fails to provide any names or addresses of purchasers in its possession, respondents shall provide the names and addresses of all such purchasers for resale to the Federal Trade Commission within forty-five (45) days after the date of entry of this order.

In addition, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

B. Within ninety (90) days after the date of entry of this order, send by first class postcard, postage prepaid, to the last known address of each purchaser of the PhaseOut device identified on the mailing list compiled pursuant to subparagraph A of this part, an exact copy of the notice attached hereto as Attachment B. The mailing shall not include any other documents.

C. For one (1) year after the date of entry of this order, make the mailing described in subparagraph B of this part to any person or organization not on the mailing list prescribed in subparagraph A of this part about whom respondents later receive information indicating that the person or organization is likely to have been a purchaser of the PhaseOut device, and to any purchaser whose notification postcard is returned by the U.S. Postal Service and for whom respondents obtain a corrected address, from the U.S. Postal Service or elsewhere. The mailing required by this subparagraph shall be made within ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event that respondents receive any information that, subsequent to its receipt of Attachment A, any purchaser for resale is using or disseminating any advertising or promotional material that contains any representation prohibited by this order, immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertising or promotional material; and

E. Terminate the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use or disseminate advertising or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph D of this part.

## VII.

*It is further ordered,* That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notifications sent to purchasers pursuant to subparagraphs B and C of part VI of this order;

B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VI of this order;

C. Copies of all communications with purchasers for resale pursuant to subparagraphs D and E of part VI of this order.

#### VIII.

*It is further ordered*, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

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

#### IX.

*It is further ordered*, That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall deliver a copy of this order to all current principals, officers, directors, and managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order.

## X.

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

## XI.

*It is further ordered,* That respondents Phaseout of America, Inc. and Products & Patents, Ltd., and their successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## XII.

This order will terminate on February 12, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

#### ATTACHMENT A

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[To be printed on Phaseout of America, Inc. letterhead]

[date]

Dear [purchaser for resale]:

This letter is to inform you that Phaseout of America, Inc. recently settled a lawsuit with the Federal Trade Commission ("FTC") concerning certain claims we made for our product, PhaseOut, which the FTC has challenged as deceptive. Although we do not admit the FTC's allegations, we have agreed to notify our distributors, wholesalers and others who sell PhaseOut to consumers to stop using or distributing advertisements or promotional materials containing those claims. We are also asking PhaseOut sellers to provide us with the names of their customers so that we may contact them directly.

#### The FTC Settlement

The FTC claimed that we made unsubstantiated claims about PhaseOut's effectiveness in reducing the adverse health effects of smoking and in helping smokers to stop smoking. The FTC also alleged that the company made misrepresentations about a study conducted at The Johns Hopkins University using PhaseOut.

\*Claims about reduced tar, nicotine and carbon monoxide yields.

The FTC alleged that the company made unsubstantiated claims that PhaseOut reduces the amount of tar, nicotine and carbon monoxide smokers get from smoking a cigarette by specific, substantial percentages. The company has agreed that it will substantiate any future claims that PhaseOut reduces the amount of any component of cigarette smoke that smokers get from smoking a cigarette.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proved that PhaseOut significantly reduces the amount of tar, nicotine and carbon monoxide smokers get under normal smoking conditions. Smokers often compensate when smoking low tar or nicotine cigarettes by taking more puffs from a cigarette, inhaling more deeply or blocking ventilation holes, such as the perforation holes produced by the PhaseOut device. The company has agreed that it will accurately represent the results of the Johns Hopkins study and any other test or study.

\*Claims that PhaseOut is effective in enabling smokers to quit smoking.

The FTC alleged that the company made unsubstantiated claims that PhaseOut is effective in enabling smokers to quit smoking. The company has agreed that it will substantiate any future claims that PhaseOut is effective in enabling smokers to quit smoking.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proves PhaseOut is effective in enabling smokers to quit smoking. The company has agreed not to make this representation in the future.

\*Claims that PhaseOut provides immediate health benefits and reduces the risk of smoking-related health problems for people who continue to smoke.

The FTC alleged that the company made unsubstantiated claims that smokers would derive substantial health benefits by using the PhaseOut product even if they continued to smoke. The company has agreed that it will properly substantiate any future claims of this type.

The FTC also alleged that the company misrepresented the Johns Hopkins test results by claiming that the study proved that smokers who use PhaseOut and continue to smoke significantly reduce their risk of smoking-related health problems. The company has agreed not to make this representation in the future.

\*Claims that PhaseOut reduces tar, nicotine and carbon monoxide yields without changing a cigarette's taste or draw.

The FTC alleged that the company made claims that use of the PhaseOut device would not produce any change in a cigarette's taste or draw. The company has agreed to substantiate any future claims regarding taste or draw.

\*Claims that PhaseOut is effective in enabling smokers to quit smoking without withdrawal symptoms.

The FTC alleged that the company made these claims without adequate substantiation. The company has agreed that it will have proper substantiation before making these claims in the future.

\*Claims that users of PhaseOut will not compensate for the product's effects by increasing the number of cigarettes they smoke per day.

The FTC alleged that the company made these claims without adequate substantiation. The company has agreed to have proper substantiation before making these claims in the future.

\*Claims that testimonials and consumer endorsements used in our ads reflect the typical or ordinary experiences of PhaseOut users.

The company has agreed that it will make these claims only if they reflect the typical experience of PhaseOut users or there is a proper qualifying disclosure to the effect that the results are not typical. No issue was raised regarding the authenticity of the actual testimonials and endorsements that have been used in PhaseOut advertising.

Our Obligations to Notify Distributors and Customers

In addition to our obligations discussed above, we have also agreed to provide notification of the FTC's allegations to consumers who have purchased PhaseOut. We need your assistance in complying with certain provisions of our settlement with the FTC.

First, we request that you discontinue using, relying on or distributing any PhaseOut advertising or promotional materials currently in your possession. We also ask that you notify any of your retail or wholesale customers who may have such materials to discontinue using them. These materials may contain claims that the FTC has alleged to be false or unsubstantiated. If you continue to use those materials, we are required by the FTC settlement to stop doing business with you. You should also avoid making any of the representations challenged by the FTC, as described in this letter.

Second, please send us immediately the names and last known addresses of all persons, including other resellers and consumers, to whom you have sold the PhaseOut device since January 1, 1992. We need this list in order to provide the notification required by our settlement with the FTC. If you do not provide this information, we are required to provide your name and address to the FTC.

If you have any questions, you may call us at (516) 599-1900 or you may call Devenette Cox at the FTC at (202) 326-3360. We apologize for any inconvenience this may cause you and thank you for your assistance.

Sincerely,

Irwin Pearl, President  
Phaseout of America, Inc.

Decision and Order

123 F.T.C.

## ATTACHMENT B

## ATTACHMENT B

*Front of Postcard*

Phaseout of America, Inc.  
 140 Broadway  
 Lynbrook, New York 11563

[Name and address  
 of PhaseOut purchaser]

**IMPORTANT HEALTH NOTICE!**

*Back  
 of  
 Post  
 card*

**Dear PhaseOut Purchaser:**

Our records show that you bought the PhaseOut smoking cessation product. Phaseout of America, Inc. recently settled Federal Trade Commission charges that we made deceptive claims in our ads about the benefits of the PhaseOut product. Although we don't admit the FTC's allegations, we agreed to send this notice to people who bought the product.

According to the FTC, our ads deceptively claimed, among other things, that people who use PhaseOut could continue to smoke while substantially reducing the risk of smoking-related health problems, including lung cancer and heart disease. As part of our settlement, we agreed to stop making claims like this unless we have scientific proof to back them up. PhaseOut has not been proven to reduce the risk of smoking-related diseases or to make cigarettes "safer."

For more information about smoking-related health risks, call the National Cancer Institute's Cancer Information Service at 1-800-4CANCER.

Sincerely,

[Date]

Irwin Pearl, President of Phaseout of America, Inc.

IN THE MATTER OF

INTERNATIONAL ASSOCIATION OF  
CONFERENCE INTERPRETERS, ET AL.

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

*Docket 9270. Complaint, Oct. 25, 1994--Final Order, Feb. 19, 1997*

This final order requires, among other things, the International Association of Conference Interpreters, a Switzerland-based voluntary professional association of interpreters from 68 countries, and its U.S. affiliate members to eliminate Association rules and bylaws regarding, among other things, fees, travel expenses, pro bono work, and commissions.

*Appearances*

For the Commission: *Kent Cox* and *Michael D. McNeely*.

For the respondents: *James Meyers* and *Robert Skitol, Drinker, Biddle & Reaths*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents, the International Association of Conference Interpreters, also known as the Association Internationale des Interprètes de Conférence (hereafter, "AIIC"), a corporation, and the United States Region of the International Association of Conference Interpreters (hereafter, "the U.S. Region"), an unincorporated association, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent AIIC is a corporation organized, existing and doing business under and by virtue of the laws of France, with its principal place of business located at 10, Avenue de Sécheron, 1202 Geneva, Switzerland. AIIC is a voluntary professional association of individuals in 68 countries engaged in the business of conference interpreting. Respondent the U.S. Region is

a voluntary, unincorporated professional association of individuals residing in the United States and engaged in the business of conference interpreting who are members of AIIC.

PAR. 2. Except to the extent that AIIC and the U.S. Region have restrained competition as described herein, AIIC members, including those in the U.S. Region, have been and are in competition among themselves and with other interpreters.

PAR. 3. AIIC and the U.S. Region engage in substantial activities that further their members' pecuniary interests. By virtue of these activities, AIIC and the U.S. Region are corporations within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. The acts and practices of AIIC and the U.S. Region, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. AIIC maintains a set of work rules that are binding on members performing services in the United States and that require members to refuse to work on inferior terms. AIIC members have agreed to abide by the work rules and can be investigated and expelled for violations. The U.S. Region has participated in formulating, securing agreement to, and enforcing those rules as they are applied in the United States.

PAR. 6. AIIC has periodically created and distributed fee schedules containing minimum fees for interpretation services in the United States. AIIC work rules state or have stated that members' rates of daily remuneration shall be the rates specified in the fee schedules. The U.S. Region has participated in formulating and securing agreement to those fee schedules as they apply in the United States.

PAR. 7. Within the United States the AIIC work rules require or have required:

A. Identical compensation for interpreters working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics;

B. Members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day;

C. Members to charge an added fee when they whisper or interpret alone;

- D. Members to charge for cancellations; and
- E. Members to pay their own travel and subsistence expenses when providing services free of charge.

PAR. 8. Within the United States the AIIC work rules prescribe or have prescribed rates for:

- A. Reimbursement or allowances for travel, lodging, subsistence and other expenses;
- B. Compensation for travel time, briefing time, rest time, and weekends or other non-working days over the duration of a conference; and
- C. Recording of interpretations.

PAR. 9. Within the United States the AIIC work rules prescribe or have prescribed mandatory standards for:

- A. The maximum hours worked per day and per shift by interpreters;
- B. The composition of interpretation teams, including the minimum number of interpreters based on the number of target and source languages used at a conference;
- C. The quality of transportation to and from conferences; and
- D. Members' use of portable electronic simultaneous interpretation equipment.

PAR. 10. Within the United States the AIIC work rules prohibit or have prohibited:

- A. Members from accepting or paying commissions;
- B. Members from engaging in comparative advertising;
- C. Members from offering or accepting "package deals" (which combine interpretation with other cost items) and lump sum payment arrangements;
- D. Members from performing non-interpretation services at conferences for which they have been hired as interpreters;
- E. Members from entering into arrangements whereby particular interpreters are available exclusively through them;
- F. Members from accepting more than one assignment for the same period of time; and

G. Members who coordinate interpreters from operating under a trade name.

PAR. 11. As applied to members residing in or traveling to the United States, the AIIC work rules require or have required that travel expenses to a job be charged based on a member's declared professional address, regardless of the member's actual location and even if no travel is actually involved. The AIIC work rules also require or have required members to declare a single professional address, to change such professional addresses no more than once every six months, and to give three months' advance notice of any change.

PAR. 12. Within the United States the AIIC work rules:

A. Required or have required members selecting an interpretation team to hire freelance interpreters before hiring interpreters who have permanent positions; and

B. Discourage or have discouraged interpreters with permanent positions from competing with freelancers.

PAR. 13. By enacting, participating in, securing agreement to, or enforcing the fee schedules, work rules, and other restrictions, as set forth in paragraphs five through twelve, respondents AIIC and the U.S. Region have been and are acting as a combination of their members or in conspiracy with their members or others to fix or stabilize fees and to restrain competition by attempting to control the price, output and marketing of interpretation services performed in the United States.

PAR. 14. The combination or conspiracy and acts or practices described above have had and continue to have the purpose and actual or likely effects of unreasonably restraining competition and injuring consumers in the United States by, among other ways, depriving consumers of the benefits of price and other forms of competition among interpreters.

PAR. 15. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE  
JULY 26, 1996

The Commission's complaint in this matter, issued October 25, 1994, charges the International Association of Conference Interpreters ("AIIC") and the U.S. Region of AIIC with unfair methods of competition.

The complaint charges that AIIC maintains work rules binding on members; that AIIC members can be expelled for violations; that the U.S. Region of AIIC has participated in enforcing those rules; that AIIC has minimum fees for interpretation services in the United States; that members' rates of daily remuneration shall be the rates specified in the fee schedules.

The complaint alleges that AIIC rules require: (a) identical compensation for interpreters working on the same interpretation team regardless of differences in their experience or skill; (b) payment of interpretation fees on an indivisible full-day basis, regardless of the number of hours actually worked; (c) added fees for whispered or solo interpretation; (d) cancellation charges; and (e) restrictions on providing services free of charge.

The complaint alleges that AIIC rules prescribe rates for: (a) reimbursement for travel, lodging, and subsistence; (b) compensation for travel time, briefing time, rest time, weekends or other non-working days over the duration of a conference; and (c) recording of interpretations.

The complaint alleges that the AIIC work rules prescribe mandatory standards for: (a) the maximum hours worked per day and per shift by interpreters; (b) the composition of interpretation teams, including the minimum number of interpreters based on the number of languages used at a conference; (c) the quality of transportation to and from conferences; and (d) members' use of portable interpretation equipment.

The complaint alleges that AIIC work rules prohibit: (a) the acceptance or payment of commissions; (b) comparative advertising; (c) "package deals" that combine interpretation with other services, and lump sum payment arrangements; (d) the performance of non-interpretation services by interpreters; (e) exclusive availability arrangements for particular interpreters; (f) the acceptance of more

than one assignment for the same period of time; and (g) the use of trade names.

The complaint alleges that AIIC rules require members to declare a single professional address, to change such professional addresses no more than once every six months, and to give three months' advance notice of any change; and that, as to members residing in or traveling to the United States, travel expenses to a job be charged based on the member's declared professional address, regardless of the member's actual location and even if no travel is actually involved.

The complaint alleges that AIIC requires members selecting an interpretation team to hire freelance interpreters before hiring interpreters who have permanent positions; and discourages interpreters with permanent positions from competing with freelancers.

The complaint alleges that the AIIC and the U.S. Region conspire with their members to fix price and output of interpretation services in the United States; that the effect of this conspiracy is to unreasonably restrain competition and injure consumers in the United States by depriving consumers of the benefits of price and other forms of competition among interpreters; and that the acts and practices alleged are to the prejudice and injury of the public.

Respondents moved to dismiss the complaint on jurisdictional grounds on December 8, 1994. This motion was denied on January 24, 1995, and by modified order on February 7, 1995. Respondents subsequently filed an answer to the Commission's complaint on February 10, 1995. On October 13, 1995, respondents moved for partial summary decision, which was denied on November 20, 1995. On October 23, 1995, complaint counsel moved for partial summary decision on jurisdictional issues, which was denied on November 29, 1995, except as to the existence of interstate commerce jurisdiction and the amenability of the U.S. Region to personal jurisdiction, which respondents did not dispute.

Except for one witness who testified on November 27, 1995, the hearing in this matter began on December 4, 1995. The last witness testified on April 17, 1996. In total, complaint counsel called 16 witnesses, including an economist and a cognitive psychologist, and respondents called five witnesses, including an economist and a psychologist. There were a total of 26 days of trial and 4,000 pages of trial transcript. Approximately 1,000 complaint counsel exhibits

numbered CX-1 through CX-3007 were admitted into evidence.<sup>1</sup> Respondents introduced approximately 240 exhibits numbered RX-2 through RX-820.<sup>2</sup> The record also includes 94 stipulated facts, adopted by order on April 8, 1996.

## FINDINGS OF FACTS

### I. THE CONFERENCE INTERPRETATION INDUSTRY

#### *A. Respondents*

##### 1. AIIC

1. Respondent International Association of Conference Interpreters, "AIIC" (CX-600-A) is an association of professional conference interpreters. (Stip. 6.) AIIC's Secretariat is located in Geneva, Switzerland. (Stip. 7.) AIIC's rules are in its "Basic Texts." (Stip. 9; CX-1; CX-2.)

2. AIIC's supreme body, the Assembly (all Association members), meets once every three years. (Stip. 10.) AIIC also has a "Council" (president, three vice presidents, a treasurer, and representatives from each of the Association's regions), nominated by their regions and elected to the Assembly. (Luccarelli, Tr. 1628; Stip. 11.) The Council implements Assembly decisions and adopts the annual budget. (Stip. 12.) AIIC also has a "Bureau" (the president, the three vice presidents and the treasurer), exercising the Council's functions. (Stip. 13.) AIIC has 2,000 members worldwide, and 141 in the United States. (CX-600-K; Stip. 36.)

3. AIIC publishes a Bulletin to members. (Stip. 67.) AIIC sends Bulletins to the United States reporting on the business of AIIC (including matters relating to the rates of remuneration and work rules.) (Stip. 17.) Proposed amendments to AIIC's Basic Texts are in the Bulletin. (Stip. 18.)

4. AIIC has two sectors. The "Agreement Sector" safeguards AIIC members working as freelance interpreters pursuant to AIIC's negotiated agreements with international organizations. (CX-2085-E; F. 492-97.) The "Nonagreement Sector," or "NAS," involves AIIC freelance interpreters working in the private sector not covered by

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<sup>1</sup> By order of July 10, 1996, approximately 430 of complaint counsel's exhibits were withdrawn.

<sup>2</sup> By order of July 11, 1996, approximately 100 of respondents' exhibits were withdrawn.

AIIC's Agreements. (CX-278-Z-2; CX-242-E.) NAS meets twice annually. (CX-245-F.)

## 2. The U.S. Region of AIIC

5. Members of AIIC in any country with 15 members may form a "Region." (Stip. 32.) The membership of an AIIC region consists of the AIIC members then having their professional address in that region. (Stip. 33.) Currently, AIIC has 22 regions. (Stip. 35.) One of these is the U.S. Region of AIIC. (Stip. 33, 36.)

### *B. The American Association of Language Specialists*

6. The American Association of Language Specialists ("TAALS") is an association of conference interpreters, translators, precis-writers and editors based in the Western Hemisphere, principally the United States. (CX-997-C, Q, Z-35 to Z-49; CX-995-C, J.)

7. TAALS has a professional code, binding on members, that, prior to 1994, included many of the restraints now challenged in the complaint against AIIC. (F. 304, 307-13.)

8. The Federal Trade Commission issued a consent order against TAALS (Aug. 31, 1994) prohibiting TAALS from price fixing or limiting price competition, agreements to restrict the time that interpreters work or the number of interpreters used and prohibiting restraints against advertising professional address rules and portable equipment restrictions.

### *C. The Conference Interpretation Industry in the United States*

9. Interpretation refers to the conversion of the spoken word from one language into another. Translation involves written statements. (Luccarelli, Tr. 1572-73.)

10. Conference interpretation involves business meetings, meetings with audiences, seminars and conferences involving sensitive subjects or technical material. (Clark, Tr. 589/21.) There are two principal modes of conference interpretation, consecutive and simultaneous. (Stip. 1.)

11. In consecutive interpretation, interpreters listen to the speakers for a while, and then interrupt to interpret what they have heard into another language. (Stip. 2.) Consecutive interpretation is usually limited to two languages because of the time required when

multiple languages are involved. (CX-304-K (Motton); Obst, Tr. 265, 267-68.)

12. In simultaneous interpretation, the interpreter talks at the same time as the speaker. (Obst, Tr. 264.) Interpreters sit in soundproof booths with microphones and headsets and provide a running interpretation into another language, which conference participants hear with their own headsets. (Stip. 3; CX-300-Z-54 (Motton); Obst, Tr. 264.) Simultaneous interpretation is performed in half the time as consecutive. (Obst, Tr. 265.) While conference interpreters sometimes perform consecutive interpretation, simultaneous interpretation is used for larger conferences. (Hamann-Orci, Tr. 15, 18; Stip. 4; Van Reigersberg, Tr. 433.)

13. Whispered interpretation is simultaneous without equipment and with the interpreter sitting next to two or three listeners. (CX-300-Z-57 to Z-58 (Motton); Hamm-Orci, Tr. 19.) Whispered interpretation is used at state dinners, for heads of state and at press conferences. (Hamann-Orci, Tr. 19; Obst, Tr. 268.)

14. A conference interpreters usually interprets simultaneously in a booth. (Clark, Tr. 591.) Conference interpreters listen and speak at the same time as someone else. (Hamann-Orci, Tr. 17.) In addition to language fluency, a conference interpreter must switch easily between two cultures and languages, which ideally involves having lived extensively in the countries where the foreign languages are spoken. (Weber, Tr. 1164, 1178; CX-303-R to S (Moggio-Ortiz).) Conference interpreters usually undergo specialized training in simultaneous interpreting. (Hamann-Orci, Tr. 17.) They are usually university educated and knowledgeable in many fields. (Davis, Tr. 854; Van Reigersberg, Tr. 384-85.) The majority of them are trained from two to five years. (CX-242-J.)

15. The number of languages at private conferences in the United States can vary from one other than English, to six or seven, but are usually two or three; the attendees can range from a couple of dozen into the thousands. (Neubacher, Tr. 762.) English and Spanish are the most common languages, followed by French. (CX-300-Z-134 (Motton); Citrano, Tr. 520.) In the United States, typical speeches are in English with interpretation into other languages. (Clark, Tr. 627.)

16. At conferences, simultaneous interpreters work in teams. (Luccarelli, Tr. 1617; Moser-Mercer, Tr. 3450.) Under AIIC's current rules, a conference in English and Spanish could have a team of three members working together in one booth, or it could have two teams

of two persons each working in two separate booths: a team interpreting from Spanish into English and a team interpreting from English into Spanish. (F. 160-61.) If there are two booths, when English is spoken on the floor the interpreters in the Spanish booth would take turns interpreting from English into Spanish, but when Spanish is spoken on the floor the interpreters in the Spanish booth would be listening. (Clark, Tr. 628-29.)

17. In the United States, except for large organizations such as the State Department or United Nations, conference interpretation teams are most often organized by intermediaries. (Weber, Tr. 1121; CX-302-Z-311 to Z-312 (Luccarelli); Stip. 5.) Intermediaries supply conference interpreters to users of interpretation services such as international associations, corporations, museums and non-profits. (Davis, Tr. 838, 846; Clark, Tr. 595.) Berlitz, Brahler, Language Services International, and CACI are examples of intermediaries. (Saxon-Forti, Tr. 2600; Luccarilli, Tr. 1564-65; Swetye, Tr. 2759; Weber, Tr. 1123.)

18. Berlitz uses conference interpreters for all simultaneous interpretation and for any assignment that is complex in nature; for sensitive subject matter or highly technical material; for large audiences, media assignments, live interviews; where quality is of the utmost importance; and for assignments involving important business meetings. (Clark, Tr. 589-91.) Some business meetings are interpreted simultaneously, others consecutively. (Clark, Tr. 590.)

19. Intermediaries advise conference sponsors about the conference interpretation business. Most clients do not know what is needed to supply simultaneous interpretation for a conference. (Clark, Tr. 602, 644; Weber, Tr. 1150; Davis, Tr. 875.)

20. Intermediaries educate clients about how difficult it is to interpret simultaneously; and the number of interpreters required. (Clark, Tr. 630-31; Weber, Tr. 1151.) Most clients do not get involved in the details of organizing interpretation teams once they have selected an intermediary, and have never heard of TAALS and AIC. (Clark, Tr. 602, 607-08; Jones, Tr. 705.)

21. According to intermediaries, a reputation for quality is important in the interpretation business. (Weber, Tr. 1152.) Berlitz has a name to uphold in the industry and wants to maintain a good reputation for quality service. (Clark, Tr. 597, 640-41.) In CACI's experience, prospective clients take reputation, as well as price, into consideration when choosing an intermediary. (Jones, Tr. 704.) The quality of interpretation is the most important factor to Brahler

because it has a reputation as a high-quality supplier. (Davis, Tr. 849, 872.)

22. Berlitz wants repeat business. (Clark, Tr. 596-97.) CACI gets repeat work because of its reputation for providing quality conference interpretation. (Jones, Tr. 704.) Half of Brahler's clients are repeat clients. (Davis, Tr. 838.)

23. Intermediaries decide the number of interpreters (Clark, Tr. 642; Davis, Tr. 862-65, 870; Jones, Tr. 697-99, 748-49), the length of the working day (Clark, Tr. 642-43; Davis, Tr. 862, 871; Lateiner, Tr. 972), and the type of equipment to use. (Davis, Tr. 871; Clark, Tr. 600-01, 643-44.)

24. The needs of clients vary with the subject matter of the meeting, the duration, the number languages that are required, and the level of quality desired. (Weber, Tr. 1151-52; Clark, Tr. 625-27.) Intermediaries can choose the working conditions when staffing a conference rather than adopting blanket rules. (Van Reigersberg, Tr. 467.)

## II. CONSPIRACY

### *A. AIIC's Basic Texts*

25. The Basic Texts include the basic rules of procedure and membership. (CX-300-Z-1, Z-163 to Z-243 (Motten).) The Basic Texts include AIIC's Statutes, Disciplinary Procedure, Admissions Procedure, Code of Professional Ethics, Professional Standards, and various Annexes to the Professional Standards. (CX-1-A to Z-55; RX-2, 1-80; Stip. 9.) The Basic Texts are published in the AIIC Bulletin, the AIIC publication disseminated world-wide to all its members. (Stip. 18.)

26. AIIC's Basic Texts bind all members of the association, including United States members. (CX-305-Z-341 (Sy); CX-218-L; CX-221-D; CX-284-D.) In 1994 the Council approved a resolution stating that "Council confirms the binding character of the professional standards." (CXT-501-T, p.2; CX-302-Z-388, Z-939 (Luccarelli); Luccarelli, Tr. 1860, 1862.) The Basic Texts are published in English and French. (CX-1-3.)

#### 1. Code of Ethics and Professional Standards

27. AIIC's Code of Ethics ("Code") governs the professional conduct of members of the association. (CX-305-Z-29 (Sy).)

Professional Standards ("Standards") provide the base working conditions. (CX-1-Z-40; CX-2-Z-40; CX-3-F.) The Code and the Standards include rules on: "double-dipping," advertising, working without a booth, required paid briefing sessions, professional address, recording fees, cancellation fees, paid non-working days, rest days and travel fees, length of day, team strength, indivisible daily rates, same team/same rate, commissions, charity restrictions, daily rate, per diem, and travel conditions. (CX-2.)

28. Annexes attached to the Standards contain the Guidelines for Recruiting Interpreters (CX-1-Z-47 to Z-50; CX-2-Z-50 to Z-53; RX-2, 61-62, 65-66), and the Staff Interpreters' Charter (CX-1-Z-53; CX-2-Z-54; RX-2, 79).

29. AIIC's 1991 Code and Standards (including the Annexes) were adopted by vote at the AIIC 1991 General Assembly. (CX-301-Z-7, Z-10, Z-44, Z-153 to Z-172 (Bishopp); CX-300-Z-3, Z-102, Z-163 to Z-243 (Motton); CX-2.) At the 1991 Assembly, the members voted on whether to remove the monetary conditions from the Basic Texts, but the vote failed. (Luccarelli, Tr. 1851; CX-262-C to J.) Thus, the 1991 Basic Texts retained references to rates in the Standards. (CX-270-K; CX-441-B.)

30. AIIC called a 1992 Extraordinary Assembly "to determine the broad lines of the structure and guiding principles of the AIIC of the future, the actual texts remaining to be adopted at the next Ordinary Assembly." (CX-272-H; CX-273-F.) AIIC members voted "to remove all mention of monetary conditions . . . from out basic texts" and invited "the council to take all necessary steps for the immediate implementation of these decisions." (CX-273-G.) The Council decided that "All provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . .The Basic Texts shall be amended consequently at the next Ordinary Assembly." (CX-279-I; CX-273-O, CXT-273-O, p.1.)

## 2. Annexes to the Code

31. Like the Basic Texts, Annexes to the Basic Texts are binding on AIIC's members. (Weber, Tr. 1340/2; CX-284-D; CX-221-D; CX-218-J.) Non-compliance with "any rules of the code of professional conduct and its annexes" could be the subject of disciplinary proceedings. (Weber, Tr. 1128/16.)

*a. Guidelines for recruiting interpreters*

32. AIIC's Guidelines for Recruiting Interpreters ("Recruiting Guidelines") are attached as Annex 1 to AIIC's Standards. (CX-1-Z-47; CX-2-Z-50; CX-214-M to N.) The Recruiting Guidelines were approved at the 1991 Assembly, and are part of the 1991 Basic Texts, (CX-300-Z-14 to Z-15 (Motton); Luccarelli, Tr. 1855/1), and the 1994 Basic Texts. (CX-1-Z-47 to Z-50; RX-2, 62, 65-66.) The Recruiting Guidelines contain five of the restraints challenged in this action: ban on package deals and lump-sum payments, commissions, and exclusive agency arrangements; restriction on trade names; and regulation of advertising. (CX-1-Z-49.) When a conference interpreter makes up a team, "she or he sees to it not only that the Association's rules, but also its recommendations are complied with." (CX-1-Z-47.) The coordinating interpreter must apply the guidelines to all interpreters he or she appoints, whether or not they are AIIC members. (CX-1-Z-47.)

33. The rules in the Recruiting Guidelines currently bind members. (Weber, Tr. 1154-56; CX-284-D; RX-336, 8145; Luccarelli, Tr. 1680-82.)

34. The precursor to the present version of the Recruiting Guidelines was originally adopted by the AIIC Assembly held in New York and published as Annex 2 to the 1983 Basic Texts. (CX-2422; CX-256-Z-45; CX-260-Z-106.)

*b. Staff interpreters' charter*

35. The Staff Interpreters' Charter was first adopted in 1977. (CX-215-D.) The 1991 Charter provides that "staff interpreters should...act as interpreters outside their organization only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (Stip. 89; CX-1-Z-53; CX-2113; CX-262-Z-129 to Z-130.)

*c. Videoteleconferences*

36. An annex to AIIC's 1994 Standards circumscribes members' ability to perform videoteleconferencing services. (CX-1-Z-54 to Z-55.) A videoteleconference is a remote conference where the interpreters are not at the same location as the speakers. (CX-1-Z-54.) The rules are in the 1994 Basic Texts. (CX-5-D; CX-2-Z-55 to Z-56;

CX-1-Z-54 to Z-55.) The videoteleconferencing rules restrict the number of hours an interpreter is allowed to work to not more than three hours a day, or else "manning strengths shall be correspondingly increased. If remote conferencing leads to night work, interpreters shall be entitled to appropriate compensation." (CX-1-Z-54.)

### *B. Creation of the Work Rules by Agreement*

#### 1. General Assembly Vote

37. AIIC's Assembly conducts the business of the association and sets polity by debates and votes on standards, the code of ethics, admissions procedure and budget. (CX-1-E to F, Art. 19; Luccarelli, Tr. 1628.) All members may vote, personally or by proxy. (CX-1-E to F, Art. 19; CX-1-P, Rule 7.)

38. The Standards and the Code are adopted by vote at the AIIC Assembly. (CX-305-Z-8 (Sy); CX-300-Z-4 (Motton).) A two-thirds majority of the Assembly is required to amend existing Basic Texts or to expel a member. (CX-1-T, Rule 14; Luccarelli, Tr. 1629.) Changes to the Annexes also can be made by the Assembly. (CX-253-D.) A simply majority of AIIC's members is otherwise acceptable for most Assembly votes. (CX-1-T, Rule 14.)

#### 2. Council Action

39. Each AIIC Region nominates its representative to the AIIC Council, and the Assembly votes on those nominations. (Luccarelli, Tr. 1628.) The Council may oversee the daily activities of the association, implementing Assembly decisions, granting waivers to rules, resolving member disputes, maintaining disciplinary investigations and actions, and adopting the annual budget. (CX-1-G to H, Art. 24, Z-1; Stip. 12; Lucarrelli, Tr. 1630.)

40. The Council may adopt Council texts, recommendations of the NAS or self-generated texts. (Lucarrelli, Tr. 1631.) "As consensus develops on rules, binding on the profession as a whole, they are gradually included in the Code. Pending consensus on rules, however, AIIC intends to publish guidance material to make all members more familiar with their rights and responsibilities in private sector negotiations. . . ." (CX-206-C.)

41. The Council approves the rates and per diem published by the association, by country or by region. (CX-304-Z-49 (Motton).) The

Council grants waivers to the application of Basic Text provisions. (CX-1-Z-1, Rule 14; CX-300-Z-35 (Motton); F. 56-57.)

### 3. AIIC's Nonagreement Sector

42. The NAS includes interpretation markets not governed by agreements negotiated by AIIC. (CX-278-Z-2.) Within the NAS, interpreters are recruited solely on the basis of the AIIC Code and their contracts are governed by the AIIC Code. (CX-242-E.) The purpose of the NAS is to "promote interpretation in the NAS in an equally systematic and AIIC-subsidized manner as in the Agreement Sectors [and to prepare] AIIC Standards of Professional Practice applicable to the sector for ratification by Council and Assembly." (CX-278-Z-2.) The NAS accepts the AIIC texts regarding working conditions. (CX-272-F, CXT-272-F to G.) The NAS exhorted members to "comply with AIIC standard practices." (CX-222-H.)

#### *C. Agreement to Follow the Basic Texts*

43. To become an AIIC member, a candidate must have practiced professional conference interpretation in a booth for at least 200 days, without complaints from employers or colleagues, while following all of AIIC's rules. (Stip. 16; CX-1-B, Art. 1; CX-304-Z-110 (Motton).) Before becoming members of AIIC, all conference interpreters must enter into the commitment described in the application form. (CX-1-C; CX-2-C; F. 44-46.)

#### 1. Applicants for Membership

44. There are two types of candidates for AIIC membership: pre-candidate and candidate. (CX-300-Z-5 (Motton).) Pre-candidates for AIIC admission are simultaneous conference interpreters who have worked less than 200 days in the booth. (CX-2053-A; CX-1-Z-29, Art. 4.) Pre-candidates agree to be "bound to observe [AIIC's] Statutes, its Code of Professional Ethics and all of its other rules and regulations." (CX-1-Z-30; CX-2-Z-30.) AIIC requires the pre-candidate to agree, in writing, that: "Having taken cognizance of the rules and regulations of the Association, and namely the provisions of the Code of Professional Ethics, I hereby undertake to abide by them." (CX-2053-A.)

45. Candidates for AIIC admission are conference interpreters who have worked at least 200 days in the booth. (CX-2054-C; CX-301-S to T, W (Bishopp); CX-300-Z-8 (Motton).) AIIC's Admissions Procedures require the applicant, "without exception," to observe the Code and all of its other rules and regulations. (CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 (Motton).)

46. Five AIIC member-sponsors are required for each candidate. (CX-1-Z-30, Art. 5; Lucarrelli, Tr. 1558; CX-300-Z-7 (Motton).) The sponsors certify that: "to the best of our knowledge, the candidate possesses the required professional experience and that she/he observes the rules and regulations of the Association." (CX-2054-A; CX-300-Z-7 to Z-9 (Motton); CX-271-G.) The sponsors guarantee that the candidate has respected AIIC's rules. (CX-202-F.) The names of candidates are published in the AIIC Bulletin (CX-300-Z-10 (Motton)) and members are expected to challenge them on their "respect of AIIC rules (including the professional code)." (CX-202-F; CX-300-Z-10 (Motton).)

47. Once the 200-day period is complete, the application process itself takes approximately one and one-half years. (Hamann-Orci, Tr. 20.) During this period all candidates follow AIIC's professional standards. (CX-300-Z-10 to Z-13 (Motton).) The 200 working day requirement may mean that applicants will follow the AIIC rules five years before membership is granted because "beginners don't work as much [as] more experienced interpreters." (CX-306-Z-143/20 (Weide).)

## 2. AIIC Rules Are Binding

48. AIIC's Statutes require, as a condition of membership, that conference interpreters "enter into a commitment to respect the statutes, the Code of Professional Ethics, and all of the Association's other rules and regulations as well as the other rules of the profession." (CX-1-C; CX-2-C.) AIIC members are "bound to observe its Statutes, its Code of Professional Ethics, and all other rules and regulations." (CX-2-Z-30.) A member of AIIC pledges to abide by the rules set forth in AIIC's Basic Texts. (Luccarelli, Tr. 1558-59.)

49. AIIC's Basic Texts, including the Code, the Standards, and AIIC's rules and working conditions, are binding on all AIIC members. (CX-305-Z-4, Z-6 to Z-7 (Sy); CX-2-Z-30.) AIIC members in the United States understand that the Code applies to interpreters

in the United States. (CX-306-Z-134/1-15 (Weide); CX-284-C to D; CX-208-I.)

50. Article 8 of the 1991 version of AIIC's Code states that: "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of the Association or not, any working conditions contrary to those laid down in this Code or in the 'Standards of Professional Practice' applying to the work of members of the Association, which establish, in particular, rules concerning remuneration, travel, copyright, subsistence allowances and travel expenses." (CX-2-Z-39.)

51. The 1994 version of the Basic Texts states: "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of the Association or not, any working conditions contrary to those laid down in this Code or in the Professional Standards." (CX-1-Z-39.)

52. Malick Sy, the President of AIIC, explained that AIIC's working conditions are binding: in the March 1995 Bulletin, he wrote, "I wish to take this opportunity to state clearly and unequivocally once again on behalf of the Council, the Bureau, and myself as President, that our working conditions are binding upon all our members." (CX-284-D.) He confirmed that members of the association adhere to the association's rules. (CX-305-Z-4, Z-7 (Sy); CX-300-Z-9 (Motton).)

53. AIIC provides a standard form contract ("model") to be used by members in their dealings with clients. (CX-1-Z-49; CX-2059; CX-301-Z-25 to Z-27 (Bishopp); Hamann-Orci, Tr. 22-23.) TAALS also has such a model contract, approved by TAALS "and in conformity with the standard practices of the International Association of Conference Interpreters-AIIC." (CX-1063-A; Hamann-Orci, Tr. 23.) AIIC has provided such a model since at least 1963. (CX-206-D.) The model has been made available to U.S. Region interpreters. (CX-427-B; CX-428-A.) The AIIC contract implements AIIC's hours, package deals, provision of non-interpretation services, commissions, portable equipment, recording, travel fees, travel conditions, cancellation fees, per diem, and professional domicile restraints. (CX-2059-A to B.)

54. Interpreters use the AIIC contract when negotiating with clients because it provides the backing of a professional organization. (Hamann-Orci, Tr. 22.)

55. AIIC's Guidelines for Recruiting Interpreters state that the Association's contract should be used by members. (CX-1-Z-49.) AIIC members use the form contract. (Hamann-Orci, Tr. 21-23.) AIIC members cite to the associations' rules in their contract negotiations with intermediaries. (Clark, Tr. 602; Weber, Tr. 1153-54.)

### 3. Waivers of the Rules

56. AIIC's rules provide a waiver by which rules may be temporarily modified by the AIIC Council. (CX-1-Z-1, Rule 14; CX-300-Z-33 (Motton).) The waiver mechanism shows that the rules are mandatory rather than advisory. (CX-300-Z-34 to Z-37 (Motton).)

57. Waivers, if granted by the Council, are "authorized for a stated period only, and if renewal is requested, a further request must be made." (CX-208-H.)

### 4. Members Adhere to AIIC Rules

58. According to Claudia Bishopp, the U.S. Region Representative on the AIIC Council from 1978 to 1993, interpreters largely succeed in applying AIIC's working conditions. (CX-301-Z-140 (Bishopp).) AIIC members generally follow AIIC's Standards, Code, and other Basic Texts and Guidelines. (Luccarelli, Tr. 1621-23; Hamann-Orci, Tr. 28; Weber, Tr. 1155.)

59. Interpreters expect intermediaries to conform to AIIC's rules and are generally unwilling to negotiate rates and certain working conditions. (Citrano, Tr. 502-06, 509.) Interpreters view the AIIC and TAALS rules "like a bible. That was how the business was conducted." (Citrano, Tr. 507/4-14; Neubacher, Tr. 778-79; Jones, Tr. 696-97, 700.)

### 5. AIIC Enforces Its Rules

60. AIIC members are subject to punishment, including expulsion, for failure to follow the AIIC Code or the Standards. (CX-301-Z-8 (Bishopp); CX-1-H; CX-2-H; Luccarelli, Tr. 1630.) AIIC has taken formal measures to discipline members through warnings, threats, investigations, and inquiries into violation of AIIC rules by

U.S. members. (Wilhelm Weber, F. 181, 229, 242, 249, 344-60; Marc Moyens, F. 219, 277; Jeannine Lateiner, F. 182, 285, 316.)

61. Under AIIC's rules (CX-1-G, Art. 24 1-2), if anyone accuses a member of the Association "of failure to observe the Statutes, the Code of Professional Ethics or any other applicable rules and regulations," it will be referred to the Council. (CX-1-Z-26; CX-2-Z-26.) The Council then appoints a three-member committee to investigate disciplinary charges. (CX-1-Z-26.) The disciplinary committee has authority to gather information from complainants, third parties, and the accused. (CX-1-Z-26.) "The refusal of any person accused [of a violation of the rules] to supply such information may be interpreted as evidence against them." (CX-1-Z-26.) The Council usually adopts the recommendation of the disciplinary committee. (CX-301-Z-122 to Z-123 (Bishopp).)

62. The AIIC Council may warn, reprimand, or suspend a member for failure to follow AIIC's rules. (CX-1-Z-27; Luccarelli, Tr. 1815-16; CX-300-Z-111 (Motton).) There is no right of appeal for warnings, reprimand or suspension. (CX-1-Z-27.) If the Council deems the member's violation sufficient to warrant expulsion, it recommends to the Assembly that the member be expelled. (Luccarelli, Tr. 1630; CX-300-Z-111 (Motton).) Only the Assembly, by two-thirds vote, may expel a member. (CX-1-T, Rule 14; Luccarelli, Tr. 1629.)

63. Charges of non-adherence to the rates set forth in the Standards, including charges of undercutting, could be the subject of AIIC's disciplinary proceedings. (Weber, Tr. 1128-29.)

64. Whenever a member is reprimanded, suspended, or expelled, the disciplinary action "shall be ... made known to the members of the Association." (CX-1-Z-27.) AIIC announces disciplinary measures taken in the Bulletin. (CX-284-N; CX-1-Z-27.) The possibility of such publication is a credible threat of punishment. (Wu, Tr. 2166.)

65. Article 12, of the AIIC Statutes states that resignation from the Association "shall not prevent disciplinary proceedings arising out of any earlier occurrence." (CX-1-C; CX-2-C.) Censure could affect an interpreter's ability to get referrals and therefore make sales. (Wu, Tr. 2167-68.)

66. Someone expelled from AIIC might never be hired by another AIIC member ever again. (Weber, Tr. 1268/21.) Publication of disciplinary actions and investigations can damage interpreters' reputations among other interpreters. (Hamann-Orci, Tr. 26-27;

Citrano, Tr. 553; Wu, Tr. 2166.) Two complaints against AIIC member, Jeannine Lateiner, were sent, apparently by the complaining party, to the other members of her team. No formal disciplinary action was taken. (Lateiner, Tr. 904; F. 182, 285, 316.)

67. The Executive Secretary of AIIC reported that the AIIC Council "stressed the need to encourage members not to hesitate to raise such matters (failure to observe obligations under the Code) even though they may not personally be involved, through appropriate channels in the future." (CX-226-B.) Similarly, AIIC's President warned the membership that members must be vigilant against lapses in adherence to the rules, that "there is not unity without the cement of discipline." (CX-227-H to I.)

68. In 1995, AIIC referred penalty matters against seven members to a committee of inquiry, announced that it suspended three members, issued reprimands to eight members, and issued "number of warnings." (CX-284-N.)

69. Interpreter associations have used fear of retaliation to force adherence to their rules. According to Luigi Luccarelli, U.S. Region representative to the AIIC Council, speaking at a TAALS meeting, "we have operated with a lot of fear in the past" and young interpreters "had heard from their teachers that they should obey the rules in order not to make enemies." (CX-962-D; CX-302-Z-326, Z-335, Z-337, Z-853.)

70. Interpreters get work through word of mouth, and they need to establish a positive reputation among their colleagues to get work because a lot of referrals come from other interpreters. (Hamann-Orci, Tr. 26; Swetye, Tr. 2795/24 to 2796/2; Citrano, Tr. 553.)

71. Interpreters must get along with their boothmate. (Hamann-Orci, Tr. 26.) Requests to work with particular colleagues are often made by future boothmates when contacted by clients. (Hamann-Orci, Tr. 26-27.) "If you can't get a partner to work with you, then you're basically unemployed." (Citrano, Tr. 516, 553.) Interpreters ask who their partners will be before they ask other questions. (Citrano, Tr. 553-54.)

72. Price undercutters could be cut out of the referral network or blacklisted. (Jones, Tr. 690; Swetye, Tr. 2795-96; CX-300-Z-108 (Motton).)

73. One intermediary testified that interpreters have agreed to deviate from the AIIC rules, and asked him to keep the terms of the agreement secret, for fear of retaliation by other interpreters. (Citrano, Tr. 516-17.)

74. In the summer of 1995, Mr. Weber, acting as an intermediary, received two anonymous telephone calls threatening him with retaliation if he testified against AIIC in this proceeding. (Weber, Tr. 1347-48.) One anonymous caller told him that if he testified, there "will be consequences." (Weber, Tr. 1347/22, 1348/4.) The other caller threatened that if Mr. Weber testified, AIIC would boycott the 1996 summer Olympic games for which he is responsible for organizing the interpretation services. (Weber, Tr. 1348/7-12.)

#### *D. Respondent U.S. Region and the Conspiracy*

##### 1. AIIC's Mandatory Rates

75. U.S. Region members discussed rates and voted at U.S. Region meetings to set daily freelance conference interpretation fees in the United States. (CX-409-A; CX-1136.)

76. The U.S. Region provided the AIIC Council with the rates for the United States to be published in the AIIC Bulletin. (CX-301-Z-45, Z-46, Z-175 to Z-182 (Bishopp).) When the AIIC Bulletin published the incorrect figure for the United States in a report from various regions in 1990, the U.S. Region Representative corrected the Bulletin figure at a U.S. Region meeting. (CX-436-F.)

77. In December 1981, AIIC's U.S. Region noted that, on the advice of antitrust lawyers, although "it is preferable not to appear with a fixed figure on the rate sheet," "there is a 'gentleman's agreement' not to ask for less than U.S. Dollars 250 per day." (CX-1226-A.)

78. In 1986, AIIC's U.S. Region agreed that "the region should publish suggested minimum rates. As far as per diem, the meeting agreed that the rules we have been applying in the U.S. are still the best for the region. . . ." (CX-427-B; CX-432-F; CX-434-C.)

79. In 1988, the U.S. Region noted that AIIC did not publish a daily nongovernmental freelance rate for 1989. (CX-432-E.) The Region agreed to "publish 'Available on request,' which is considered better than not indicating any rate at all." (CX-432-E.)

## 2. The U.S. Region Connection to AIIC's Rules

80. AIIC's U.S. Region members or their elected representatives voted on AIIC's fees, Standards, and Code of Ethics. (CX-441-B; CX-300-Z-100 to Z-103 (Motton).) The U.S. Region urged members to attend, or to tender proxies to those who would attend, AIIC General Assembly meetings. (CX-407-E; CX-436-E; CX-446-A; Stip. 40, 42.) The U.S. Region contributed funds to members to defray travel costs for trips to European AIIC meetings "on our behalf." (CX-427-A.)

81. In response to the prospect of litigation at the Federal Trade Commission, in 1994, AIIC's U.S. Region published a resolution urging the "AIIC Council to continue its support of the U.S. Region's effort to defend those Standards." (CX-448-A, E.) In 1995, the representative for the U.S. Region to the AIIC Council stated that the "major concern all along has been to maintain AIIC's right to set working conditions for its members." (CX-450-B, C.)

## 3. The U.S. Region and Compliance with AIIC's Work Rules

82. The U.S. Region has secured compliance with AIIC's work rules. (CX-1393; CX-1396; CX-1470-A; CX-1471.) The U.S. Region reminded U.S. members of their obligations under the AIIC rules and urged adherence to the work rules for the United States (CX-56; CX-407-F; CX-439-B), and informed members of the availability of AIIC's standard form contracts. (CX-428-A.)

83. The U.S. Region enforces the AIIC rules. In 1984, the AIIC Council passed a resolution opposing the use of unpaid students in place of professionals and requested "the U.S. Region to report to the Bureau as soon as possible. . . ." (CX-236-G.)

84. The U.S. Region agreed to recommend to the AIIC Council a change in universal minimum manning strengths, but decided that it would fix the charges for non-working days and travel days. (CX-427-B.)

## 4. AIIC's Work Rules Were Binding on U.S. Members

85. In May 1994, after receiving a report that the AIIC Council reaffirmed the binding nature of the professional standards on all the members of the association, the U.S. Region passed a resolution to maintain AIIC's standards. (Luccarelli, Tr. 1862-63.) Absent a waiver, it is not possible for any AIIC region to rescind any of AIIC's

Basic Texts. (CX-300-Z-34 (Motton); Luccarelli, Tr. 1813; CX-302-Z-295 to Z-296 (Luccarelli).)

86. In 1988, the U.S. Region requested a renewal of its waiver from the rule against solo interpretation. (CX-432-G.) The U.S. Region applied for, and received, waivers for an interpreter to work alone when a meeting is no more than 40 minutes long. (CX-300-Z-34 to Z-35 (Motton); CX-259-H; CX-268-F.) The U.S. Region applied for a renewal of this waiver once again the following year. (CX-435-A; CX-2452.)

87. In 1986, AIIC's U.S. Region considered, but did not request a waiver for interpreters to accept 80% of the standard fee for meetings of less than 2 and 1/2 hours duration. (CXT-245-Q; CX-428-B; CX-301-Z-136 (Bishopp).)

88. In December 1989, the AIIC Council member for the U.S. Region passed on to members of the U.S. Region caution about working for three agencies who purportedly did not respect AIIC conditions and noted that some regions had refused work from these agencies. (CX-434-B; CX-301-Z-151.12 (Bishopp); CX-253-D.)

89. In 1990, AIIC's U.S. Region representative prepared a provisional paper on the local working conditions in the U.S. Region in response to a request from AIIC. (CX-435-A; CX-1408-A, C to E; CX-439-D to F.) The paper, sent to members with the U.S. Region minutes for discussion or revision, was intended "to ensure the uniform application in the USA of the AIIC Code of Professional Conduct and its Annexes." (CX-439-D.) The local working conditions described AIIC's rules on team strength, including: a daily rate multiplier for solo consecutive work; rules for recruiting interpreters; rules for direct contracts between the interpreters and the conference organizer; provision for cancellation, preparation, non-working days, and travel fees; and recording, and films. (CX-439-D to F; CX-301-Z-152.18.)

### III. AIIC'S RESTRAINTS

#### *A. Minimum Daily Rates*

90. AIIC specifies minimum rates charged by AIIC members for work done in the United States. (F. 102.) Article 8 of the 1991 Standards provides, "The rate of daily remuneration shall be the standard rate applicable in the region concerned and, more precisely in the appropriate cases, in the country concerned . . . in those

countries where it is possible to apply a standard rate." (CX-2-Z-43-44.) Articles 9, 10 and 11, concerning simultaneous, consecutive, and whispered interpretation, specify that members shall charge the standard rate. (CX-2-Z-43-44.) Article 8 of the 1991 Standards provides for a "basic rate," which equals two-thirds of the standard rate. (CX-2-Z-43.) Its purpose is to calculate the charge for non-working days, such as travel and briefing days. (F. 130-32, 134.)

91. The "standard" and "base" rates originate from AIIC's defining large and small teams of interpreters for simultaneous interpretation. (F. 170-74.) The standard rate was the "small team rate" and the base rate was the "large team rate." (F. 174.) The small team got a higher rate because each interpreter worked harder. (CX-300-Z-106/3-16 (Motton); Lateiner, Tr. 913-16; Weber, Tr. 1134/7-19; CX-304-T/12-U/5 (Motton).) AIIC members in the United States did not distinguish rates for teams. (Weber, Tr. 1134.)

92. Since its founding in 1953, AIIC published rates of remuneration for its members. (CXT-2468, p.1; CX-3-D, K to M; CX-4-I to K; CX-5-F, I to K; CXT-6, pp. 3, 507; CX-7-E, H, J; CX-8-F, H, J; CX-9-F, I to K.) It required members to comply with local fees when they exceed AIIC minimums. (CX-50; CX-9-M; CX-2-Z-48.)

93. From 1970 to 1975, AIIC rate lists included the term "minimum." (CX-50; CX-58.) From 1976 until 1980, the rate lists carried the title, "AIIC Minimum Rates." (CX-60-65.) From 1983 to 1991, it sent out the rates under the title "Market Survey." (CX-71-84.)

94. Rates labeled "Market Survey" are not the product of a survey. (CX-300-Z-90 (Motton); CX-77; CX-306-Z-111-114 (Weide).) A memo sent to the Regions by then AIIC Treasurer Patricia Longley explains that these "surveys" actually are local minimum daily rates. (CX-2446-C; F. 519.)

95. AIIC rates were published in the Bulletin, which AIIC regularly mailed from Geneva to its U.S. members. (Stip. 19; CX-301-Z-42 (Bishopp); Weber, Tr. 1263-64; CX-305-Z-49-50 (Sy); Luccarelli, Tr. 1749; CX-257-E.)

96. AIIC's published rates included a "standard" and "base" rate for each region of AIIC (CX-71 to CX-83), or earlier, a "small team" and "large team" rate. (CX-57-68.) For the United States, however, they included a single rate (CX-55-65), because the U.S. Region did not use the small team. (F. 171.)

97. After the Federal Trade Commission investigation of the conference interpretation industry began, AIIC ceased publishing rates. (F. 93, 538.) AIIC's Extraordinary Assembly in 1992 in Brussels decided to remove "monetary conditions" from its Basic Texts. (F. 509.) At its General Assembly meeting in 1994, it adopted new versions of its Code and Standards, modifying references to rates. (CX-970-A; CX-1-Z-37-46.)

98. Originally, the AIIC Assembly discussed and voted on rates. According to former member Wilhelm Weber, "Typically, council would make proposal concerning rates. And then there would be a discussion in the assembly, and the assembly would either accept the proposal or reject it." (Weber, Tr. 1135.)

99. Until 1973, AIIC published a single rate for all interpreters worldwide (CX-203-C), except in certain countries, including the United States, where mandatory minimum rates were higher. (Weber, Tr. 1142.) In May 1973, AIIC began "readjustments and alignments to rates," (CX-201-E) setting rates in the currencies of individual countries. (CX-220-L; Weber, Tr. 1142-46.)

100. Members of the U.S. Region voted on the rates to charge in the U.S. and sent them to AIIC in Geneva to be published by AIIC as the rates for the United States. (Lateiner, Tr. 918-20; CX-405-C; CX-432-B; CX-1136.) The U.S. Region also supplied AIIC with the rates created by TAALS. (F. 307-08.)

101. The TAALS rates were created by vote at TAALS General Assembly meetings. (F. 307.) U.S. Region members were also members of TAALS and voted on rates. (F. 370-73; CX-432-E.)

102. U.S. Region members understood AIIC's rates to be mandatory minimums. (CX-1238 (Langley); CX-303-Z-86 (Moggio-Ortiz); Hamann-Orci, Tr. 38; Lateiner, Tr. 955.) The phrase "minimum daily rates" left to the judgment of individual interpreters to ask for higher rates, but not to work for less than the minimum rate. (Weber, Tr. 1140; F. 519.)

103. The three U.S. Region members who testified about undercutting charges lodged against them each defended themselves on the basis that they did not in fact undercut. (Hamann-Orci, Tr. 53; Lateiner, Tr. 903; CX-1273-C.) AIIC members testified that they never charged below the AIIC rate. (Luccarelli, Tr. 1757-58; Lateiner, Tr. 977; CX-303-Z-90 (Moggio-Ortiz); Hamann-Orci, Tr. 38.)

104. From 1988 to 1991, intermediaries generally paid the TAALS/AIIC rate or more. (F. 328-34.)

105. After 1973, regions proposed their own rates to the AIIC Council (CX-224-Z-7 to Z-8) and the Council approved them. (CX-267-H; CX-301-Z-41 to Z-42 (Bishopp).) AIIC became concerned about regional differences in rates, "lest divergent currency and rates developments weaken or destroy [the] universal system on which AIIC hinges." (CX-207-C.) The NAS tried to reduce these differences. (CX-223-L to M.)

106. U.S. Region members feared that if they charged less than AIIC minimum for the United States, they would be branded as undercutters, losing important referrals from other members. (CX-301-Z-152.9 to Z-152.10 (Bishopp); Hamann-Orci, Tr. 38.) Interpreters expressed concern to intermediaries about being known to other interpreters as price undercutters. (Jones, Tr. 690.) They feared other interpreters may not give them references for future work. (Jones, Tr. 690; Citrano, Tr. 514.) Interpreters explained they could not work for Metropolitan because of its lower pay because "in this business, you have to work with a partner and if you can't get a partner, you're kind of dead in the business." (Citrano, Tr. 516.)

107. The term "undercutting" refers to not respecting the AIIC rules (Swetye, Tr. 2820-21); working under inferior conditions, such as improper manning strength, working alone all day, or working without the proper equipment (Swetye, Tr. 2820-21; Hamann-Orci, Tr. 53); and working for lower rates than suggested by AIIC. (CX-305-Z-173 to Z-174 (Sy); CX-301-Z-152.9 (Bishopp); Hamann-Orci, Tr. 53.)

108. The Secretary-General of AIIC felt that "members know very well that they must not undercut" AIIC's rates. (CX-1238.) On November 10, 1983, Wilhelm Weber wrote to the Secretary-General of AIIC that he was concerned about a clause on the back of the AIIC standard contract, which the Los Angeles Olympics Organizing Committee interpreted to mean that interpreters could be negotiated downwards from the going rate. (CX-1236; Weber, Tr. 1206.) The Secretary-General of AIIC replied on December 15, 1983. She wrote, "I don't see how anyone could honestly use it for undercutting purposes. Members all know [w]hat the local rate is, and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut." (CX-1238; Weber, Tr. 1207-09.)

109. AIIC's publication of a "suggested minimum" rate raised prices by defining the price below which AIIC members would not

compete. (Wu, Tr. 2085.) With AIIC's rules that all members of an interpretation team be paid the same rate, AIIC's rules affected prices paid to non-members as well as members of AIIC. (Wu, Tr. 2086.)

### *B. Per Diem*

110. According to Article 13(a) of the 1991 Standards of Practice, "For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence. As a general rule, this allowance shall be paid on the first day of the conference and in the currency of the country where it is being held." (CX-2-Z-46.) Members were required to charge for subsistence when they worked away from their professional address. (CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp).)

111. Previous versions of the AIIC Code and Annexes required members to charge clients per diem for lodging and subsistence. (CX-3-N; CX-4-L to N; CX-5-K to L; CXT-6-E-M, p.4; CX-7-F, J; CX-8-G; CX-9-F to G.)

112. AIIC prepares per diem sheets which are mailed to members in the United States. (CX-259-V; CX-300-Z-74/9 to Z-75/5 (Motton); CX-268-B, E, M; CX-102 to CX-130 (lists of per diem rates).)

113. AIIC Council approved per diem rates. (CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton).)

114. At meetings in 1980 and 1981, the Non-Agreement Sector discussed how to calculate the per diem amount for travel of less than a full day that did not require an overnight stay. (CX-223-N; CX-228-F to H.) Secretary-General D. Hespel and past President W. Keiser noted that a full subsistence allowance "is owed per night spent away from the professional domicile" and a one-half subsistence allowance (per diem) is owed per day if all travel can be completed between 8:00 a.m. and 8:00 p.m. and the interpreter does not cross a border. (CXT-229-B; CX-230-C.)

115. AIIC published per diem for the United States of America, one for New York, one for Washington and one for "elsewhere," which "shall be due for each night spent away from the interpreter's professional domicile." (CX-247-Z-2, Z-5; CX-124-E; CX-125-E.)

116. The U.S. Region adopted a formula whereby the organizer pays the interpreter's hotel room, including tax and service, and the

interpreter would then charge the organizer a fixed percentage of the hotel rate (40% in 1991) for meals. (CX-301-Z-65, Z-150 to Z-152.1 (Bishopp); CX-432-F; CX-343-C; CX-439-F.)

117. According to Berlitz, "there has always been a standard per diem that interpreters charged." (Clark, Tr. 614; Neubacher, Tr. 771.)

118. The chairman of a NAS meeting cited the "disastrous effect" of "bargaining" away the per diem, and the need for "clear, easily applicable, unambiguous rules" to avoid this. (CX-223-L.) AIIC's Council worried that interpreters working for two clients holding consecutive conferences might try to split expenses as a "sales argument" which would constitute "unfair competition." (CX-222-Q.) In such cases, the interpreter must charge both clients a full per diem. (CX-222-Q.) According to a report given at its January 1987 NAS meeting, the fact that in Canada no per diem "can be set," as a result of the action against AIIC under the Anti-Combines Act, "leads to true competition between members." (CX-245-H.)

119. AIIC's agreement on travel expense and per diem prevents competition on the total price for an interpretation assignment. (Wu, Tr. 2093-94.) These rules make the detection of cheating more likely, by requiring these reimbursements and payments to be stated separately on contracts for interpretation. (Wu, Tr. 2093-94.)

### *C. Indivisible Daily Rates*

120. AIIC's rules require that members charge for a full day regardless of the amount of time they actually work. The 1991 AIIC Standards provide that "remuneration shall be on an indivisible daily basis." (CX-2-Z-42.) AIIC's Code and Annexes dating back to 1972 include the same requirement. (CX-3-I; CX-4-H; CX-5-H; CX-6-G; CXT-6-E to M, p.3; CX-7-E; CX-8-F; CX-9-F.)

121. AIIC is opposed to hourly rates for interpretation. (CX-304-Z-113 (Motton); CX-301-Z-32 to Z-33 (Bishopp).) AIIC's rules mean that "you charge per day no matter how long you work." (CX-303-Z-109 (Moggio-Ortiz); CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).)

122. Where they received an AIIC waiver, interpreters who worked alone for 40 minutes in the U.S. were required to charge the full daily rate. (CX-301-Z-152.1 (Bishopp); CX-432-G.)

123. The June 1993 Bulletin recommended that interpreters negotiate indivisible rates for "conferences of short duration,"

explaining that "one cannot take other assignments in the course of a free half-day." (CXT-276-E-G, p.2.)

124. According to one U.S. Region member, charging twice for the same day is unethical, and interpreters will only take one assignment at the daily rate. (CX-2579-A.) If members accept two contracts on the same day, it must be "after having ascertained that no other member is available . . . provided . . . appropriate fees are paid." (CX-481-I.)

125. According to a U.S. Region member, a TAALS proposal to accept 80% of the daily fee for short meetings was unacceptable because it violated AIIC's rule and "would undermine the hard won gains of TAALS and AIIC and open the door to abuse by the greedy." (CX-886-D.) The NAS voted to ask the Council not to permit regions to charge 80% of the daily rate or remuneration for sessions not exceeding two and one-half hours. (CX-245-I, F.)

126. U.S. Region interpreters charge indivisible daily fees. (Swetye, Tr. 2830-31; CX-306-Z-129 (Weide); CX-300-Z-143 (Motton); Weber, Tr. 1264.) For example, Idette Swetye sent a contract (CX-2601) to the Konrad Adenauer Foundation in which she was to be paid a full day's pay for interpreting one luncheon speech lasting forty minutes. (Swetye, Tr. 2826-28.) AIIC members charge for a full day regardless of the number of hours even if it's a half day. (Weber, Tr. 1264; CX-300-Z-143 (Motton) ("We don't have hourly rates"); (CX-306-Z-129 (Weide).)

127. Intermediaries understood the "AIIC rate" or "industry rate" to mean a daily rate for services regardless of the actual time required. (Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53; Clark, Tr. 617.)

128. Berlitz always pays conference interpreters on a daily basis. (Clark, Tr. 624.) Although it rarely happens, Brahler pays interpreters a daily rate even for a short meeting of two to three hours. (Davis, Tr. 860.) Half of Brahler's interpreters are not members of AIIC or TAALS. *Id.*

129. AIIC's rule requiring that fees be paid on an indivisible daily basis standardizes the unit of output to which the agreed daily rate applies. (Wu, Tr. 2107.) It also helps AIIC detect cheating by making rates more comparable. (Wu, Tr. 2107.)

*D. Fees for Non-Working Days*

130. AIIC rules require interpreters to be paid for days traveling, preparing for a conference, or resting. Article 12(a) of the 1991 Standards of Professional Practice states: "When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate." (CX-2-Z-46.)

131. AIIC's rules required that "every contract signed with a member of the Association for a conference ... must include payment of travel. . . ." (CX-2-Z-48.) AIIC specified unrestricted tickets and, for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and remunerated at the same rate." (CX-4-L.) In lieu of rest days, the interpreter could accept first class airfare. (CX-2-Z-47.)

132. Article 12(b) of the 1991 Standards requires payment for non-working days when an interpreter is working at his or her home base. It states: "When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate." (CX-2-Z-46.)

133. Article 14 of the 1991 Standards provides that "Contracts for the recruitment of members of the Association shall make provision for the payment of a fee for each journey made between the place of the interpreter's professional address and the conference venue." (CX-2-Z-47.) This fee is to be paid in addition to expenses for travel and per diem. (CX-2-Z-47, Z-48.)

134. Article 14 of the 1991 Standards further requires payment of fees for rest days after travel, unless flying first class. (CX-2-Z-47.) The rule specifies that the interpreter receives one paid rest day if the journey time is 9-16 hours, two paid rest days for a journey of 16-21 hours, and three paid days for a journey of more than 21 hours. If the interpreter could finish the trip after normal working hours on the eve of the conference or after the conference, the interpreter receives only one-half of the base rate as a travel fee. (CX-2-Z-47.)

135. Article 7(g) of the 1991 Code provides that members "shall request a paid briefing session whenever appropriate." (CX-2-Z-39.)

The 1991 Recruiting Guidelines provide that the "coordinating interpreter shall ensure . . . that, if necessary, a briefing session be held." (CX-2-Z-51.)

136. The 1994 Standards perpetuate the rule that members must charge for non-working days. Article 8 provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45.)

137. The 1994 Standards quantify rest days. Article 10 provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours.)" (CX-1-Z-45.)

138. The 1994 Code continues the briefing days requirement, stating that members "shall request a briefing session whenever appropriate." (CX-1-Z-39.)

139. AIIC provides for fees for non-working days in the standard form contract used by its members. (CX-2060-A; CX-226-B; Weber, Tr. 1221.) The Recruiting Guidelines state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council," without limiting clauses. (CX-1-Z-49.)

140. AIIC had a provision calling for payment of non-working days in 1972. (CX-9-F,K,G,L; CXT-6-E to M, pp.4-5, 7-8.) Over the years, the fees due for non-working days (including briefing, travel and rest days as well as for the intermediate days of a conference) increased as a percentage of the daily rate. (CX-217-D; CX-2-Z-46.)

141. At its July 1979 meeting in Geneva, the Council agreed that an interpreter working for two employers, one after another, in the same city away from his or her professional address, could allocate the travel fees between the two employers if it was done retroactively, and not as an inducement to obtain the contract, providing all intervening days were paid in accordance with the provisions of Art. 16c of the Code. (CX-222-Q.)

142. At the February 1980 Private Sector (NAS) meeting, the chairman "asked for an indicative vote as to whether half the small

fee is always due for travel taking place the day before or after normal working hours on the last day of a conference. A large majority of those present felt that this was so at the moment. . . . The meeting then decided: When the journey takes place the day before or after a conference at times which makes [sic] it impossible to accept work on these days a large majority felt that the amount paid should be higher than half the small fee - there was no agreement on the actual level of this higher amount." (CX-223-O.)

143. The September 1986 AIIC Bulletin advised, "Divergent interpretations of Annex I, par. 4 of the [AIIC Professional] Code result in evident undercutting among AIIC members. It must always be stipulated that . . . the basic rate applies to non-working days except for special terms negotiated with agreement organizations." (CXT-243-D to F, p.1.)

144. These rules specifying payment for non-working days help AIIC members to detect cheating on the fee agreement, by requiring separate payment for these days. Requiring separate payments allows AIIC members to determine whether their fellow AIIC members adhere to the minimum fee rule. (Wu, Tr. 2089.)

145. In 1981 the Executive Secretary reported to AIIC members a complaint against another member for not following the non-working days rule. After investigation, AIIC found the complaint to be "now without foundation as the member concerned succeeded in amending the contracts." (CX-2438.)

146. In the 1984 Los Angeles Olympic Games, the Olympic Committee negotiated to reduce costs by not paying interpreters for non-working days. (Weber, Tr. 1222/4-14.) AIIC-member Wilhelm Weber, who organized interpretation teams at the Olympics, told the Committee that it was "part of our code of professional conduct and that it was also current practice in the profession." The Committee agreed to pay for non-working days. (Weber, Tr. 1223/10-13.) The LAOOC eventually conformed to AIIC rules on non-working days. (Weber, Tr. 1262.)

147. Members of the U.S. Region adhered to the AIIC agreement to charge for non-working days. (Luccarelli, Tr. 1605; CX-302-Z-8 (Luccarelli).) According to a New York intermediary, interpreters insist on being paid a half day's travel, on top of a full day's interpretation fee, even when they work and travel on the same day. (Citrano, Tr. 552-53.) One AIIC member refused to work without two full paid travel days. (Citrano, Tr. 512, 514.) AIIC or TAALS members who accepted conditions and remuneration less favorable

than the rules provide did so only after extracting the intermediary's promise not to reveal their actions to any other AIIC or TAALS member. (Citrano, Tr. 516-18.)

148. Mr. Misson, a member of the U.S. Region, wrote to a client on May 26, 1990, seeking an amendment to his contract. He explained that he had mistakenly quoted the previous year's rate but would honor his quote and would waive the per diem. However, Mr. Misson insisted that he had to charge extra for the day spent traveling because he could be accused of undercutting by his colleagues in AIIC, which is more important to him than the money involved and asked the client to keep the discussion confidential. (CX-2456-A.) The client accepted the new terms. (CX-2456-B.)

149. AIIC's rules specifying payment for non-working, rest, travel and briefing days prevent competition on the total price for an interpretation assignment. (Wu, Tr. 2088-91; CX-223-L.)

#### *E. Same Team Same Rate*

150. AIIC requires that all interpreters on a team receive the same rate. Article 6(c) of the 1991 AIIC Standards provides that members shall accept assignments only if all the freelance interpreters of that team are contracted to receive the same amount of remuneration. (CX-2-Z-42; CX-301-Z-33, Z-35 (Bishopp); CX-305-Z-101 (Sy); Weber Tr. 1224-25.) Previous versions of AIIC's Code and its Annexes dating from 1972 contain similar rules. (CX-3-I, Art. 6(c); CX-4-H, Art. 6(d); CX-5-F, Art. 13(c); CXT-6-E-M, Art. 13(d); CX-7-E, Art. 12(d); CX-8-F, Art. 11(d); CX-9-F, Art. 11(d).) AIIC's Recruiting Guidelines require that if a coordinator is a member of the interpreting team, her or his fee as an interpreter shall be the same as the other interpreters on the team. (CX-1-Z-49.)

151. AIIC's rule that members of the same team receive the same pay did not apply when interpreters were recruited for an "exotic" language. (CX-2-Z-42, Art. 6(c); CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).) This exception applies to languages like Russian, Japanese, or German for which "there is difficulty finding interpreters." (CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).)

152. AIIC's "same team same rate" rule, according to AIIC's past-president, Mr. Thiery, means that conference interpreters are paid "the

same daily remuneration at the start of one's career as a colleague with twenty years' experience." (CX-203-C.)

153. Except for interpreters working in exotic languages, the experience of members of the U.S. Region has been that interpreters on the same team are normally paid the same rate. (Swetye, Tr. 2819-20; CX-303-Z-110 (Moggio-Ortiz); Hamann-Orci, Tr. 40; Saxon-Forti, Tr. 2681.)

154. AIIC avoids competition from new interpreters through use of its "same team same rate" rule. (CX-220-M.) In 1980, the AIIC Schools Committee declared, "The idea of a beginner's rate in the Nonagreeent Sector is out of the question." (CX-224-W.)

155. AIIC's rules which specify that members must charge at least the AIIC rate, and that all members of an interpretation team be paid the same rate, also affect prices paid to non-members and intermediaries pay AIIC rates to non-members. (Wu, Tr. 2085-86; Jones, Tr. 694; Neubacher, Tr. 763-64.)

156. The rule also discourages AIIC members from working with undercutters. One interpreter explained that, "Even if I were recruited to work with undercutters, I couldn't accept according to AIIC rules because I would be paid more than they would." (CX-231-Q.)

157. AIIC's rule requiring all members of an interpretation team to be paid the same rate reinforces the assurance that members are adhering to the rates and rules generally. (Wu, Tr. 2101.) It also helps AIIC members detect cheating by making prices more easily observed and compared. (Wu, Tr. 2103.) It helps AIIC members deter entry by novices gaining experience by working for lower rates. (Wu, Tr. 2104-05.)

### *F. Team Size and Hours of Work*

#### *1. History*

158. AIIC rules specify the number of hours that members will work in a single day. Article 4 of AIIC's 1991 and 1994 Standards, entitled "Definition of the interpreter's working day," provides, "The normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours." (CX-2-Z-42; CX-1-Z-45.) The six hour length of day rule applies to simultaneous, consecutive, or whispered interpretation. (CX-1-Z-45; CX-2-Z-42.)

159. AIIC has rules on the number of interpreters to be hired per job per number of languages used at a conference. (Article 5 of the

1991 Standards; CX-2-Z-42.) Article 8 requires that members charge the standard rate (F. 90), and sets the team size. (CX-2-Z-42; F. 160-62.)

160. Article 11 of the 1991 Standards provides for teams of simultaneous interpreters: "As a general rule, a team is composed of at least two interpreters per language and per booth." (CX-2-Z-44.) Article 11 also contains a table "that must be respected" that specifies the number of target and source languages used in the conference room, the number of booths, and the number of interpreters "at the standard rate." (CX-2-Z-44 to Z-45.) For a one-language conference, the table specifies that if the interpretation is into one other language there be two interpreters at the standard rate, and if the interpretation is into two other languages there be four interpreters at the standard rate. (CX-2-Z-45.) For a two-into-two language conference, the table calls for three interpreters. A three-into-three-language conference requires five interpreters. (CX-2-Z-45.)

161. Article 9 of the 1991 Standards provides for consecutive interpreters with two languages being interpreted into two, the minimum number of interpreters required is two at the standard rate. If the number of languages used is three, the minimum number of interpreters is three at the standard rate. (CX-2-Z-43.)

162. Article 10(a) of the 1991 Standards provides that for whispered interpretation a conference of one or two languages there be two interpreters "remunerated at least at the standard rate." (CX-2-Z-43.)

163. The 1994 Standards retain the identical team size requirement as the 1991 Standards. (CX-2-Z-43.) However, in Article 6 of the 1994 Standards references to the standard rate are removed, and makes no mention of having one interpreter for whispered interpretation in certain circumstances. (CX-1-Z-42.)

164. Versions of the AIIC Code or its Annexes, back to 1972, specified the number of interpreters for a conference. (CX 3-K to M; CX 4-I to K; CX 5-F, J to K; CX 6-E, J to K; CX 7-C, H to J; CX 8-D, H to J; CX 9-D.)

165. Article 6(a) of the 1991 Standards provides that "remuneration shall be on an indivisible daily basis." (F. 120.)

166. Many AIIC interpreters charge for overtime when working beyond six hours. (Neubacher, Tr. 767/19 to 770/5, 781/17-24, 804/18 to 805/4; Jones, Tr. 750/5-8; Weber, Tr. 1189/25 to 1190/7; Davis, Tr. 860/22 to 862/8; Clark, Tr. 636/2-8; Citrano, Tr. 539/20-

24, 542/11 to 544/11, 544/25-546/20; Luccarelli, Tr. 1662/3 to 23; CX-2330 to CX-2336; Saxon-Forti, Tr. 2697-99; CX-2596-B; Wu, Tr. 2238/8-2239/7; F. 343.)

167. The AIIC standard form contract defines the length of the day as six hours, and members have used it to charge for overtime. (CX-306-Z-9/13 to Z-10/2, Z-55/6 to Z-56/3, Z-61/13 to 22, Z-63/8 to Z-64/7, Z-65/19 to Z-66/24, Z-71/13 to Z-72/23 (Weide); CX-2347-B; CX-2348-B.)

168. AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime. (CXT-6, p.6; CX-221-Z-9 to Z-10; CX-2064-C.)

169. Articles 9, 10 and 11 of the 1991 Standards list the number of interpreters to be used for particular numbers of language combinations "at the standard rate." (CX-2-Z-43 to Z-44.)

170. In the 1970's, AIIC maintained two team size tables for simultaneous interpretation that set forth the number of interpreters to be hired for a conference. There was the "small team" (or in French "petite équipe,") and the "large team" (or in French "grande équipe.") (CX-9-I, J; CX-6; Lateiner, Tr. 912/19 to 914/23; Weber, Tr. 1132/20 to 1133/21.) For simultaneous interpretation going from two languages into two languages, AIIC's tables called for higher remuneration per interpreter for a conference using two interpreters, and lower remuneration when using three or four interpreters. (CX-9-I, J; CX-6-J, K, CXT-6-E to M, pp. 6-7; Lateiner, Tr. 912/19 to 914/23; Weber, Tr. 1134.) A higher rate applied to the small team size table, ostensibly, because the workload was greater when an interpreter was working in a small team. (Lateiner, Tr. at 913/5 to 916/3; Weber, Tr. 1134/7-19; CX-300-Z-106/3-16 (Motton).) The small team rate was 160% of the large team rate. (CX-9-J; CX-2461-A (1990).) Prior to 1981, AIIC required interpreters working alone in consecutive to charge twice the large team rate (200%). (CX-6-J; CXT-6-E-M, p.6.)

171. The U.S. Region decided not to adopt the small team in the United States. (CX-211-C; CX-405-C; CX-407-F to G.) At the U.S. Region's November 1975 meeting, the U.S. Region voted unanimously to "remind AIIC in general that it never had the petite equipe and is determined to expose all outside interpreters who accept the practice in our Region." (CX-405-C.) Its warning was published in the AIIC Bulletin. (CX-210-E.) AIIC published rate sheets entitled "Local Conditions in the U.S.A." that set forth a single rate of remuneration when working in the U.S. rather the small team rates

and large team rates as published for other regions. These sheets contained the U.S. Region's team size rules. (CX-50; CX-56.)

172. The varying systems of team configuration and remuneration for small and large teams became too complicated. AIIC found that the system resulted in "grey areas" where there was competition among interpreters. (CX-220-V, Z-29 to Z-32, CXT-220-Z-29 to Z-32 at 1.) Competition in the application of the two team size tables in the private sector led to undercutting. (CX-206-B-2; CXT-206-B-2.)

173. The single team size table was meant to simplify the teams and remuneration and increase interpreter incomes and rates. (CXT-220-Z-30, p.2; CX-225-B.) The AIIC Council wanted to standardize the system of teams and remuneration to get rid of competition regarding team size. (CXT-206-B-2 at 1; CXT-220-Z-29 to 32 at 2; CXT-224-Z-4.)

174. The 1981 General Assembly voted to retain the "two-tiered" system, but dispensed with the terms "small team" and "large team," publishing new team size tables designating the number of interpreters needed at either the "standard rate" or the "base rate." (CX-224-K; CX-226-U to V.) The standard team size table increased the number of interpreters needed in the former small team table for two-into-two languages conferences from two to three interpreters and from four to five interpreters for a three-into-three language conference using simultaneous interpretation. The new team size table provided, however, that one less interpreter would be needed for two language and three language conferences that were of short duration. (CX-2-Z-46; CX-224-K; CX-5-J to K.) Thereafter, AIIC's "market surveys" set forth a "standard rate" and a "base rate" corresponding to the team size tables in AIIC's professional standards. (CX-71 to CX-74; CX-76 to CX-83; CX-5-I; CXT-6-E to M, p.6.)

175. In 1991 the General Assembly adopted a single team size table for simultaneous interpretation. Most regions had already abolished the old "small team" by then. (CX-260-Z-88.) The 1991 Basic Texts retained the earlier "standard" team size table setting forth the minimum number of interpreters needed at the standard rate. These texts, however, eliminated the table with larger team sizes charged at the base rate. (CX-2-Z-45; CX-260-Z-88, Z-94; CX-256-Z-28, Z-32.)

176. AIIC team size rules prohibit interpreters from working alone, and interpreters working in the same booth take turns at the

microphone. (Moser-Mercer, Tr. 3450/4 to 23; CX-302-Z-86/2 to 87/19 (Luccarelli).) Team size rules provide for interpreter relief, so during a working day interpreters spend no more than three hours interpreting. (Moser-Mercer, Tr. 3450/4 to 23; Luccarelli, Tr. 1617/15 to 18/19; CX-302-Z-86/2 to 87/19 (Luccarelli).)

177. The team size and length of day rules affect workload. The number of interpreters in a bilingual meeting in the United States depends upon the length of the meeting. (Swetye, Tr. 2776/4-14.) For two-language conferences, three interpreters are required for a full-day meeting and two interpreters for a meeting lasting half a day or no more than four hours. Six interpreters are required for a three language conference. (CX-439-B, D to F; CX-301-Z-152.46 to Z-152.48 (Bishopp); Weber, Tr. 1132/20 to 1133/21.)

## 2. Compliance

178. Interpreters have refused to work for intermediaries under working conditions that exceed AIIC's team size and length of day rules. (Neubacher, Tr. 778/21 to 779/7; Jones, Tr. 694/13 to 695/15, 696/13 to 697/9, 700/11-16; Davis, Tr. 839/19 to 840/1, 869/22 to 870/2; Clark, Tr. 601/5-24, 614/22 to 615/20.) During the 1984 Olympics, a team leader and AIIC member pulled the interpreters from a meeting that continued for more than six hours, because that is what the AIIC rule says. (Weber, Tr. 1253/13-1255/15.) AIIC members have charged overtime for work in excess of six hours. (F. 166-68, 343.)

179. AIIC members adhere to AIIC's team size table. (Luccarelli, Tr. 1669/17-19; Hamann-Orci, Tr. 44/9-23; CX-306-Z-55/6 to Z-56/3, Z-65/19 to Z-66/24, Z-71/13 to Z-72/23 (Weide); CX-2347-B; CX-2348.)

180. In 1988, the U.S. Region asked the AIIC Council for a waiver to allow an interpreter to work alone for up to 40 minutes, which the Council granted. (CX-432-G; CX-435-A; CX-301-Z-152/24 (Bishopp); Luccarelli, Tr. 1788/5 to 1789/10; CX-300-Z-34/15 to Z-35/2 (Motton).)

181. TAALS wrote to Wilhelm Weber questioning his proposed hours of work and team size for the 1984 Olympic Games as a possible violation of the TAALS/AIIC codes. (CX-1248-A.) AIIC also wrote a letter warning him to conform to AIIC's code. (CX-1253, CXT-1693-A-C; Weber, Tr. 1223/14 to 1224/20, 1226/2 to 1228/17.) An AIIC member objected to a contract offered by Mr. Weber to

provide interpretation services at the Olympics with seven hour days. (CX-1300-A; Weber, Tr. 1252/22 to 1253/11.)

182. In 1985, AIIC reprimanded U.S. Region member Marc Moyens in the AIIC Bulletin for "pushing the limit of" the Code, "concerning the composition of teams that lie behind the team strength tables." (CXT-239-I.) The Canadian Region complained to AIIC and TAALS that a member of the U.S. Region, Jeannine Lateiner, organized a conference in Canada using a petite equipe team size when Canada did not use a petite equipe. (CX-1066-D; CX-1086; CX-1090; CX-1100; Lateiner, Tr. 901/8-904/11, 909/13-910/8, 946/2-947/17.)

183. The U.S. Region decided at its November 23, 1991, meeting to send the table of manning strength to all members of the region. (CX-439-B.)

### 3. Effects

184. To the extent that interpreters use it to limit the length of their working day, AIIC's "normal working day" rule reduces output. (Wu, Tr. 2125; Silberman, Tr. 3122.)

185. The AIIC rule defining the length of the normal working day fixes price, specifying the time period for which the daily rate is to be paid, after which overtime is charged. (Wu, Tr. 2123-25.) An agreement not to work more than six hours a day without being paid overtime could reduce competition. (Silberman, Tr. 3122.)

186. AIIC's "normal working day" rule helps AIIC detect cheating on the price agreements by standardizing the working day, an observable aspect of output. (Wu, Tr. 2123.)

187. AIIC's team size rules restrict interpreters from competing bi-directionally (French to English and English to French). (Wu, Tr. 2126-27.)

188. AIIC's team size rules reduce output, specifying the work that an interpreter will perform. By raising price, the rule reduces output. (Wu, Tr. 2128-29.) AIIC's team size rules fix price, specifying the amount of output for which the rate is to be paid. Interpreters have worked on smaller teams for additional compensation. (Wu, Tr. 2127-28.)

189. AIIC's team size rules help AIIC detect cheating, specifying the number of interpreters required. Deviation would be observable. (Wu, Tr. 2127.)

190. AIIC's team size and length of day rules increase consumer costs. (Jones, Tr. 702/8 to 703/12; Clark, Tr. 627/22 to 632/3.) The U.S. State Department's costs of interpretation would increase with a six-hour rule because it would have to hire additional interpreters. (Obst, Tr. 300/20 to 301/4.)

#### 4. Health and Quality

191. The 1994 General Assembly inserted a justification for its length of day rules by alluding to "the principles of quality and health." (CX-1-Z-42 to Z-45.) References to "quality and health," were added to the team size and hours of work provisions after the FTC investigation began. (F. 537-39; CX-1-Z-42 to Z-44.)

192. Respondents have no studies addressing performance falling during the work day (Moser-Mercer, Tr. 3431/11-15), or for interpreters working outside the team strength tables. (Moser-Mercer, Tr. 3431/16-20.) No scientific studies support respondents' health and quality claims with respect to conference interpretation. (Parasuraman, Tr. 3804/12-20, 3702/6-23, 3625/23 to 3630/1.)

193. The United Nations uses a six-hour rule based upon its negotiated agreement with AIIC. (CX-2069-I; Moser-Mercer, Tr. 3539.)

194. As support for the health and quality justifications for the team size and length of day rules, AIIC referred to a memorandum from the United Nations in the 1950's. (CX-305-Z-88/2 to Z-89/8, Z-142/12-14 (Sy); CX-306-Z-94/7-11 (Weide); Saxon-Forti, Tr. 2705/19 to 2706/2; CX-300-Z-48/10-52/2 (Motton).) The 1957 U.N. Medical Officer's memorandum recommends that issues of workload be handled on an individual basis:

The question of fatigue due to the length of time on duty in the booths does not lend itself to such general solutions. Some of the interpreters have not found the existing hours of work excessive; others find 1 ½ hours at a time all they can manage efficiently and would even require every third day off. The question of workload therefore is one which should be dealt with administratively on an individual basis, bearing in mind such considerations as the volume of work in particular booths etc. (RX-668 at 2 ¶ 7; Parasuraman, Tr. 3711/21-3713/4; Moser-Mercer, Tr. 3551/20-3552/7.)

195. AIIC's agreements with the International Trade Secretariats, Interpol, and Coordonnees provide that the work day should not exceed seven hours (two sessions of 3 to 3 ½ hours). (CX-2066-B; CX-245-L (International Trade Secretariats); CX-2067 (Interpol);

CX-2068 (Coordonnees); Luccarelli, Tr. 1841/22 to 1843/3 (European Union, Coordonnees, and Interpol.) Interpol provides longer coffee breaks. (Weber, Tr. 1843.)

196. AIIC's agreement with the European Commission provides that the interpreter may work up to three sessions a day for three and one-half hours for each session except for sessions beginning after 3:30 p.m., which cannot exceed three hours. Thus, the work shall not exceed ten hours as set forth in the European Commission's regulations for staff and independent interpreters. (CX-2632-B, CXT-2632-B to G, p.1 (European Union); Luccarelli, Tr. 1841/22 to 1842/6 (European Union); Obst, Tr. 300/8-17.)

197. Quality and health do not suffer under AIIC's agreements in the Agreement Sector. The length of day rules and team size tables in these AIIC agreements assure health and quality. (Moser-Mercer, Tr. 3540-3541.)

198. The U.S. State Department expects its conference interpreters to work as long as needed for the conference and does not follow the six-hour rule. (Obst, Tr. 293/3 to 294/4, 295/9-25, 300/8-19.)

199. The number needed and the time they are able to work varies with the interpreters' language skills, experience, and stamina. (Moser-Mercer, Tr. 3479/13-19, 3538/15-23; CX-306-Z-89 (Weide); CX-305-Z-87/4-17 (Sy); CX-300-Z-47/10-24 (Motton); Clark, Tr. 666/5-13.)

200. The number of interpreters needed for a multilingual conference varies depending upon: (a) difficulty of the material, (Weber, Tr. 1151/14 to 1152/9; Obst, Tr. 298/12 to 300/7; Van Reigersberg, Tr. 404/17 to 405/7; Jones, Tr. 697/10 to 698/23; Davis, Tr. 862/10 to 867/19; CX-302-Z-86/2 to 90/18 (Luccarelli); (b) duration of the conference day (Weber, Tr. 1151/14 to 1152/9, 1188/24 to 1189/24; Van Reigersberg, Tr. 435/10 to 436/16); and (c) amount of time each target language is spoken on the conference floor. (Van Reigersberg, Tr. 406/12 to 407/10; Jones, Tr. 697/10 to 698/23, 700/3-10, 748/16 to 749/13; Davis, Tr. 862/10 to 867/19; Clark, Tr. 595/19 to 96/9; Luccarelli, Tr. 1600/8 to 1601/20; 1617/15 to 1618/19.)

201. Intermediaries sometimes ask AIIC members to work beyond AIIC's team size table and length of day rules and believe the quality would remain acceptable. (Davis, Tr. 862; CX-254-C (right

column); CX-248-H to I; Weber, Tr. 1188-89; CX-306-Z-4/4 to Z-7/15, Z-8/7 to Z-12/16 (Weide).)

202. In the United States, in 1994 freelance interpreters worked an average of 102 days. (CX-285-F to G.) U.S. interpreters working 160 days per year are in the top quarter in volume of work. (Luccarelli, Tr. 1607-09.)

203. Comparing occupations is accepted scientific methodology for opinions about AIIC's team strength and length of day rules. (Parasuraman, Tr. 3626/19 to 28/21, 3641/16 to 45/22; Moser-Mercer, Tr. 3508/3 to 10/17.)

204. Worker performance may vary with the cognitive demands on the worker. (Parasuraman, Tr. 3797/18 to 98/5.) Cognitive means mental processes of human behavior such as language, reading, memory, and decision making. (Parasuraman, Tr. 3602-25.)

205. Conference interpreting requires cognitive skills of verbal memory, speaking, and reasoning. (Moser-Mercer, Tr. 3417/7 to 19, 3486/25 to 89/13; Parasuraman, Tr. 3647/1 to 48/4, 3655/15 to 83/10.) Interpreters perform cognitive tasks when performing conference interpretation. (Moser-Mercer, Tr. 3486/25 to 88/4; Parasuraman, Tr. 3799/2 to 13.) However, interpreters usually work in half hour shifts and then are relieved by their boothmate. (CX-301-Z-13-14 (Bishopp); CX-300-Z-48 (Motton).) A six-hour day means that interpreters are on the microphone three hours a day. Interpreters may work even less because they are not interpreting when their target language is being spoken on the floor. (Luccarelli, Tr. 1617/15 to 18/19.)

206. Air traffic control and piloting involve high cognitive demand. (Moser-Mercer, Tr. 3509/10 to 09/17; Parasuraman, Tr. 3626/19 to 28/21, 3630/2 to 31/7, 3635/9 to 36/3.) Air traffic controllers engage in cognitively demanding tasks. (Parasuraman, Tr. 3632/22 to 34/11; CX-2636.) Likewise, a pilot engages in cognitively demanding tasks. (Parasuraman, Tr. 3637/3 to 19.)

207. Dr. Parasuraman, complaint counsel's expert, compared the cognitive demands of conference interpreting (both simultaneous and consecutive), air traffic controllers, and pilots regarding whether AIIC's team size tables and length of day rules are reasonably necessary for quality and health of the interpreter. (Parasuraman, Tr. 3625/12 to 22, 3626/19 to 28/21, 3629/7 to 30/11, 3702/24 to 04/2.) He used scientific methodology to compare performance of occupations. (Parasuraman, Tr. 3627/12 to 28/21, 3639/17 to 41/23, 3648/5 to 49/14, 3703/10 to 04/2; CX-2639.) The task analysis

compared the cognitive demand imposed by 17 job characteristics in each occupation. (Parasuraman, Tr. 3648/5 to 21, 3649/10 to 53/19; CX-2639; CX-2635.)

208. Dr. Parasuraman found that the cognitive demand on conference interpreters for consecutive or simultaneous interpretation is not as high as the cognitive demand on air traffic controllers and pilots. (Parasuraman, Tr. 3626/19 to 28/21, 3639/17 to 40/4, 3649/10 to 14, 3655/3 to 14, 3683/11 to 84/3, 3655/15 to 83/10; CX-2639.)

209. Studies of the performance and health of air traffic controllers and pilots show that they do not decline for the first eight to ten hours of work. (Parasuraman, Tr. 3626-28; CX-2635.) Dr. Parasuraman believed that interpreters' performance would not decline for an eight to ten hour work day. He concluded that respondents' six-hour work rule is not reasonably necessary to maintain quality. (Parasuraman, Tr. 3622/13 to 22, 3692/7 to 15, 3692/25 to 93/11, 3693/23 to 24, 3694/19 to 95/9, 3700/20 to 01/4.) Studies of air traffic controllers' health show no link between adverse health effects and the occupation. (Parasuraman, Tr. 3713/6 to 14/15, 3704/20 to 05/20; CX-2635-B.) Dr. Parasuraman believed that there is no link between the occupation of conference interpreter and adverse health effects. He concluded that the six-hour work rule is not reasonably necessary to protect interpreters' health. (Parasuraman, Tr. 3628/22 to 29/6, 3704/20 to 05/20, 3714/16 to 15/7.)

210. AIIC commissioned a study of stress among interpreters. The 1981 Cooper and Cooper study arose after AIIC adopted its six-hour rule in 1979 (F. 158), but never examined the issue of the length of the work day or the performance of interpreters. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.) It did not include any physiological examination, but used a questionnaire sent to AIIC members. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.) The study concluded that interpreters' occupational stress was about the same as experienced by business executives. (RX-147-48; Parasuraman, Tr. 3705/21 to 3709/7; Moser-Mercer, Tr. 3557/18 to 61/11.)

211. Some AIIC members recognize that the team strength tables and length of day rules are exceptionally protective when conference interpreting is compared to other occupations. (CX-247-Y; CX-248-Z-7.) One commented that:

No profession that I know of has a 21-hour working week. And no matter how great the mental stress, nervous tension, etc. of our job, there are plenty of other professions where working conditions are just as trying, physically and mentally, where strains, stresses and responsibilities are considerably greater and far more sustained, remuneration no better and hours far longer than ours. To claim that our profession is unique on any of those counts is ridiculous. (CX-215-D; CX-248-Z-7; CX-247-Y.)

### *G. Professional Address Rule*

#### 1. History

212. AIIC rules require that members declare a single professional address, keep such address for at least six months, and provide three months' notice before any change. (CX-300-Z-39 to 41, Z-71 to Z-72 (Motton); Bowen, Tr. 1008, 1012; CX-301-Z-22 to Z-23 (Bishopp); CX-2-Z-40; CX-1-Z-40.)

213. The professional address rule has been in effect since AIIC was founded. (CX-2434.)

214. Article 1(a) of the 1991 Standards of Professional Practice states that the declared professional address "shall be the only place on which contracts shall be based." (CX-2-Z-40.)

215. Under AIIC rules, professional address determines when members must charge for travel and rest days. Article 12(a) states, "When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest. . . . This remuneration shall be at least equal to the base rate." (CX-2-Z-40, Z-46.)

216. Under AIIC rules, professional address determines when members must charge per diem or subsistence allowances and train fare or airfare. (CX-2-Z-46; F. 110.) Article 14 requires contracts to include fees "for each journey made between the place of the interpreter's professional address and the conference venue," and sets out the calculation of such fees. (CX-2-Z-47; F. 130.) Article 15(a) states that every contract signed with a member "away from the place of her or his professional address must include payment of travel." (CX-2-Z-48; F. 237.)

217. "Professional address" refers to the location from which an AIIC member is to base travel charges. (CX-268-C; CX-495-P.) For work outside the professional domicile, the interpreter will charge for travel and per diem. (Bowen, Tr. 1008; CX-301-Z-19 to Z-20, Z-21 (Bishopp); Hamann-Orci, Tr. 45.)

218. Each member's professional address is in the AIIC Directory. (CX-2-Z-40; Weber, Tr. 1210-1211; CX-600.)

219. Members are allowed one professional address at a time. (CX-301-Z-19 to Z-20, Z-21(Bishopp); CX-300-Z-38 (Motton); CX-2-Z-40.) Some interpreters have alternating domiciles -- six months in one city and six months in another. (Hamann-Orci, Tr. 46; Bowen, Tr. 1010.)

220. Interpreters' professional addresses are not always where they reside. (CX-302-Z-140 (Luccarelli); Bowen, Tr. 1009; CX-495-P.)

221. Interpreters may declare their professional address away from their home so they get more work "because it would mean that they wouldn't charge for travel." (CX-302-Z-140 (Luccarelli).) However, when interpreters work near their home they charge the client for travel based on their professional domicile, not their residence. (CX-302-Z-140 to Z-141, Z-438 (Luccarelli); CX-2-Z-40; CX-301-Z-20 (Bishopp).)

222. Under the professional address rule, an interpreter with a professional domicile in Brussels, would charge any client in the United States for a round trip ticket between Brussels and the U.S. (Hamann-Orci, Tr. 45.) A member vacationing in Europe, with a professional address in Washington, D.C., could accept a conference interpreting job in Europe by charging for travel from the United States. (CX-301-Z-21 to Z-22 (Bishopp).)

223. Because of this professional domicile rule, Dr. Margareta Bowen, an AIIC member, traveled round-trip between Washington and New York to work a conference in New York but charged the client for roundtrip travel between Vienna and New York because Vienna was her professional domicile. (Bowen, Tr. 1011-12.)

224. The professional address rule protects local interpreters from outsiders who might travel at their own expense in order to work, replacing a local person. (CX-300-Z-42 to 43 (Motton); Weber, Tr. 1213.)

225. An AIIC member, C. Gibeault-Becq., was offered a job in Washington on November 15, 1991. Her professional address would change to Washington on December 20. The U.S. Region Representative suggested that she contact AIIC in Geneva, or "telephone all other colleagues with your language combination in the Washington area, to verify that they were all indeed working on that date." (CX-1471.)

226. Members of the U.S. Region of AIIC testified that it is unethical and unfair to local colleagues for interpreters not to charge for travel when working away from their own professional address. (CX-300-Z-39 (Motton); Hamann-Orci, Tr. 32.)

## 2. Enforcement

227. Members follow the professional address rule, unless they obtain a waiver. (CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30.) In July 1984, the AIIC Council adopted a policy for granting waivers of the professional address rule and reaffirmed its determination to enforce the rule. (CX-237-H; CXT-237-H.) The AIIC Council issued reprimands for changing professional domicile without providing three-months' advance notice. (CX-237-I; CXT-237-I.)

228. AIIC's Recruiting Guidelines require AIIC members who are recruiting interpreters to apply AIIC rules to non-members. (F. 32.) AIIC construed the professional domicile rule to prohibit Mr. Weber from recruiting an Austrian interpreter, whose parents lived in Los Angeles, to work at the Olympics -- even though the interpreter was planning to travel to Los Angeles at his own expense and avoid lodging costs by staying with his parents. (Weber, Tr. 1211-12)

229. U.S. Region member Wilhelm Weber was accused of violating AIIC's rule on professional domicile. (Weber, Tr. 1264.) In 1983, he transferred his professional domicile for six months from Monterey to Geneva to obtain work. Weber stayed in Geneva for about six weeks and went back to Monterey. (Weber, Tr. 1265.) Weber accepted an interpreting job at a conference in San Francisco, although his professional address was still in Geneva. In July 1984, the AIIC Council threatened to issue sanctions against Mr. Weber for violation of the professional address rule. (CXT-237-H.)

230. The AIIC General Assembly in 1985 voted on whether to expel U.S. Region member Marc Moyens (CX-304-Z-128 (Motton)), for violating the professional address rule, for working for two employers in Europe without charging each for transatlantic travel. (CXT-239-I.) His expulsion was rejected but a Committee of Inquiry recommended that the Council reprimand Mr. Moyens. (CXT-239-I.) He resigned from AIIC. (CX-304-Z-128 (Motton).)

231. On November 30, 1991, the U.S. Region Representative wrote to one member who "without officially notifying AIIC of his change of address" had been working in the New York area although

he had a Washington, D.C. professional address. The U.S. Region Representative declared, "this is against our rules." (CX-1470-A; CX-608-Z-221.)

232. The 1994 AIIC Standards retain the professional address rule but not as the basis for calculating travel and subsistence charges. (CX-1-Z-40.)

233. The proposed amendments to the AIIC Basic Texts, "eliminated the monetary conditions while taking care to preserve the great principles which the association holds to, such as professional address. . . ." (CXT-279-K to O, p.4.) In January 1984, the NAS reaffirmed "its moral commitment to the concept and the application of the principle of professional address." (CX-1568-A; Luccarelli, Tr. 1770.)

234. The Council granted a waiver to one member, in January 1995, "allowing her to work four months per year for the Canadian Government while retaining her professional address in Norway." (CX-284-L.)

### 3. Economic Effect

235. The professional address rule reduces output by protecting local interpreters from competition. (Wu, Tr. 2199-2100.) It discourages out of town interpreters from working at a conference without being paid for travel, and from taking work from local interpreters. (Wu, Tr. 2100-01)

236. The professional address rule also deters cheating by helping members to detect undercutting by out-of-town interpreters in violation of the AIIC rules on fees. (Wu, Tr. 2100.)

#### *H. Travel Arrangements*

237. AIIC set rules for travel arrangements. Article 15(a) of the 1991 Standards provides "Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel" by the shortest possible round trip. (CX-2-Z-48.) It further specifies that travel by air shall be first class, business class, or club class and that tickets are not to be restricted to a particular carrier. (CX-2-Z-48.) The rule also requires that for successive conferences away from the interpreter's professional address, unless there is a separate payment for return travel from each

conference, the interpreter shall receive a fee and a subsistence allowance for every day between conferences. (CX-2-Z-48.)

238. In the 1994 Standards, AIIC has replaced the former provisions with the statement in Article 10, "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey," and Article 9 provides, "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." (CX-1-Z-45.) AIIC's standard form contract continues to provide for first class travel on journeys of long duration. (CX-2059-B.)

239. AIIC's rule concerning travel arrangements was binding in the U.S. The 1991 paper, "Working conditions for interpreters in U.S.A.," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states, in ¶ 6, that "In addition to professional fees, each interpreter shall be entitled to: return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. Interpreters are entitled to business class or first class tickets. When train service is more convenient, first class tickets." (CX-439-D to E.)

240. AIIC's travel rules help its members maintain their agreement by deterring cheating. (Wu, Tr. 2093-94.)

### *I. Cancellation Fees*

241. AIIC requires that members be paid even if the event for which they are hired is canceled. Article 2(c) of the 1991 Standards provides: "Any contract for the recruitment of a member of the Association must specify that in the event of the organizer canceling all or part thereof, whatever the reason for and the date of cancellation, the interpreter shall be entitled to the payment of all fees contracted therein (working and non-working days, briefing days as well as days allowed for rest and travel) in addition to the reimbursement of any expenditure already incurred." (CX-2-Z-41.) Article 2(d) of the 1991 Standards further states that the interpreter cannot be forced to accept an alternative job to mitigate the organizers' liability. (CX-2-Z-41.)

242. When Wilhelm Weber began to organize interpretation services for the 1984 Los Angeles Olympics, he did not offer the standard AIIC cancellation clause to interpreters. (Weber, Tr. 1235-36, 1244-45.) When news of this reached AIIC, AIIC warned Mr. Weber about his breach of the rules. (CX-1693-A to C; CXT-1693-A

to C; Weber, Tr. 1243-48, 1255-56.) As a result of the pressure by AIIC, an "acceptable" cancellation clause was included in the Olympics contracts and Mr. Weber received a reprimand from AIIC for his actions. (Weber, Tr. 1257; F. 356.)

243. Other AIIC interpreters have relied on AIIC's standards to obtain cancellation clauses in contracts. Ursula Weide wrote a June 28, 1992, letter relying on the AIIC standard contract cancellation clause in requesting a fee from a person who had tried to put together a team of interpreters for an arbitration, but who postponed the engagement. (CX-2571-A to B.)

### *J. Recording*

244. AIIC requires that fees should be charged for recordings of the interpretation at conferences. Article 2(b) of both the 1991 and 1994 Standards provides: "Any contract for the employment of a member of the Association must stipulate that the interpretation is intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements." (CX-2-Z-41; CX-1-Z-40.) AIIC's rule on recordings is binding in the United States. (Weber, Tr. 1251.)

245. Interpreters' practice of charging for recordings goes back to the 1979 Code. (CX-6, CXT-6-E to M, p.1.) The April 5, 1989, AIIC Bulletin reported that members at the NAS meeting held in Dublin in January voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale, at 100% the daily rate. (CX-253-D; CXT-251-W at pp.2-3.)

246. AIIC's rule on recordings helps the AIIC agreement by discouraging potential undercutting on the minimum daily fee by waiving a charge for recordings. (Wu, Tr. 2119.)

### *K. Charity*

247. AIIC limits free charitable work by its members. Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," states: "Members of the Association may provide their services free of charge, especially for conferences of a

charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed." (CX-2-Z-42; CX-1-Z-41; CX-9-F; CXT-6-E to M, p. 4; Weber, Tr. 1232.)

248. The 1983 AIIC General Assembly in Berlin passed a resolution that student interpreters should work only at conditions of remuneration that are in conformity with the professional code of conduct. (Weber, Tr. 1231; CX-234-J to K.) The resolution further provided that the students should work free of charge only if they pay for their own travel costs and per diem. (Weber, Tr. 1231-32.)

249. The student interpreters at the 1984 Olympics did not comply with the Code, because the LAOOC paid the student interpreters' airfare from Monterey, CA to Los Angeles, CA. (Weber, Tr. 1232-33.) As a result, the Council determined that a letter of warning should be sent. (Weber, Tr. 1271-72.) U.S. Region Representative Jean Neuprez then wrote to Wilhelm Weber, who was responsible for coordinating the Olympics' interpretation services, on June 16, 1984, warning that his actions "go against a number of principles and rules of our profession." (CXT-1320-A to C, p.1.)

250. AIIC's restrictions on pro bono work deter entry by novice interpreters working without charge. Absent the rule, student or novice interpreters could seek to work without charge in order to gain experience and make contacts in the profession. (Wu, Tr. 2109.)

#### *L. Commissions*

251. AIIC prohibits its members from giving or receiving commissions. Paragraph c)4 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." (CX-1-Z-49; CX-2-Z-52; CX-301-Z-100 (Bishopp); Luccarelli, Tr. 1690-1691.) Article 6(d) of the 1991 Standards states that: "Remuneration shall be net of any commission." (CX-2-Z-42.)

252. AIIC's rule against commissions prohibits granting secret discounts. The ban on commissions is based on a practice in Europe of an organizing interpreter charging a commission "under the table" as a condition of hiring an interpreter. (Luccarelli, Tr. 1691.)

253. The March 1981 AIIC Bulletin reports a meeting involving AIIC members where the practice of intermediaries taking a commission was "heartily condemned" and states, "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organizers for expenses incurred in recruiting a team, but this must be charged to the organizer and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." (CX-227-J.)

254. AIIC's ban on commissions deters entry by preventing new interpreters from gaining experience by paying commissions to intermediaries. (Wu, Tr. 1251.)

### *M. Package Deals*

255. Paragraph b)7 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards Colleagues," provides that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular avoid lump-sum arrangements concealing the real fees and expenses due individual interpreters." (CX-1-Z-49.) Similarly, paragraph c)1 states, in part, "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." (CX-1-Z-49.) Paragraph b)5 of the AIIC Guidelines for Recruiting Interpreters, provides, "Interpreter's fees shall be paid directly to each individual interpreter by the conference organizer." (CX-1-Z-49.)

256. AIIC opposed package deals, and required direct contracts between the interpreter and the conference sponsor. (CX-301-Z-100 (Bishopp); Luccarelli Tr. 1692) A provisional paper on AIIC working conditions for interpreters in the United States, prepared for and discussed at meetings of the U.S. Region in 1990 and 1991, stated, "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." (CX-439-B, D-E; CX-435-A.)

257. AIIC feared that "[n]on-interpreter intermediaries (such as multinational language schools) and commercial intermediaries (providers of temporary labour, translation bureaux) are eating into our markets. They all facilitate the gradual mushrooming of a 'grey market'." (CX-237-B.)

258. The Council issued an emergency suspension against a member for failing to provide a direct contract to the interpreters on a team that she was organizing to perform conference interpretation work. (CXT-240-G.) At its July 1985 meeting, the Council decided to lift her suspension as soon as she "submitted to the AIIC her written promise to respect henceforth all commitments incumbent upon her as member of the Association." (CXT-240-G.)

259. An AIIC founding member and past president, Christopher Thiery (Weber, Tr. 1137), wrote in the Bulletin in 1978 that the danger of "losing our freedom to establish our own rates" would come from losing direct contact with the people who used interpretation services. "We must never forget that when the chips are down an intermediary may well have to cut costs to stay in business. And if we happen to be one of the 'costs,' then that's just too bad for us." (CX-219-U; CX-616-Z-53.) He wrote earlier, "The danger lies for us in the presence of the intermediary, whose interests can never be identical to ours. . . . Once we accept impresarios and professional conference organizers and conference halls as our employers, we lose control over the situation and end up by being paid what they decide is good for us. Hence, the gradual introduction of the direct contract and direct payment principle. . . ." (CX-203-C.)

260. Clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters. (CX-227-J; CX-1633-B.)

261. AIIC's ban on package deals helps AIIC detect cheating on the AIIC price agreements by requiring that prices for interpreters be separately stated, and therefore permitting those prices to be monitored. (Wu, Tr. 2153.) AIIC sought "to avoid letting happen to conference interpreters what had happened to other 'interpretive' professions (actors, musicians, etc.): to fall into the hands of commercial impresarios with all that would entail: paying commissions, varying rates of remuneration with the creation of 'divas.' Hence direct contract rules with equal remuneration for all the members of a given team." (CXT-233-J & M.)

#### *N. Exclusivity*

262. Paragraph c)3 of the AIIC Guidelines for Recruiting Interpreters, under "Duties Towards the Profession," provides, "The

conference interpreter makes it clear that he or she does not 'provide' interpreters, but that she or he recommends them and negotiates contracts on their behalf. She or he avoids creating the impression that certain interpreters are available only through him or her or that she or he controls teams of fixed composition." (CX-1-Z-49; CX-256-Z-45; CX-214-N; CX-5-Q.)

263. In the United States, recruiting interpreters do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with interpreters as employees. (Luccarelli, Tr. 1693-94; CX-301-Z-105 (Bishopp); CX-428-A.)

264. AIIC's prohibition of exclusivity helps the AIIC agreement by preventing the formation of firms of interpreters. (Wu, Tr. 2147.) Reduction in product heterogeneity makes it easier for members to agree. (Wu, Tr. 2147.) AIIC's prohibition of exclusivity also reduces output by preventing the formation of interpreter firms, which might be an efficient means of providing interpretation services. (Wu, Tr. 2149.) It also deters entry by new interpreters benefitting from the reputation of a firm and letting them enter the market, gain experience and develop a reputation. (Wu, Tr. 2148.)

#### *O. Trade Names*

265. Paragraph c)1 the AIIC Guidelines for Recruiting Interpreters provides, "The coordinating interpreters's conduct must always be in keeping with the dignity of the profession. She or he acts under her or his own name and does not seek anonymity behind the name of a firm or organization, although co-operative services may be offered by a group of interpreters who carry on business under a group name." (CX-1-Z-49.)

266. Cooperative services as referred to in this rule, means that a group of interpreters set themselves up as an office. There are no such "cooperatives" of interpreters in the United States. (CX-301-Z-104 (Bishopp).)

267. The 1983 Code of Ethics provided that members had a duty towards the profession not to seek anonymity behind the name of a firm or organization. (CX-5-Q.)

268. AIIC's prohibition of trade names helps reduce competition among AIIC members by reducing the ability of members to differentiate themselves in the minds of consumers. The restriction

therefore reduces product heterogeneity, which makes it easier for members to reach and maintain price agreements. (Wu, Tr. 2146.) It deters entry by new entrants trying to make themselves known. (Wu, Tr. 2147-48.)

### *P. Portable Equipment*

269. A "bidule," is a miniature portable interpretation system small enough to be carried in a briefcase. (Davis, Tr. 846-47; CX-302-Z-80 (Luccarelli); Hamann-Orci, Tr. 47.) Portable booths are versions of permanent booths. (Luccarelli, Tr. 1699-1700.)

270. AIIC restricts members' use of portable equipment. AIIC's Code of Ethics prohibits members from simultaneous interpretation without a sound booth except when the quality of the interpretation work is not impaired. (CX-1-Z-38; CX-301-Z-133 to Z-134 (Bishopp).)

271. In January 1991 the AIIC Council adopted standards governing members' use of portable electronic simultaneous interpretation equipment. (CX-266-Z-14; CX-2-Z-38; CX-301-Z-15, Z-133 (Bishopp).) Those standards permit use of portable equipment for visits to factories, hospitals or remote field visits. (CX-266-Z-14.) The standards limit the use of portable equipment to short meetings (two hours) with 12 or fewer participants. (CX-266-Z-14; CX-267-F; CX-301-Z-133 (Bishopp).) The standards mandate at least two interpreters when portable equipment is used. (CX-266-Z-14; CX-267-F.)

272. The Council standards must be met before members may accept an interpretation assignment with portable equipment. (CX-266-Z-14; CX-300-Z-70 to Z-71 (Motton).)

273. Portable equipment costs less. (CX-270-G.) The rent of portable equipment is less than the cost for standard booths. (CX-302-Z-282 to Z-283, Z-804 (Luccarelli); Clark, Tr. 634; Obst, Tr. 303.) No technician is required. (Hamann-Orci, Tr. 47; Obst, Tr. 307/5; Neubacher, Tr. 778; Clark, Tr. 632.)

274. The NAS agreed that use of the "bidule" "must be strongly discouraged." (CX-259-U.) In January 1992 in Washington, D.C., the NAS exhorted members to dissuade the use of portable equipment. (CX-270-G.)

275. AIIC's rules against portable equipment reduce output by limiting the use of interpretation technology. (Wu, Tr. 2139.) The rules force adherence to AIIC's team strength tables for simultaneous

interpreting. (F. 175, 188-90.) The rules reduce output by specifying the number of interpreters required, limiting the amount of work an individual interpreter will perform, raising the price of the interpretation services, and aiding in the detection of cheating. (Wu, Tr. 2123, 2127-29, 2139.) Specifying the time an interpreter may work (two hours), AIIC's rules against portable equipment reduce output. (Wu, Tr. 2139, 2125; Silberman, Tr. 3122.)

### *Q. Other Services*

276. The AIIC model contract states: "The functions of the interpreter shall exclude the written translation of texts; they shall therefore be confined to the interpretation of spoken proceedings and shall not cover any event not specifically provided for in the contract." (CX-2347-B, ¶ 2; CX-2060-D, ¶ 2.)

277. The rule against performing other duties does not discourage interpreters from translating on weekends or on breaks when they are not interpreting. (CX-301-Z-26 (Bishopp).) Members occasionally depart from this rule without punishment from AIIC. (Luccarelli, Tr. 1672.)

278. Harry Obst, the Chief Interpreter of the State Department, and a highly credible witness, sometimes asks an interpreter to translate a written document when a translator is unavailable, "and they usually do." (Obst, Tr. 301-02.)

279. The intermediary, Metropolitan Interpreters and Translators, sometimes asks interpreters to interpret when clients are checking in, or at the gift shop. While no interpreter has directly refused, some have disappeared "when asked to perform such services." (Citrano, Tr. 523-24.) AIIC and TAALS members are a little more likely to avoid such extra services. (Citrano, Tr. 524.)

### *R. Moonlighting*

280. AIIC's "Guidelines for Recruiting Interpreters" requires AIIC members to hire: "freelance interpreters rather than permanents having regular jobs." (CX-1-Z-48; CX-2-Z-51; CX-6-O.)

281. AIIC's "Staff Interpreters' Charter" provides that staff interpreters should act as interpreters outside their organization "only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (CX-1-Z-53; CX-2-Z-54.)

282. "Moonlighting" refers to an interpreter who already has permanent employment seeking temporary employment elsewhere. (CX-305-Z-99 (Sy); CX-304-Z-84 to Z-85 (Motton).)

283. AIIC members understood the provisions of AIIC's rules regarding moonlighting to mean that permanents should not perform freelance work unless no freelance interpreter is available. (CX-301-Z-106 to Z-107 (Bishopp); CX-300-Z-121 to Z-122 (Motton); Lateiner, Tr. 907/4-5.) At the U.S. Region meeting in 1988, AIIC members were warned: "[O]ur permanent colleagues are reminded that if they are offered a contract outside their organization they should check first whether there are any free-lance interpreters available with the required language combination. They have a permanent, steady job and freelancers don't. Therefore they should show some 'restrain' [sic] in the private market." (CX-432-M.)

284. The majority of AIIC's members are freelancers. In 1981 only 17% of AIIC members were Staff interpreters. (CX-230-N; Stip. 57, 58, 60). At its November 1975, and 1976 meetings, the U.S. Region agreed that staff interpreters should not work in the private sector unless all freelancers were already engaged. (CX-405-C; CX-407-F.)

285. In 1980, Jeannine Lateiner was investigated for hiring permanent interpreters instead of local freelance interpreters. (Lateiner, Tr. 905; CX-1138-A to B.) The next year, AIIC's Council stated that: "The Council meeting of July 1981 had condemned the practice of moonlighting and had called for restraint from retired staff interpreters, wishing to do freelance work despite their pensions." (CX-230-M.) In 1984, the AIIC Council suspended three members (CX-236-C), following a case of moonlighting which attracted a lot of attention in Switzerland. (CX-1256-B.) In 1986, after press articles and the Council action, moonlighting practically disappeared in Geneva. (CX-241-B to C.)

286. The NAS has asked permanents to show restraint in accepting work in the Non-Agreement Sector (CX-240-I), discussing what it called "the problem" of moonlighting and retired permanents working on the private market (CX-1538-G).

287. The purpose of the anti-moonlighting rule is to protect the interests of freelance interpreters. (CX-300-Z-114 to Z-115 (Motton); Motton CX-300-Z-121 (Motton); CX-301-Z-95 to Z-97 (Bishopp).)

288. The AIIC Bureau invited members to file official complaints concerning any violations of the moonlighting rule, including written proofs or copies of contracts. (CX-301-Z-152/5-6 (Bishopp).)

289. Interpreters honor the anti-moonlighting rules, and attempt not to compete with AIIC's freelance members who are not employed. (Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64.)

290. AIIC's rules against moonlighting reduce output by restricting the output of staff interpreters. (Wu, Tr. 2136.) They deter entry into the private sector by preventing staff interpreters from entering the private sector without giving up their staff positions. (Wu, Tr. 2136.)

291. There are no justifications for the moonlighting rule. (F. 191-211.) The moonlighting rule is over broad, since it prohibits staff interpreters from working freelance on days when they are not working for their organizations.

### *S. Double-Dipping*

292. Article 3 of the AIIC Code provides that "members of the Association shall not accept more than one assignment for the same period of time." (CX-1-Z-37; CX-2-Z-37; CX-3-B, Art. 4(c); CX-4-C, Art. 3(b).) AIIC referred to this as "double-dipping." (CX-432-G.)

293. AIIC's president explained that interpreters cannot accept two contracts for the same time. (CX-305-Z-94 (Sy).) The rule means that only overlapping assignments are prohibited, which does not prevent members from accepting more than one assignment in a day. (*Id.*; Luccarelli, Tr. 1673-74.)

294. Part of the reason for the rule against double-dipping was to avoid over booking by an interpreter who accepts more than one assignment for a day, which could be deceptive and leave a team short handed. (Luccarelli, Tr. 1675-76.)

295. AIIC allowed departures from the rule against double-dipping so long as there was no other member available and "appropriate fees" are paid. (CX-237-K.) AIIC has not enforced the rule. (Luccarelli, Tr. 1673-76.)

296. In 1988, the U.S. Region discussed double-dipping where an interpreter is engaged in a conference and accepts work at a short meeting during that employment. "It is said that the practice is widespread in Washington, and there is the anecdote of interpreters working with a taxi waiting to take them back to their other meeting." (CX-432-G.)

*T. Advertising*

297. AIIC prohibits comparative advertising. The AIIC Code excludes "commercial forms of one-upmanship." (CX-1-Z-49; CX-2-Z-52.)

298. Members understand "commercial forms of one-upmanship" to be about comparative claims. This provision means that interpreters cannot disparage their colleagues in order to get work. (CX-2-Z-52; CX-301-Z-103 (Bishopp); Luccarelli, Tr. 1682-1683.)

299. The 1994 Code of Ethics provides that AIIC members "shall refrain from any act which might bring the profession into disrepute." (CX-1-Z-38; CX-2-Z-38.)

300. The 1972 AIIC Code of Ethics stated, "Members shall refrain from any activities likely to bring discredit on the profession, including all forms of personal publicity." (CX-9-C.) This barred "activities such as canvassing or commercial forms of one-upmanship or advertising." (CX-5-Q; CX-260-Z-109; CX-232-F.) Prior to 1991, AIIC prohibited members from publicizing individually that they are conference interpreters. (CX-301-Z-12 to Z-13 (Bishopp).)

301. In 1994, AIIC acted against Carol Gold, an AIIC member in Canada, for making comparative pricing claims. Ms. Gold wrote a letter to a client that stated that "Using accredited conference interpreters [meaning: "AIIC members" (CX-305-Z-332/24-25 (Sy))] would be much more expensive and would involve bringing in two interpreters from Montreal, plus one local." (CXT-501-W.) The AIIC Council concluded that Ms. Gold's conduct "constitutes a flagrant violation of paragraph (b) of Article 4 of the Code of Professional Ethics." (CXT-501-V to W; CX-305-Z-336/1-4 (Sy).) Ms. Gold sent documents concerning this matter to the Canadian Bureau of Competition; the AIIC Council issued a warning to Ms. Gold. (CX-305-Z-336 (Sy); CXT-501-W at p.2.)

302. Also in 1994, thirty-six members of AIIC filed a complaint against a member named T. Cordon Vilas. (CXT-502-Z-53 to Z-54; CX-305-Z-337 (Sy).) Ms. Vilas had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. (CXT-502-Z-53-54; RX-815.) The AIIC Council suspended Ms. Vilas for two years, until the next Assembly. (CX-502-Z-36; RX-815; CX-305-Z-338 (Sy).)

303. AIIC's prohibition on comparative advertising reduces product heterogeneity, which makes it easier for the members to

agree. (Wu, Tr. 2144/20-22.) It deters entry by making it more difficult for entrants to make themselves known. (Wu, Tr. 2145/1-8.)

#### IV. TAALS

##### *A. TAALS' Rules*

304. TAALS' rules are binding on its members. (Saxon-Forti, Tr. 2689; CX-2240-A; CX-995-C; CX-993-D.) Applicants for TAALS membership follow the association's rules for the 200 day period "in the booth" prior to becoming members. (CX-997-Q; Hamann-Orci, Tr. 20.) In signing the TAALS application form, candidates undertake to abide by the TAALS rules. (CX-986-A.) TAALS members voted on rules at TAALS Assembly meetings. (Lateiner, Tr. 923-24, 929; CX-895-B; CX-962-I.)

305. TAALS enforces its rules. (CX-1742.) Members who infringe the Code are subject to expulsion or other penalties. (CX-997-I; Hamann-Orci, Tr. 51, 53-54.)

306. In 1989, Janine Hamann-Orci was investigated by TAALS for quoting low rates and manning strength at odds with TAALS guidelines. (Hamann-Orci, Tr. 52; CX-2552; CX-2553.) The interpreter who filed the complaint was a member of AIIC, as were three members of the TAALS disciplinary committee that investigated Ms. Hamann-Orci. (Hamann-Orci, Tr. 93-94; CX-2554.) The Committee to Ensure Respect for the Code exonerated Ms. Hamann-Orci. (CX-2557-A to B; CX-913-F.)

##### *B. AIIC and TAALS Rates*

307. TAALS voted on the rates at its General Assembly meetings. (Hamann-Orci, Tr. 31; CX-301-Z-56 to Z-58 (Bishopp).) Charging less than the association rate was undercutting for which violators would be expelled. (Hamann-Orci, Tr. 53-54.)

308. AIIC used the TAALS rate as its published rate for the United States. (CX-301-Z-45/10-20, 49/15 (Bishopp); CX-304-Z-80, Z-207, Z-221 (Motton); CX-83; CX-925-A; CX-409-A.) AIIC obtained the TAALS rate either from the U.S. Region Representative to the Council or by writing directly to the president of TAALS. (CX-301-Z-45 to Z-46 (Bishopp).)

309. Prior to 1991, intermediaries understood the "industry rate" to be the rate recommended by TAALS and AIIC. (Davis, Tr. 843;

Clark, Tr. 610-11; Jones, Tr. 688-89, 694; Neubacher, Tr. 763.) In the late 1980's, to determine the rate for private sector freelance conference interpretation, intermediaries contacted a member of TAALS or AIIC. TAALS and AIIC interpreters charged the same. (Clark, Tr. 668; Jones, Tr. 688-89; Citrano, Tr. 555.)

310. Members of AIIC and TAALS frequently have the same rates today. (Jones, Tr. 690-93; Citrano, Tr. 573.)

### *C. Same Rules*

311. Before the Federal Trade Commission Consent Order against TAALS (The American Association of Language Specialists ("TAALS"), C-3524 (Aug. 31, 1994) (consent order)), AIIC and TAALS had the same rules. (Saxon-Forti, Tr. 2677; CX-301-Z-140 (Bishopp); Lateiner, Tr. 922.) The TAALS standard contract form states that it conforms with the standard practices of AIIC. (CX-2114-A to B; Hamann-Orci, Tr. 23.)

312. AIIC and TAALS had similar rules concerning per diem (F. 110; CX-997-J, Art. 13a, K, Art. 3); charges for non-working days (F. 130-35; CX-997-K, Art. 4, J Art. 11(a)); cancellation clauses (F. 241; CX-997-K, Art. 1); and recordings (F. 244; CX-997-L, ¶ C.6). Each association specified minimum travel arrangements (F. 237; CX-997-K, Art. 4); and prohibited members from being paid for travel and subsistence when working for free (F. 247; CX-997-J, Art. 12). AIIC and TAALS required all interpreters on the same team be paid the same rate (F. 150-51; CX-997-J, Art. 10d; Hamann-Orci, Tr. 40) and on an indivisible daily basis (F. 120; CX-997-J, Art. 10b; Saxon-Forti, Tr. 2696); and both required that fees be payable without the deduction of any commission. (F. 251; CX-997-J, Art. 11b.) AIIC and TAALS had rules on the number of booths and interpreters required (F. 160-62; CX-997-L, ¶ B.3); and defined a working day as two sessions of three hours each. (F. 158-59; CX-997-L, ¶ B.4.) TAALS and AIIC had restrictions on the use of portable equipment (CX-988-B; CX-301-Z-134 (Bishopp); F. 269-72); on the performance of non-interpretation services at conferences (CX-997-J, Art. 7); and on advertising (F. 297; CX-997-I, Art. 4b). Both required that members declare a single professional address and base travel charges on that address. (F. 212, 215; CX-997-J, Arts. 8, 13.)

313. AIIC and TAALS required members to refuse work under conditions not in accord with their rules. (F. 48; CX-997-I, Art. 6.) TAALS told its members that they should use the AIIC rate when

engaged in conference interpretation outside the United States. (Saxon-Forti, Tr. 2695.)

#### *D. Coordination*

314. TAALS and AIIC coordinated their activities. "[T]here is a systematic exchange of information between TAALS and AIIC." (CX-409-A; CX-218-J; CX-266-Z-6.)

315. In 1984 the TAALS Council appointed an official liaison from TAALS to AIIC with a term of eight years. (CX-1728-B.) Information discussed by either AIIC or TAALS is shared by the two organizations. (CX-300-Z-32 (Motton); Lateiner, Tr. 917; Luccarelli, Tr. 1766-68, 1802; CX-302-Z-402 to Z-405 (Luccarelli); CX-898-D to E.)

316. AIIC and TAALS worked together in enforcing their overlapping rules. (Lateiner, Tr. 904-05; CX-1066-A; CX-1090; CX-1138-A to B.) TAALS and AIIC coordinated enforcement against Wilhelm Weber for the 1984 Olympic Games. (F. 355, 359; CXT-237-H-I, p.1; CX-239-B.) In 1984, TAALS suspended Wilhelm Weber for working without charging for travel outside of his listed professional domicile. (CXT-1731-B.)

### V. EFFECTS

#### *A. Anticompetitive Effects*

##### 1. Price Study

317. Ninety-six AIIC freelance members reside in the United States. (Stip. 60.) Dr. Lawrence Wu, complaint counsel's economic expert, examined the daily rates charged by AIIC members domiciled in New York and Washington for private sector ("freelance") conference interpretation. (CX-3003-04.) Sixty-two members were subpoenaed; 51 returned the subpoena; and 42 produced private market contracts in response to the subpoena (the "Wu Data Set"). (Wu, Tr. 1995; CX-3005.)

318. The freelance prices charged by AIIC members indicate that AIIC members agreed to charge the AIIC "suggested minimum" rate or more during 1988 through 1991. (Wu, Tr. 2020-22, 2051-52.)

a. The "suggested minimum" rate was the most frequently charged price in each of the four years. (Wu, Tr. 2002-04.)

b. "Cheating" on the suggested minimum rate was only in 10% of transactions over this four-year period. (Wu, Tr. 2007.)

c. Ninety percent of prices charged by the AIIC members were at or above the "suggested minimum." (Wu, Tr. 1996.)

Prices by these AIIC members for private market freelance interpretation services were affected by the agreement to charge the "suggested minimum" or more as a day's rate for conference interpretation. (Wu, Tr. 2020/7-22.)

319. In the four years from 1988 through 1991, 90% of the transactions in the Wu Data Set were at or above the AIIC suggested minimum rate for that year. (Wu, Tr. 1996; CX-3004.) In the same four years, 70% of the transactions were at or within \$50 above the AIIC suggested minimum rate (Wu, Tr. 1996; CX-3004), and 41% of the transactions were exactly at the AIIC suggested minimum rate. (Wu, Tr. 1996; CX-3004.)

320. In each of the four years from 1988 through 1991, the most frequently charged price of the transactions was the AIIC suggested minimum rate for that year, to the dollar. (Wu, Tr. 1996, 2004; CX-3004.) In 1988 through 1991, the percentage of transactions at the AIIC suggested minimum rate were 28, 39, 52 and 39%, respectively. (Wu, Tr. 2003, 2007; CX-3004.)

321. Ten percent of the 1988-1991 contracts (39 out of 384) were at prices below the AIIC suggested minimum. (Wu, Tr. 2007; CX-3005.)

322. Of those 39 contracts entered into by 18 interpreters (Wu Tr. 2008), eight were for conferences in January, and may have been entered into prior to the publication of that year's AIIC or TAALS rate. (Wu, Tr. 2008-09, 2262-63; Silberman, Tr. 3335; RX-189, 157-0031, 157-0053-54, (contract for Jan. 3-6, 1991); RX-194, 161-0057; RX-191, 126-0011 (contract dated Dec. 29, 1988).)

323. Seven of the contracts charging below the minimum rate were entered into by AIIC member Raquel Felsenstein, including contracts for short interpretation assignments at Eastern High School in the District of Columbia. (Wu, Tr. 2009-10, 2221-22, 2258.) However, this member adhered to AIIC and TAALS rates and rules including proper team size when organizing teams of interpreters for conferences. (CX-2577-D; CX-2578-C; Wu, Tr. 2010-11, 2014-15.)

324. Interpreters differ in their reputation, training, experience, specialization and language combinations. (F. 199.) Conferences differ in subject matter, schedules, languages, and use of languages. (Wu, Tr. 2023-25; F. 200.) In a competitive market, prices would reflect that variety. However, the prices observed by Dr. Wu do not reflect variety, but are around the AIIC suggested minimum price. (Wu, Tr. 2025-26, 2028-29.)

325. These AIIC members were adhering to AIIC's rules as well as to AIIC's published rates. (Wu, Tr. 2017-20, 2054.)

326. The distribution of transaction prices is consistent with an agreement to charge the AIIC suggested minimum rate. The AIIC rate was charged 41% of the time; there was adherence to the suggested minimum rate 90% of the time; and there was no significant cheating on the minimum (less than 10%). (Wu, Tr. 1996.)

327. That AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output. (Wu, Tr. 1994-95, 2020-22, 2051-57.)

## 2. Industry Witnesses

### *a. Rates*

328. Intermediaries learned from interpreters that TAALS and AIIC raised the minimum rates. Berlitz determined what to pay interpreters in Western European languages by contacting TAALS and AIIC interpreters. (Clark, Tr. 610-11.)

329. Intermediaries understand that TAALS and AIIC members charged the same rates. In the late 1980's, Susan Clark of Berlitz understood that the rate Berlitz was quoted was applicable to all AIIC and TAALS members. (Clark, Tr. 612-13.)

330. Even before 1987, Berlitz knew that the TAALS/AIIC rate changed every year. (Clark, Tr. 586, 611.) There were yearly increases in the TAALS/AIIC rates. (Clark, Tr. 611-12; CX-3002.)

331. Prior to 1991, interpreters' rates went up by the same amount, typically \$25, at the same time of year. (Jones, Tr. 690-93; Davis, Tr. 845; Clark, Tr. 612; Neubacher, Tr. 764.) This pattern exists through the present. (Jones, Tr. 690-93.)

332. From 1988 through 1991, intermediaries generally paid the AIIC/TAALS rate or more, rather than attempt to negotiate lower prices with conference interpreters, whether they belonged to those organizations or not. (Clark, Tr. 613; Neubacher, Tr. 763; Jones, Tr. 688-89/10-12, 694.)

333. Joseph Citrano of Metropolitan Interpreters and Translators recruited conference interpreters and found that AIIC and TAALS interpreters did not negotiate rates, and only occasionally negotiated travel time. (Citrano, Tr. 504-06.) Members of AIIC and TAALS pointed out to Mr. Citrano that his offer "didn't conform to the rules that were in the book." (Citrano, Tr. 502-03.) In the past five or six years, interpreters referred to the rate as the TAALS rate and the AIIC rate. (Citrano, Tr. 555.)

334. Since 1991, the change in interpreter rates has been more erratic than it was before 1991, but interpreter rates have continued to climb. (Davis, Tr. 845; Weber, Tr. 1185-87.)

#### *b. Rules*

335. Interpreters viewed the industry rules "like a bible. This was how the business was conducted." (Citrano, Tr. 507.) Interpreters declined offers of employment, stating as their reason for declining the offers that those offers did not conform to industry standards. (Citrano, Tr. 508-09.)

336. Per Diem: In Susan Clark's experience at Berlitz there has always been a standard rate that conference interpreters charge for per diem. (Clark, Tr. 614.) In Berlitz's experience, the standard rate that all conference interpreters charged for per diem was \$60, now it is \$70. (Clark, Tr. 614.)

337. Travel: Interpreters insist on being paid a half day's travel, on top of a full day's interpretation fee, when they work and travel on the same day. (Citrano, Tr. 552-53.)

338. Indivisible Day: Berlitz always pays conference interpreters on a daily basis. (Clark, Tr. 624.) Brahler pays interpreters the daily rate regardless of how short the day is, and has paid a full day's rate to interpreters it hires for two to three hours. (Davis, Tr. 859-60.) "[I]t was generally understood that any portion of any full day was considered a full day's rate; in other words, the services were not prorated." (Neubacher Tr., 765-66.) The demands by interpreters conformed with AIIC's rules on indivisible day. (F. 120-29.)

339. Same Team, Same Rate: CACI pays the same rate at a conference to the most experienced and least experienced interpreters. (Jones, Tr. 688.) Neubacher paid the AIIC rate to AIIC and TAALS interpreters and to other interpreters who worked at conferences with AIIC and TAALS interpreters. (Neubacher, Tr. 763, 765.) LSI also pays the same rate to all conference interpreters in European languages. (Weber, Tr. 1184.) The demands by interpreters conformed with AIIC's rules on same team, same rate. (F. 150-57.)

340. Recording: Interpreters usually demand a fee if they are asked to provide a recording of the conference interpretation. (Jones, Tr. 705-06.) The demands by interpreters conformed with AIIC's rules on payment for recordings. (F. 244-46.)

341. Team Size: Intermediaries sometimes deviate from industry staffing requirements. In those circumstances, they pay interpreters extra compensation. (Citrano, Tr. 539; Neubacher, Tr. 767-69; Lateiner, Tr. 916.) The demands by interpreters conform with AIIC's rules on team size. (F. 169-77.)

342. Although interpreters can work alone for short presentations, CACI has found that in these situations interpreters usually ask for more money and may request that the acceptance be kept private. (Jones, Tr. 701, 745-46.) Berlitz occasionally negotiated a deviation from the strict industry staffing requirements, and in those circumstances, paid the interpreters extra compensation. (Neubacher, Tr. 767-69.)

343. Hours: Interpreters may insist on receiving overtime payments if the workday exceeds a normal workday. Berlitz pays interpreters more money when they work in excess of six hours in a single day. (Clark, Tr. 636.) Linx paid interpreters about 20% more than the standard rate when interpreters worked more than six hours in a day. (Neubacher, Tr. 804-05.) Metropolitan finds that interpreters seek overtime for anything over a seven hour workday, and it pays them an extra \$100 to \$200 each. (Citrano, Tr. 543, 545.) Brahler has paid interpreters overtime on occasions that would be an hour or hour and a half over the schedule. (Davis, Tr. 861.)

### 3. Anticompetitive Effects

#### *a. 1984 Olympics*

344. In 1984, the Olympic Games were organized privately, and the Los Angeles Olympic Organizing Committee ("LAOOC") was

extremely cost-conscious. (CX-1243-A; CX-1278-A; Weber, Tr. 1200-01.) LAOOC decided to save the expense of professional interpreters at the main Press Center by using unpaid, volunteer college students and professors. (CX-1336-D.) Wilhelm Weber, then a member of TAALS and AIIC, proposed that LAOOC use unpaid interpretation students from the Monterey Institute, where he was Dean, to replace volunteer college students and teachers who were going to be used to provide interpretation solely at the Press Center. (Weber, Tr. 1200-01.) Ten of the graduate students would act as interpreters and 40 would be translators. Professional interpreters would be used elsewhere. (CX-1268-B.) Weber wanted assurance that no professional interpreters be used at the Press Center because he "wanted to avoid the impression that by offering student interpreters [he] would be taking work away from professional interpreters." (Weber, Tr. 1202.) The LAOOC retained Weber as the Chief Interpreter, responsible for all professional interpreters and 45 student interns who worked at the games. (Weber, Tr. 1199-1201.)

345. The LAOOC initially sought to pay conference interpreters at rates below the then "going rate." Mr. Weber reported that LAOOC wanted to engage in "collective bargaining about fees." (CX-1236.) However, Mr. Weber explained to LAOOC that conference interpreters would not work for less than the "going rate" and it agreed to fees at the going rate. (Weber, Tr. 1203-05.) AIIC's Secretary-General wrote to Weber confirming that "any bargaining with the client can only be upwards and not downwards" from the local rate. (CX-1238; F. 517.) Although the LAOOC did not want to pay interpreters for non-working days, Mr. Weber told the LAOOC that such payments were "part of our code of professional conduct and that it was also current practice in the profession," and the LAOOC agreed to pay for them. (Weber, Tr. 1222/9-14, 1223/7-13.)

346. AIIC's president wrote to LAOOC from Geneva, warning against hiring non-AIIC interpreters at less than the going rate. (CX-1278-B.)

347. At its November 1983 meeting, the U.S. Region asked its representative on the AIIC Council, Jean Neuprez, to contact Mr. Weber about "potentially serious" charges. (CX-1240.) On November 21, 1983, Mr. Neuprez wrote Mr. Weber, asking him to clarify the situation. (CX-1240.)

348. At its meeting in early January 1984, the AIIC Council adopted a resolution, published in the Bulletin, disapproving Mr. Weber's use of unpaid interns. (CX-236-G; CX-1253-A; CXT-1693;

Weber, Tr. 1230; CX-5-B.) The Council directed the U.S. Region to send to Weber a letter of warning. (CX-236-G; Weber, Tr. 1230.)

349. Following the Council meeting, the U.S. Region Representative to the AIIC Council, Jean Neuprez, sent Mr. Weber a second letter warning him not to violate any AIIC rule in connection with the Olympics. (CX-1253-B; CXT-1693.)

350. Mr. Weber understood the letter from Mr. Neuprez to the U.S. Region to be a warning, a sanction, "one of the . . . possible [AIIC] actions, the others being suspension or expulsion." (Weber, Tr. 1228.) Mr. Weber believed he had to respond to correct the rumors to protect his own reputation, and to prevent interpreters who agreed to work at the Olympics from being accused of violating AIIC's rules. (Weber, Tr. 1234/1-12.)

351. Some U.S. Region members wrote to Weber refusing his offers to work at the Olympics because of the contractual conditions, and out of fear that students would be integrated with professionals. (CX-1246-A; CX-1286-A; CX-1695-A; CX-1722.)

352. On March 1, 1984, Patricia Longley, the Secretary General of AIIC, wrote a letter to Mr. Weber about the contract for interpreters at the Olympics, stating "There seem to be . . . several deviations from the AIIC standard contract." (CX-1283-A.) She complained about the cancellation clause, provisions concerning rest days, non-working days, and per diem, and the clause on recording of interpretation because it carried no written guarantee that it is for internal use only, such as the preparation of minutes. (CX-1283-A.)

353. AIIC's president and secretary general also urged LAOOC to avoid "pitfalls," and to accept AIIC's contractual conditions. (CX-1278; CX-1280.) On February 29, 1984, AIIC's president warned the LAOOC that it should not bring interpreters from other regions or non-AIIC interpreters willing to work at lower rates. (CX-1278-B.) On March 1, 1984, the secretary general, spelled out in detail AIIC's rules regarding cancellation fees, fees for rest days and non-working days, and per diem. (CX-1280-B-C.) She informed the LAOOC that officials of AIIC had asked Mr. Weber to "reopen discussions with you on the points raised in our letter and have asked M. Jean Neuprez to coordinate reactions on the part of the professional conference interpreters in North America." (CX-1280-C; Weber, Tr. 1243.)

354. Albert Daly, the president of AIIC, also wrote a letter to Mr. Weber, dated June 5, 1984, saying: "We shall hold you personally responsible as recruiting interpreter if for reasons of the non-

appearance of the USSR at the games, any of the contracts offered by LAOOC are not honored and interpreters fees paid in full, provided they do not find work elsewhere." (Weber, Tr. 1255-56; CX-1316.) Weber understood this letter to mean that Daley would ask him to pay for any canceled interpreter contracts - which totaled approximately \$700,000 - "out of his own pocket." (Weber, Tr. 1256-57.)

355. TAALS was also concerned about the Olympic games, and AIIC and TAALS shared information on enforcement and their efforts to change the terms of the contracts. (CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1733; CX-1735.) Lisa Valiyova, an AIIC and TAALS member and chairman of TAALS' "fact-finding committee," and liaison to AIIC, wrote to Mr. Weber (CX-1248; CX-1728-B), questioning how he would bring the contracts "into line with the TAALS/AIIC Codes" regarding same team, same rate; hours; and team size. Valiyova kept AIIC informed about the progress of her "Fact-Finding" investigation. (CX-1310.)

356. The LAOOC acceded to AIIC's rules in its hiring of interpreters for the Olympics, and conformed their contracts to AIIC's rules. (Weber, Tr. 1257-58, 1262.) These contracts comported with AIIC's rules on when and for what use interpreters could be recorded. (Weber, Tr. 1250/20-21, 1252/4-8, 1262/20.) AIIC was also successful at forcing the LAOOC to include the full-payment cancellation clause required by AIIC's rules, rather than the partial payment clause initially negotiated by Mr. Weber with the LAOOC. (Weber, Tr. 1235/25 to 36/7, 1262/22.)

357. AIIC took credit for the changes. In a letter to Mr. Weber dated June 16, 1984, AIIC's U.S. Region Representative stated: "Thanks, especially to AIIC's pressure (you yourself acknowledged it and were pleased), the proposed conditions were improved, and recently an acceptable cancellation clause materialized." (CX-1320-B, CXT-1320 at p.2; Weber, Tr. 1257/16 to 58/10.) That "acceptable cancellation clause" was the standard, full-payment AIIC clause. (Weber, Tr. 1235/25 to 36/7.)

358. As a result of the negotiations with Mr. Weber and AIIC, LAOOC had higher costs of simultaneous interpretation than anticipated. LAOOC reported to the president of AIIC in Geneva that: "These costs resulted in some Federations not holding Congresses here, and others substantially reducing their original interpretation requirements." (CX-1293.)

359. A November 26, 1984 letter from AIIC's president to Mr. Weber issued several warnings. (CX-1741.) Although, "the contracts

finally issued were almost in conformity with normal standards, . . . because of inadequacies in the original offers, several colleagues refused work which should normally have been theirs, and this is unacceptable under Article 5 a) of the Code." (CX-1741-A.) AIIC's president also observed that several AIIC candidates worked at the Olympics while paying their own travel expenses, "does not promise them an easy acceptance into the Association," and he noted that a very close watch would be kept on Mr. Weber with regard to his handling of the 1988 Seoul games. (CX-1741-A-B.)

360. In January 1985, the AIIC Council passed a resolution, which it published in the Bulletin, commending "those members who rejected contracts offered for the Los Angeles Olympic Games when such contracts included provisions that were not in keeping with AIIC practice." (CX-239-B.) The resolution further "Congratulates the members of the United States Region for their efforts which resulted in obtaining contracts more in conformity with normal working conditions." (CX-239-B.)

*b. Other anticompetitive effects*

361. In a history of AIIC, Mr. Thiery, past president and founding member of AIIC, wrote,

In 1957 . . . AIIC decided for the first time that the daily remuneration should go up. . . . [A]nd the intergovernmental organizations refused even to acknowledge letters. When AIIC's united front forced the decision upon them (members simply refusing contracts at earlier rates), we suddenly came to be considered as very reasonable people who entirely deserved a long due increase in pay. In fact, that was the first test of AIIC's strength. And when, in 1963-1964, AIIC decided to increase the daily rate from \$30 to \$40, large as the rise was it went through much more smoothly. (CX-203-C.)

Those "intergovernmental organizations" included the United Nations and its New York headquarters. (Weber, Tr. 1137-38.)

362. In 1974, Mr. Thiery wrote that "AIIC minimum rates are recognized the world over." (CX-204-B.) AIIC interpreters at the United Nations in New York walked out in protest "against what were regarded as unreasonable working hours, and it is understood that satisfactory solutions have now been agreed by the authorities." (CX-204-F.)

363. AIIC and its members understand that the price fixing rules applied in the United States. (Weber, Tr. 1140/18-22 (mandatory

minimums), 1223/11-13 (non-working days, travel), 1225/9-13 ("same team same rate"), 1247/18-22 (paid rest days), 1252/9-16 (per diem), 1266 (travel); (Bishopp) CX-301-Z-33/1-13 (indivisible daily rate), Z-35/12-16 ("same team same rate"), Z-58/14 to Z-59/5 (minimums), Z-67/19-24 (per diem), Z-87 to Z-89 (non-working days, rest days), Z-91/1 to Z-92/7 (travel days); Bowen, Tr. 1011-12 (phantom travel charges); Hamann-Orci, Tr. 38/1-5 (mandatory minimums), 39/25 to 40/16 (same team same rate); Lateiner, Tr. 955/10-14 (minimum rates); Lucarrelli, Tr. 1762-64 (travel fees); (Moggio-Ortiz) CX-303-Z-86/11-14 (mandatory minimum), Z-113/5-13 (non-working days); (Motton) CX-300-Z-80/5-7 (indivisible daily rate); Saxon-Forti, Tr. 2696/10-18 (indivisible daily rate); Swetye, Tr. 2819/14-16 (same team same rate).

364. In 1975, "the U.S. Region has finally managed to bring PAHO [Pan American Health Organization] into line." As Marc Moyens reported to the AIIC Council and to U.S. Region members, "PAHO's Chief of Personnel sent a letter to our Council member [Moyens] assuring him that the PAHO's fee would now be '154.15 gross' in the USA. It is the first time such an assurance has been given by PAHO." (CX-405-A-B.)

365. In 1976, AIIC members refused to work for the Organization of American States in Santiago de Chile at \$83, insisting on the AIIC world-wide minimum rate of \$105. U.S. Council member Marc Moyens negotiated fees with OAS, which "resulted in a deal under which AIIC members agreed for the last time to work for \$83 provided that: 1) OAS rate would be raised to \$105 right after the Conference; 2) this fee would apply all over the American continent; 3) this fee would be \$105 net in the U.S. region, in conformity with U.N. practice. The AIIC minimum was thus established and it was agreed that OAS would hold periodic meetings with M. Moyens to review the rates and settle any pending questions such as contracts and working conditions." (CX-407-C.)

## *B. Market Share*

### 1. Relevant Markets

366. The relevant product markets in this case include conference interpretation of language pairs (English to Spanish, Spanish to English, French to English, etc.). (Wu, Tr. 2057, 2063; Silberman, Tr.

2985.) The relevant geographic market is the United States. (Wu, Tr. 2193-94.)

367. Conference interpretation is a narrower product market than all interpretation. Persons unable to provide simultaneous interpretation generally would not be hired as conference interpreters in the private sector. (Weber, Tr. 1172/4-5; Jones, Tr. 681; Clark, Tr. 591.)

## 2. Market Share Calculation

### *a. Numerator*

368. AIIC's U.S. members are distributed among the following languages: 129 French, 95 Spanish, 22 German, 16 Italian, 23 Portuguese. (RX-503.) These figures include all interpreters rated A, B or C in any of those languages. An "A" rating represents native fluency, a "B" represents perfect command, and a "C" language is one that the interpreter can understand, but does not typically work into. (CX-600-O.) Including all such interpreters is necessary in order to be consistent with the data from other sources, since some other sources do not distinguish interpreters by A, B or C ratings. (RX-220 (Berlitz); RX-258; RX-342 (CACI); RX-335 (Lateiner); RX-334 (LSI); RX-288 (Metropolitan).)

369. In addition to AIIC members, the numerator of a market share calculation should include TAALS members. TAALS members adhered to the same rates and rules as did AIIC members. (F. 407-23.) TAALS members in the United States worked primarily between English and the French, Spanish, German, Italian, and Portuguese. (CX-995; CX-997; CX-998.)

370. TAALS and AIIC have overlapping memberships. (Luccarelli, Tr. 1568; Lateiner, Tr. 917, 922; CX-301-Z-134, Z-148 (Bishopp).) AIIC and TAALS have the same membership requirements. (CX-1-B; CX-986-A, C.)

371. In 1995, in the United States, TAALS had 97 members and AIIC had 144 members. (CX-3006; CX-998; CX-600; CX-601.) The overlap of 52 members represents 54% of TAALS' members in 1995 that were also members of AIIC. (Wu, Tr. 1991-92.)

372. In 1991, in the United States, TAALS had 108 members and AIIC had 126 members. (CX-3006; CX-995; CX-608; CX-609.) The overlap of 54 members represents 50% of TAALS' members in 1991 that were also members of AIIC. (Wu, Tr. 1991-92.)

373. Thus, the number and percentage of TAALS members that were also AIIC members stayed roughly the same from 1991 to 1995. Over many years, many U.S. Region members were also TAALS Council Members. (CX-913-F; CX-914-C; CX-919-B; CX-302-J (Luccarelli).)

374. Adding interpreters who are members of TAALS but not AIIC (RX-503), yields numerators of interpreters who were members of AIIC or TAALS at January 1, 1995: 159 French, 129 Spanish, 30 German, 20 Italian, 31 Portuguese.

375. In addition to AIIC and TAALS members, the numerator of a market share calculation should include candidates for admission to both TAALS and AIIC. Such candidates adhere to the rules of the associations. (F. 44-47, 304.) The number of such candidates is not in the record.

*b. Denominator*

376. Respondents' estimates of the total number of conference interpreters, by language, are set forth in RX-502. Respondents' expert offered three estimates. (RX-502; Silberman, Tr. 3008-11.) Respondents' expert made these estimates by counting the names that appeared on lists of interpreters obtained from the State Department, AIIC, TAALS, ASI, and the intermediaries who testified at trial. (RX-500; Silberman, Tr. 2992-93.) Some of those private intermediaries' lists are not limited to conference interpreters. (Clark, Tr. 667 (Berlitz); Jones, Tr. 683-684 (CACI).)

377. Respondents' expert did not make any adjustment to his estimates to account for the fact that the lists he used included individuals other than conference interpreters. (RX-502 n.\*; Silberman, Tr. 3010-11, 3223-24, 3237-38.)

378. The difference between respondents' largest estimate (no. 1) and their other estimates is that estimate no. 1 includes all State Department seminar interpreters, whether or not those interpreters appear on the list of any intermediary. (RX-500; Silberman, Tr. 3237/18-22.) State Department seminar interpreters should not be included as current participants in the market for conference interpretation.<sup>3</sup> The difference between respondents' intermediate estimate (no. 2) and smallest estimate (no. 3) is that estimate no. 2

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<sup>3</sup> Intermediaries do not regard seminar interpreters as substitutes for conference interpreters and have not used seminar interpreters rather than AIIC members or other conference interpreters. (Neubacher, Tr. 770; Weber, Tr. 1174.) The State Department, likewise, does not use seminar interpreters for conferences except "in a real emergency when no conference interpreter is available." (Obst, Tr. 285.)

includes 238 interpreters whose names appear in Berlitz's files but not on the lists of any other intermediary. (RX-500; Silberman, Tr. 3244/12-24.) The interpreters whose names appear in Berlitz's files but not in any other intermediary's files should not be included in the denominator. The difference between respondents' estimate no. 2 and estimate no. 3 is that estimate no. 2 includes 238 interpreters whose names appear in Berlitz's files but not on the lists of any other intermediaries. These intermediaries should not be counted in the denominator.<sup>4</sup>

379. Using respondents' smallest estimate, no. 3, as the denominator and an adjusted numerator consisting of all TAALS and AIIC members (less overlaps) yields "market shares" of the two associations combined based on headcounts, as follows: 44% of the estimated number of French conference interpreters (159 of 364); 34% of the estimated number of Spanish conference interpreters (129 of 374); 28% of the estimated number of German conference interpreters (30 of 107); 29% of the estimated number of Italian conference interpreters (20 of 68); and 24% of the estimated number of Portuguese conference interpreters are AIIC or TAALS members (31 of 131).

380. Knowledgeable intermediaries placed the number of conference interpreters between 300 and 500, making AIIC's (and TAALS') membership between 35 and 60% of all U.S. conference interpreters. (Wu, Tr. 2198-99; Clark, Tr. 597-98 ("a few hundred"); Weber, Tr. 1197 (500); Davis, Tr. 857 (500 plus various categories "off the top of my head"); Wu, Tr. 2214-15 (Berlitz Production Manager Lisa Broadwell estimated 300); Hamann-Orci, Tr. 56 (300).)

381. Alternatives to AIIC and TAALS interpreters are limited. (Citrano, Tr. 526-27.) In 1987 AIIC reported that "in North America, in particular in New York (United Nations). . . , local freelance interpreters are often difficult to obtain." (CX-248-Z-3.) Berlitz's business would suffer a "very negative" impact if it did not use AIIC or TAALS interpreters. (Clark, Tr. 638.) Brahler would find it difficult to staff a conference if it could not use AIIC or TAALS members. (Davis, Tr. 866.) In 1979, AIIC's president stated that "our association . . . includes, perhaps, nine tenths of the capable members of this profession world wide. . . ." (CX-221-K.)

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<sup>4</sup>The Berlitz list used was not limited to conference interpreters (Clark, Tr. 667/4-6), is not currently used by the Berlitz employee who recruits interpreters (Silberman, Tr. 3239/2-6), and includes interpreters who do not perform simultaneous interpretation. (Silberman, Tr. 3247/9-18.)

382. The State Department is the second largest public employer of interpreters in the United States, after the United Nations (Obst, Tr. 330-31), yet it is frequently difficult for the State Department to find conference interpreters in the romance languages (French, Spanish, Italian, and Portuguese) in the United States. (Van Reigersberg, Tr. 407-08.)

383. AIIC and TAALS members constitute most of the qualified conference interpreters in the United States. (CX-2576-A, CX 2573 (Weide); CX-2600 (Swetye); CX-2459-E to F (Weber); Hamann-Orci, Tr. 44; CXT-221-A to Z-20, p.3.)

### 3. Ease of Entry

#### *a. Historic entry*

384. AIIC has maintained rates for the United States since at least 1973 (Weber, Tr. 1143; CX-201-F), and AIIC's agreements continue to achieve adherence to the "suggested minimum" rate. (F. 317-27.) New entry into the conference interpretation profession has not been sufficient to defeat the agreements.

385. Entry into the conference interpretation profession has been slow in the United States over the last several years. Wilhelm Weber, who for 14 years was Dean of the Interpretation Department at the Monterey Institute of International Studies (Weber, Tr. 1122), wrote in 1990 that several factors in the United States "have led to a very low turnover in the profession, thereby inverting the age pyramid in favor of older interpreters and seriously endangering the future of the profession in this country." (CX-2459-D.)

386. Interpretation schools in the United States produce very few graduates. During Mr. Weber's tenure at Monterey, that school produced "normally not more than four or five [conference interpretation graduates] a year." (Weber, Tr. 1195-96.) Georgetown's program in interpretation graduated 10 students in the past four years, 1992 through 1995. (Bowen, Tr. 997-98.) Georgetown and Monterey "are the two main places" that teach conference interpretation in the United States. (Luccarelli, Tr. 1652/12-13.)

#### *b. Entry barriers*

387. Private sector intermediaries will not hire as conference interpreters persons who have not had formal training or substantial

experience in conference interpretation. Berlitz hires conference interpreters who are members of TAALS or AIIC, or have similar experience. (Clark, Tr. 592.) CACI requires formal education in simultaneous interpretation and at least two years of experience. (Jones, Tr. 684.) Language Services International and Metropolitan hire as conference interpreters only people trained in simultaneous conference interpretation. (Weber, Tr. 1161/11-19; 1163/9-23; 1178/13-24; Citrano, Tr. 531-32.)

388. In addition to an undergraduate degree, conference interpreters have training in conference interpretation. AIIC members who testified had extensive training: Margareta Bowen, Vienna and Georgetown (Bowen, Tr. 989-90); Janine Hamann-Orci, two certificates at Georgetown (Hamann-Orci, Tr. 11); Jeannine Lateiner, five years at Geneva (Lateiner, Tr. 897-98); Luigi Luccarelli, two years at Monterey (Luccarelli, Tr. 1552-54); Evelyn Moggio-Ortiz, three diplomas from Geneva (CX-303-J); Peter Motton, London (CX-300-I); Anna Saxon-Forti (Saxon-Forti, Tr. 2654); Idette Swetye (Swetye, Tr. 3842); Ursula Weide, four semesters at Heidelberg and four semesters at Georgetown (CX-306-F); Wilhelm Weber studied interpretation and translation for four years at the University of Geneva. (Weber, Tr. 1118.)

389. A conference interpreter without specialized training cannot do simultaneous interpretation. (Davis, Tr. 853.)

390. The ideal candidate for training in conference interpretation should have lived extensively in the countries of each of his languages, and has a university degree in something other than languages or interpretation "such as economics, medicine, the law and so on." (Weber, Tr. 1166/7-9.)

## VI. JURISDICTION

### *A. Personam Jurisdiction Over AIIC*

391. U.S. Region members hear reports of AIIC's committees, groups, and sectors at U.S. Region meetings, and discuss AIIC-related issues, including upcoming AIIC meetings (CX-436-E; CX-417-B); the AIIC "rates" (CX-432-E) and working conditions (CX-435-A); the AIIC logo (CX-434-B); the future of AIIC (CX-438-A; CX-439-B); the procedure for proposing amendments to AIIC's Basic Texts (CX-1406-B); sponsorship of Russian-speaking interpreters for AIIC membership (CX-436-E; CX-439-B); and the possibility of

adding intermediate level classifications of interpreters' language abilities (CX-436-F; CX-415-B).

392. AIIC asked the U.S. Region to send an observer to the Monterey Institute in California on behalf of the AIIC Schools Committee, and the U.S. Region did so. (CX-432-D; Stip. 50.)

393. The U.S. Region used the funds in its U.S. bank account (CX-300-K; CX-300-M (Motton); CX-432-B) to reimburse, fully or partly, Region members who travel to perform tasks for AIIC and for other AIIC business (CX-438-A), including Council (CX-432-C), NAS (CX-432-D to E), Permanents Committee (CX-432-D to E), and AIIC-wide meetings (Stip. 50; CX-405-B).

394. The Assembly elects a member who resides in the United States to be the U.S. Region representative to the AIIC Council. (Luccarelli, Tr. 1628; CX-304-Z-53 (Motton).) This person typically opens and presides over meetings of the U.S. Region. (Stip. 46.)

395. The Treasurer of the U.S. Region resides in the United States. (Stip. 45.) This person collects AIIC dues from U.S. members and transfers the funds to AIIC in Geneva, reminds members of their obligation to pay dues (Stip. 45), and has warned that failure to do so would result in deletion of their name from the annual directory. (CX-407-B; CX-300-G, K, L (Motton); CX-401-A.)

396. The President of AIIC and other foreign-based AIIC officials travel to the United States on AIIC business. (CX-305-I, L, Z-282 to Z-283 (Sy); CX-245-J; CX-500-A to B.)

397. AIIC members with professional addresses in the United States participate directly or by proxy, in meetings of AIIC's U.S. Region, which are held once or twice a year. (CX-410; CX-441; CX-443; CX-450.)

398. Members of the U.S. Region actively participate in AIIC decisions by attending, or by giving their proxies to U.S. Region members who will attend an AIIC General Assembly. (CX-423-B, CX-436-E, CX-407-E; CX-300-Z-98 to Z-104 (Motton).) The U.S. Region has paid for expenses of U.S. Region members to participate in AIIC meetings. (Stip. 50.)

399. AIIC members domiciled in the United States serve on AIIC committees. (Stip. 27; CX-300-J (Motton).)

400. Members of the U.S. Region spent three years preparing for the AIIC General Assembly held in New York in 1979. (CX-407-F; CX-409-C to D; CX-410; CX-411-B; Stip. 28.)

401. A resident of New York, N.Y., served as AIIC vice-president, and a resident of Washington, D.C., served on the AIIC

staff interpreters and budget committees. (CX-245-J; CX-300-O to Q; CX-616-Y; CX-606-Z-248.)

402. AIIC collects dues from U.S. members annually and wires 10% of the total annual dues of the U.S. Region's members back directly to the U.S. Region's bank account as a refund. (Stip. 49; CX-300-K to N, Z-157 (Motton); CX-304-Z-53 (Motton).)

403. U.S. Region members used to pay AIIC dues to the U.S. Region, which retained a portion of those dues to cover U.S. expenses and forwarded a portion to AIIC headquarters. (CX-407-A to B) More recently, U.S. Region members mail a check to the U.S. Region Treasurer who converts the dues into Swiss Francs and wires them to AIIC headquarters in Geneva. (CX-300-K to L; CX-434-C.)

404. AIIC sends funds to U.S. members to reimburse them for attending meetings on its behalf. (CX-432-C-D.)

405. The U.S. Region received special "outlying regions contribution" funds from AIIC. The U.S. Region has to account to the AIIC central organization for those funds. (CX-300-M to N, Z-24; CX-1510-A.)

406. AIIC holds meetings of its international membership within the United States. The General Assembly met in New York in 1979. (Stip. 28-30; CX-245-J; CX-255-F.)

407. AIIC held educational events in the United States. (CX-245-J; Stip. 51, 73; CX-300-Z-51 to Z-52; CX-434-D; CX-436-D.)

408. AIIC regularly sent Bulletins to the United States that report on the general business of AIIC, discuss AIIC's rules and announce the dates of future meetings. (Stip. 17-19; CX-302-Z-123 to Z-124 (Luccarelli); CX-303-Z-57 (Moggio-Ortiz); CX-306-Z-30 to Z-31 (Weide); CX-214-E to F; CX-259; CX-268; CX 270.)

409. AIIC regularly sent surveys and questionnaires to members in the United States. (Stip. 20-23; CX-239-B; CX-1643-E; CX-432-A; CX-434-A, C; CX-436-C.)

410. AIIC mails membership directories listing members' names, addresses and language combinations to U.S. consumers to help its members market their services. (Stip. 59, 61-62; CX-268-Z-7; CX-301-Y to Z-1 (Bishopp).)

411. AIIC provided the U.S. Region with an information packet on conference interpretation and interpreter terms and conditions, to which the region could add local information such as fees and per diem. (CX-432-F; CX-434-B; CX-303-Z-69 to Z-70 (Moggio-Ortiz).)

412. AIIC prepared form contracts for members, including U.S. members, to use when negotiating agreements with conference sponsors. (Stip. 66; CX-2059-A to E; CX-2060-A to H; CX-2-Z-41, 1991 Standards of Professional Practice, Article 2(a).)

413. AIIC negotiates "Agreements" with large intergovernmental and other international organizations that hold meetings and employ interpreters in the United States, governing the pay and working conditions of such interpreters. (Stip. 74-75; Moser-Mercer, Tr. 3540/1 to 41/5; Luccarelli, Tr. 1591/9-21, 1643/5 to 44/14; CX-305-Z-345/14 to Z-347/24 (Sy); CX-2598; CX-2597.)

414. AIIC offered insurance to U.S.-based members and published information in its Bulletin about insurance programs offered by unaffiliated third-parties. (Stip. 70; CX-301-Z-152.8 (Bishopp).)

415. AIIC sent membership cards in credit card format to U.S. members, entitling them to special discounts AIIC has negotiated for its members at hotels in the United States. (CX-268-Z-7; CX-432-I to J; CX-439-B.)

416. AIIC provided its U.S. interpreters with a computerized list of convention centers and other potential customers, seminars on public relations techniques and model Yellow Pages advertisements. (CX-268-Z-7 to Z-8.)

417. AIIC maintained a "solidarity fund" that lends money to members, including U.S. members. (CX-301-Z-152.8 to Z-152.9 (Bishopp).)

418. AIIC purposefully availed itself of the benefits of U.S. laws. AIIC's 1991 Standards of Professional Practice, Article 2(a), states, "As far as possible, members shall use a standard form of contract as approved by the Association." (CX-2-Z-41.) The AIIC standard form contract referred to by Article 2(a) calls for the application of U.S. law to interpretation of contracts negotiated by U.S. members. (CX-2059-B; CX-2060-D.) Further, AIIC members lobbied the United States Congress to protest the Postal Union's failure to hire U.S.-based interpreters. (CX-1404.)

*B. Minimum Contacts With The United States Arising  
From Conduct Challenged In The Complaint*

419. AIIC published rates of remuneration for the United States. (F. 93-96.)

420. AIIC prepared schedules of per diem charges (to cover expenses while on work-related travel), with entries unique to the United States. (F. 113, 115.)

421. AIIC tailored its work rules for application in the United States. (F. 96 (rates); F. 113 (per diem); F. 125 (indivisible day waiver); F. 171 (team size).)

422. AIIC produced documents called "Local Conditions in the U.S.A.," which included interpretation team size, contracting methods, and paid briefing days for scientific and technical conferences. (Stip. 22; CX-50; CX-56.)

423. At the request of its U.S. members, AIIC waived the U.S. applicability of provisions concerning interpreters working alone and authorized interpreters within the United States to perform simultaneous interpretation alone for up to 40 minutes. (CX-1384-A; CX-268-F; CX-301-Z-152.43 (Bishopp); CX-300-Z-33 to Z-36 (Motton); CX-432-G to H.)

424. The U.S. Region discussed and sent to Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." (CX-439-A, D; CX-1408-A.) This document was intended ensure the uniform application of the AIIC Code and its Annexes in the United States. (CX-439-A, D to F; CX-1408-A, C to E.)

425. In 1991, the AIIC Council gave 3500 Swiss Francs to the U.S. Region for FAX machines to be used in New York, Washington, D.C. and the West Coast. (CX-439-A.)

426. AIIC surveys its members, including those in the U.S., annually on market conditions. (Stip. 21, 23; CX-268-J; CX-1643-E; CX-434-A, C; CX-432-A.) The U.S. Region provided AIIC with information on the U.S. market for interpretation. (CX-210-F-G; CX-211-B-C; CX-218-G-H; CX-270-E; CX-435-A; CX-1346.)

427. AIIC reports on market conditions in the U.S. (CX-302-Z-164, Z-384 (Luccarelli); CX-245-H; CX-259-S; CX-305-Z-216 to Z-217 (Sy).)

428. AIIC investigated complaints against U.S. Region members for violations of its rules. (Wilhelm Weber, F. 181, 229, 242, 249, 344-60); Marc Moyens, F. 182, 230; Jeannine Lateiner, F. 182, 285, 316.)

429. AIIC cautioned U.S. Region members against moonlighting and double-dipping (CX-432-G to H) and solicited complaints from the U.S. Region against U.S. members who have moonlighted in

violation of AIIC rules and asked for the moonlighters' names and copies of contracts. (CX-432-M.)

430. The U.S. Region conspired with AIIC. (F. 75-89.)

431. The U.S. Region representative to the AIIC Council advised members on how to comply with the rules and issued warnings. (CX-1471; CX-1470-A.)

432. U.S. members of AIIC serve on the bodies responsible for creating and enforcing AIIC's rules. (CX-300-O to Q (Motton); CX-2490-A to G; CX-1-G-H and CX-2-G to H (1991 & 1994 AIIC Statutes Article 24 (6).)

433. AIIC advised one U.S. conference organizer who had inquired about whether interpreters' conduct had violated the AIIC Code of Ethics to contact the U.S. Region representative to the AIIC Council if she wanted to pursue the matter. (CX-1393; CX-1396.)

434. An AIIC Council member criticized some contracts in the United States that violated AIIC rules. (CX-405-B.)

435. AIIC has cooperated with TAALS with respect to conduct in the United States challenged in the complaint. (F. 307-16, 355.)

436. The AIIC General Assembly met in New York in 1979 and voted to adopt provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. (CX-6-A to M, CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D.)

437. AIIC's Non-Agreement Sector met in Key Biscayne, Florida in 1987, and decided to ask AIIC to be more restrictive in granting waivers of the AIIC rules challenged in the complaint. (CX-245-I.) At that meeting, the Non-Agreement Sector also agreed on manning strengths, fees for radio and television interpretation, and on an extra fee of 20% or 100% when interpretation is recorded. (CX-245-F to H.) In addition, members were informed that the daily rate in the United States was \$320, with per diem based on the price of a single room in a good hotel, plus 50%. (CX-245-H.)

438. AIIC's Non-Agreement Sector met in Washington, D.C. in 1992. Members discussed AIIC provisions on team strength, portable equipment, and recorded interpretation. (CX-270-F to G.)

439. AIIC sends mail to U.S. members from Geneva about AIIC meetings, waivers, changes to the provisions, and disciplinary actions against members violating AIIC work rules. (Stip. 17-19; CX-268-F, K; CX-266-E; CX-300-Z-23 to Z-24 (Motton).) AIIC mailed to the

United States copies of its rate schedules including rates unique to the United States. (CX-306-Z-31, Z-189 (Weide).)

440. AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before General Assembly meetings. (CX-1406-B; CX-266-Z-5; CX-260-A to B.)

*C. Personal Jurisdiction Over U.S. Region*

441. The U.S. Region is subject to personal jurisdiction in the United States. (Order re Complaint Counsel's Motion for Partial Summary Decision, Nov. 29, 1995, at p.3.)

*D. The U.S. Region As A Separate Entity Under Section 4*

442. AIIC has 22 regions including the U.S. Region. (Stip. 31-32, 35; CX-1-G, I-K.)

443. The membership of the U.S. Region consists of AIIC members having their professional address in the United States. (Stip. 33, 36.)

444. AIIC's "General Document on Regions" and Articles 34 to 36 of the AIIC Statutes serve as the charter for the creation, recognition, representation, and governance of the U.S. Region and all regions. (Stip. 31; CX-1-K, Z-8-12.)

445. The U.S. Region has its own Rules of Procedure. (Stip. 38.) The rules govern its members' participation in the U.S. Region activities, identify the U.S. Region's officers, set down meeting schedules, and provide for budgetary disciplines. (Stip. 38, 43, 44, 46; CX-2124-A; CX-417-F; CX-304-Z-65 (Motton); CX-2449.)

446. The U.S. Region holds meetings, once or twice a year, at which nearly half of U.S. AIIC members are present or represented. At these meetings, the U.S. Region holds elections, reviews the U.S. Region's financial status, and conducts U.S. Region business. (Stip. 39, 40; CX-410-441; CX-443-450.) The U.S. Region mails to all members minutes of its meetings that are approved at the following meeting. (Stip. 47; CX-410 to CX-441; CX-443 to CX-450.)

447. The U.S. Region elects a treasurer and a regional secretary, and nominates a candidate for regional representative to serve on the AIIC Council. (Stip. 43, CX-1-K, Z-8 to Z-12; CX-429; CX-302-Z-348 to Z-349 (Luccarelli); Luccarelli, Tr. 1628.) The U.S. Region's treasurer, regional secretary, and regional representative serving on

the AIIC Council operate together under the term "the Bureau." (Stip. 44; CX-2124-A; CX-429; CX-435-B; CX-304-Z-53 to Z-53 (Motton).)

448. When voting at AIIC Council meetings, Luigi Luccarelli, the current U.S. Region representative, votes according to his understanding of the views of the members of the U.S. Region. (CX-302-Z-350/2-20 (Luccarelli).)]

449. The U.S. Region maintains its own funds in bank accounts in the United States (CX-432-B; CX-443-A; CX-300-M/2-M/6), makes decisions regarding disbursements (CX-450-C; CX-436-D; Stip. 50), and receives and collects AIIC membership dues. (Stip. 49; CX-407-A to B; CX-300-K/10-M/6 (Motton).)

450. With AIIC's regional structure and according to its purposes, each region represents the profession of conference interpreters in its region and safeguards their interests. (CX-1-A; CX-2-A; CX-274-D.)

451. The U.S. Region represents conference interpreters in the United States and safeguards the interests of U.S. Region members. The U.S. Region: (a) recommended to the AIIC Council daily rates or agreed to daily rates applicable in the United States (Lateiner, Tr. 916-920; Weber, Tr. 1147; CX-201-F; CX-222-P; F. 90-103); (b) adopted recommendations relating to proposed revisions to AIIC's code and professional standards that reflected the interests of the U.S. Region (CX-435-B); (c) negotiated with the Organization of American States regarding daily rates for interpreters (CX-407-C); (d) adopted per diem rate formulas applicable in the U.S. Region (CX-301-Z-65 to Z-66 (Bishopp); CX-432-F; CX-434-C); (e) issued a warning letter to a U.S. member, Wilhelm Weber, about possible violation of AIIC's rules in connection with interpretation at the 1984 Olympics in the United States (Weber, Tr. 1226-28; CX-1253-A to C; CXT-1253-A to C); (f) cautioned U.S. members about accepting jobs at the 1984 Olympics in the United States that do not conform to AIIC's rules (CX-1253-B; CXT-1253-B); and (g) encouraged U.S. Region members to work in the United States in accord with the AIIC working conditions applicable in the United States. (CX-439-B; CX-301-Z-152.47 to Z-152.48 (Bishopp).)

452. The U.S. Region adopted team size tables and length of day rules for the United States that are different than AIIC's universal team size tables and length of day rules (CX-2254; CX-407-F; CX-409-A; CX-439-B, D-F; CX-50; CX-56; CX-301-Z-152.47 to Z-152.48 (Bishopp).) It has sought a waiver of the AIIC rules to allow

interpreters to work alone for 40 minutes in the United States. (CX-301-Z-152.14 to Z-152.15 (Bishopp); CX-432-G; CX-435-A.)

*E. Members' Profit*

453. Respondents' members are profit seekers. AIIC's members engage in the profession of conference interpretation. (Stip. 8; CX-1-B, Art. 6.)

454. One of AIIC's goals is to represent the profession of conference interpreter and to safeguard the interests of its members. (CX-2490-D, ¶ 10; CX-1458-A; CX-1-A; CX-2-A; CX-245-D.)

455. AIIC defends the interests of its members "in case of controversy surrounding the application of agreed standards." (CX-1458-A.)

456. AIIC's president stated that the association exists to serve the interests of its members. (CX-305-Z-184 to Z-185 (Sy).)

457. AIIC adopted rules requiring its members to charge AIIC-published rates. (F. 90-157 (mandatory rates, per diem, non-working days, "same team same rate"); F. 237-54 (travel arrangements, cancellation, recording, charity).)

458. AIIC rules are designed to improve the terms and conditions under which members work. (F. 158-211 (team size and hours); F. 212-36 (professional address); F. 255-303 (package deals, exclusivity, trade names, portable equipment, non-interpretation services, moonlighting, double-dipping, advertising).)

459. AIIC holds meetings of its entire membership, as well as meetings of committees and regions, at which issues affecting interpreters' livelihoods are discussed. (CX-271-B; CX-259-Q.)

460. AIIC aims is to improve members' remuneration. (CX-208-I; CX-273-G; CX-231-O.) AIIC's president stated in 1957: "AIIC decided for the first time that the daily remuneration should go up." (CX-203-C.) The AIIC Council reminded members in 1973 that "it is the Council's duty, as part of its responsibility for protecting members' interests, to maintain interpreters' remuneration by effecting readjustments and alignments to rates." (CX-201-E; CX-224-Y.)

461. AIIC's Basic Texts refer to terms of employment that relate to members' remuneration. (CX-2-Z-40 to Z-49; F. 90-157 (daily rate and rate); F. 150-57 (same team).)

462. AIIC mailed schedules of rates for conference interpretation. (F. 93-96.)

463. AIIC aims to improve the working conditions for all interpreters. (Stip. 63; CX-245-C.)

464. Respondents assist freelance members to secure interpretation jobs. (F. 465-75.)

465. AIIC rules encourage the hiring of its members. AIIC Guidelines for Recruiting Interpreters require that "members of the Association and applicants for membership shall be approached before non-members." (CX-219-M to N; CX-2-Z-51; CX-1-Z-48.)

466. AIIC membership helps interpreters obtain work. (CX-304-Z-83, Z-110 to Z-111 (Motton); CX-301-Z-152.3 (Bishopp); CX-280-E.)

467. AIIC produces an annual directory, with the name, address and language combination of each member. (Stip. 59; CX-600-A, Z-12, Z-90 to Z-92; CX-606.) Conference interpreters and intermediaries use AIIC's directory to recruit interpreters. (Clark, Tr. 593; Weber, Tr. 1159; Hamann-Orci, Tr. 91.) AIIC sends its directory to purchasers of interpretation services. (CX-268-E; RX-22, 405; CX-304-Z-109/16 (Motton).)

468. The AIIC directory facilitates searching for interpreters with a specific languages or in a particular location. (Stip. 62.) AIIC intends its membership directory to be used by employers. (CX-274-B; CX-1458-A.) Interpreters join AIIC to get their names in the AIIC directory used by chief interpreters and conference organizers. (CX-271-M; Swetye, Tr. 2795; CX-306-X/2 (Weide); Hamann-Orci, Tr. 21; CX-304-L, Z-109/24 to Z-110/11 (Motton).)

469. AIIC provides members with Availability Cards used to inform potential employers of their available dates. (Stip. 64; CX-274-D; CX-2092-A-B.)

470. AIIC's treasurer wrote to members: "[D]on't forget that AIIC has been working for several years in order to improve physical and technical conditions of work . . . to improve our remuneration and that, in particular, the mention of your name and quality in the Yearbook is often most helpful in the pursuit of your professional career." (CX-201-B.)

471. AIIC refers business to members. (CX-427-A; CX-2050-B; CX-1583-A.)

472. AIIC posts employment opportunities in the AIIC Bulletin. (CX-253-E; CX-254-F; CX-276-W, CX-2497-K.)

473. AIIC promotes AIIC members to prospective customers. (Luccarelli, Tr. 1625; CX-274-B to C; CX-259-T; CX-257-O.) AIIC

uses the Public Relations Committee "to get more work for our members." (CX-1593-A; CX-280-F; CX-2490-E, ¶ 11.)

474. AIIC advised potential buyers of interpretation services to "entrust the recruiting of a team of interpreters to those AIIC members who are ready to perform this essential service." (CX-215-B; CX-2093; CX-2103-A to J.)

475. AIIC published a magazine, *Communicate*, to promote interpretation to purchasers. (CX-2095-A to D; CX-279-I.)

476. AIIC provides members with form contracts (containing AIIC's working conditions) for agreements with clients. (Stip. 66; CX-2059-A to F; CX-2060-A to H.)

477. AIIC provides members with other materials to educate purchasers on interpretation services and the staffing of conferences. (CX-1458-A, L to M; CX-2088-A to F; CX-2089.)

478. AIIC rates interpretation equipment and facilities in a *Directory of Conference facilities*. (CX-259-N to O; CX-2073; CX-2074; CX-2070-A to Z-65; CX-2071-A to N; CX-2112.)

479. AIIC publishes a quarterly AIIC Bulletin to members. (Stip. 67; CX-259; CX-268; CX-270; CX-274.)

480. AIIC's Statistics Committee surveys AIIC members, including those in the United States. (Stip. 20.) These surveys provide members with accurate figures on employment, language trends, and venues of meetings. (CX-268-J; CX-269-G; CX-1643-E.)

481. AIIC surveys users of interpretation services. (Stip. 68; CX-259-I; CX-280-I to M.)

482. AIIC provides members with information concerning the calculation of Value Added Taxes with respect to interpretation services. (CX-280-E; CX-71 to CX-84; CX-1643-E.)

483. AIIC negotiates discounted prices on members' purchases. (CX-268-Z-7; CX-259-G.) AIIC membership cards entitle their holders to discounts at hotels and on airfares. (CX-268-Z-7; CX-1458-F; CX-2058-A to W.) Members of AIIC previously received discounts on the purchase of publications, such as dictionaries. (Stip. 69.) AIIC provides members with applications for credit cards. (CX-1658-E.)

484. AIIC provides its members insurance plans for health, loss of earnings, and retirement. (CX-259-E; CX-306-Z-135/6 (Weide); CX-301-Z-152.8/17 (Bishopp).) For the Non-Agreement Sector, AIIC negotiates agreements with insurance plans for accident, sickness and loss of earnings benefits to which members can then subscribe

directly. (CX-1643-C; CX-261-W; CX-1458-M; CX-304-Z-126, Z-331 (Motton).) AIIC also makes available travel insurance. (CX-1658-F; CX-1458-M; CX-304-Z-126, Z-331 (Motton).)

485. AIIC members manage two retirement plans for members. (Stip. 71, 72; CX-2077-D to E; CX-1458-M; CX-1643-C; CX-2076-A.)

486. AIIC maintains a "Solidarity Fund" to assist members through grants and loans in emergency distress situations, such as workplace accidents. (CX-226-Z-5; CX-301-Z-152.8/22 to Z-158.9/4 (Bishopp); CX-254-H; CX-2085-B.)

487. AIIC contacted European governments to obtain exemption from the Value Added Tax for interpretation services. (CX-280-D-E; CX-268-J.)

488. AIIC contacted a U.S. Senator to increase employment for U.S. interpreters in a meeting of the United Postal Union. (CX-1404-A-E.)

489. AIIC safeguards the interests of its members by training and research. (CX-301-Z-1/22-24 (Bishopp).) AIIC organized lectures and seminars to improve the quality of interpretation. (Stip. 73.)

490. AIIC has seminars to assist members with commercial aspects of interpretation (RX-27, 461; CX-277-Z-5); on sales and negotiating techniques (CX-1578-A; CX-253-B; CXT-279-Z-2 to Z-5); and on "Winning Work Competitively" (CXT-279-Z-2 to Z-5; CX-1578-A; CX-1579-A.) AIIC instructed members in "Sales Arguments" for interpreters negotiating with clients. (CX-302-Z-314 to Z-315 (Luccarelli); CX-1480-B.)

491. AIIC organizes seminars and lectures on the practice of interpretation. (CX-252-D; CX-269-I; CX-277-Z-25; CX-301-Z-1.1/12 (Bishopp).)

492. AIIC negotiates "Agreements" with large international organizations. (Stip. 74.) These Agreements govern the pay rates and working conditions applicable to all freelance interpreters working for those employers. (Stip. 75; CX-2490-E, ¶ 12; CX-1538-A.) AIIC's negotiated agreements for all freelance interpreters, whether or not members of AIIC. (CX-305-Z-186 (Sy); Stip. 76.) There are five Agreements, which AIIC refers to as the "Agreement Sectors": (1) members of the United Nations Common System ("United Nations"); (2) the European Union; (3) Coordonnees; (4) Interpol; and (5) various international trade secretariats. (Stip. 77.)

493. AIIC negotiates an agreement on remuneration and working conditions for freelance interpreters working for the United Nations

Common System (including the United Nations, the World Health Organization etc.). (Stip. 78; CX-1643-B.)

494. AIIC negotiates an agreement, which is in effect throughout the world, with labor unions, known as international trade secretariats, that governs rates of pay and working conditions for all freelance interpreters (not just AIIC members). (Stip. 79; CX-277-W.)

495. AIIC negotiates an agreement with Interpol governing the wages and working conditions of freelance interpreters working for it. (CX-1458-M; Stip. 75, 78.)

496. AIIC negotiates an agreement with the European Union, which includes the European Commission, the European Parliament, and European Court of Justice, for an agreement to provide interpretation services. (CX-1458-M; CX-1643-C.)

497. AIIC negotiates an agreement governing the wages and working conditions of freelance interpreters working for Coordonnees, which consists of European Space Agency; the Council of Europe; the Organization for Economic Co-operation & Development; the North Atlantic Treaty Organization; and the Union de l'Europe Occidentale. (Stip. 81; CX-1643-C.)

#### VII. LABOR EXEMPTION

498. The State Department's list of freelance interpreters, which includes many AIIC members, is a "roster of independent contractors." (CX-242-H.)

499. Interpreters hold a copyright interest in any recording of their interpretation because they are independent contractors. (CX-244-F; CX-224-Z-8-9; CXT-273-O-P; CX-2121; CX-2059-B.)

500. AIIC's standard contract limits the control of the conference organizer over the work practices of interpreters because interpreters operate as independent contractors. (CX-2059-B.)

501. AIIC's agreements specify terms for freelance interpreters with various organizations, but not for staff interpreters who are employed by those organizations. (CX-302-Z-121/18 to Z-122/1 (Luccarelli).)

502. There exists an interpreters' union in the United States that is separate from AIIC and TAALS. *See* Motion for Leave to File Amicus Brief on Behalf of the Translators and Interpreters Guild Affiliated with the Newspaper Guild, AFL-CIO, CLC, Oct. 17, 1995.

503. Freelance interpreters determine whether to work at a particular conference on a case by case basis. (Luccarelli, Tr. 1614-15, 1620-21; Swetye, Tr. 2775/2-14, 2793/10-19; Silberman, Tr. 3354/11-14, 3355/20-22.)

504. The AIIC committee that explored various options for restructuring the organization acknowledged that a trade union's members must be employees. (CX-268-W-X.) This was part of the reason AIIC rejected unionization. (*Id.*) Some governmental and intergovernmental organizations employ staff interpreters. (Luccarelli, Tr. 1693/24 to 1695/8.) No AIIC member has established a commercial interpretation firm with interpreters as employees. (Luccarelli, Tr. 1693-94; CX-301-Z-105 (Bishopp); CX-428-A.)

505. In 1992 respondents rejected the option of becoming a union. (CX-270-K, n.\*\*; *cf.* CX-268-W-X.)

506. Since 1964, AIIC has negotiated collective bargaining agreements with institutional employers (EEC, UN, NATO). (CX-218K-L; CX-203-C; CX-225-B-C; CX-284-D; CX-286-Z-32.)

507. In 1978, AIIC's president felt that non-agreement (freelance) members were independent and not employees (CX-219-S), since employers could not instruct them how to do their work. (CX-219-U.)

508. Agreement sector AIIC members want AIIC to act as a union. (CX-284-C.)

## VIII. NEED FOR AN ORDER

### *A. Likelihood of Continuing Violations*

509. In August 1992 at the Extraordinary Assembly in Brussels, members of AIIC removed monetary conditions from the AIIC Basic Texts. (CX-273-G.) The resolution states:

DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation,  
FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world,  
DECIDES on the following principles:

1. To remove all mention of monetary conditions (*e.g.* rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . ."

(CX-273-G.) The resolution provided that AIIC may negotiate agreements governing the working conditions of conference

interpreters, including remuneration and manning strengths, with employers in non-governmental organizations. (CX-273-H.)

510. The day before the Extraordinary Assembly, the NAS held a meeting -- that was planned to have "neither minutes nor recording of the proceeding" -- to explain how, in light of the antitrust laws, it is possible to "operate in another way." (CX-271-C, F; CX-273-U.)

511. According to one of the members of the AIIC Council (CX-616-C), AIIC "deregulated" its monetary conditions at the Extraordinary Assembly and "trusted" its members to "keep the faith." (CX-285-S.)

512. The AIIC Council reminded members that they could still assert their "rights" despite removal of express mandatory conditions. (CXT-2479, p.1.) The U.S. Region Council member advised U.S. Region members in January, 1994, "We should not forget . . . that deregulation does not mean we have lost our rights as individual professionals. Those are still the same, and we have to defend them individually." (CX-1566.) Another Council member wrote, in June 1993, "competition must be exercised in conformity with the code of professional ethics" and working conditions. He also stated that interpreters have the "right" to the same working conditions in the future:

rights should be respected in the future as they were in the past: the interpreter working away from his "professional address" has the RIGHT to a per diem and to complete reimbursement of his travel expenses; the interpreter has a RIGHT to payment of "nonworking days"; the interpreter has a RIGHT to compensation for a "loss of earnings"; the interpreter has the RIGHT to fees that are a fair reflection of the difficulty and importance of his work. (CXT-2479, pp. 1-2.)

### *B. History of Attempts to Evade the Antitrust Laws*

513. In November 1975, the U.S. Region meeting, "unanimously decided to set up a committee to study the [antitrust] question in liaison with TAALS." (CX-405-C.) AIIC's Executive Secretary wrote TAALS and requested information on antitrust legislation in the United States. (CX-210-E, D.)

514. AIIC knew it was illegal to agree on rates in the United States. (CX-305-Z-27, Z-35, Z-206 to Z-207 (Sy); Weber, Tr. 1208-09; CX-300-Z-88 to Z-89 (Motton).)

515. In 1979, the AIIC Council became aware of an antitrust suit against AIIC's Canadian region. (CX-222-N; CX-223-V.) AIIC

ceased publishing rates for Canada because of the litigation. (CX-301-Z-59 to Z-60 (Bishopp).)

516. AIIC stopped publishing rates for the U.S. between 1981 and 1987 because of the antitrust laws. (CX-305-Z-36 (Sy); CX-72, CX-73, CX-75.) Nevertheless, its price agreements continued. (CX-1226) According to the report of the December 5, 1981, meeting of the U.S. Region, there was a "gentleman's agreement" to maintain the price conspiracy:

As members of Council know, there is a "gentleman's agreement" not to ask for less than US Dollars 250 per day. Because of the advice given by the anti-trust lawyers consulted; it is preferable not to appear with a fixed figure on the rate sheet. There is a trend now to ask for 275. (CX-1226-A.)

517. In 1983, AIIC's Secretary General explained that despite the price-fixing laws, members know what they are supposed to charge:

Members all know that [sic: what] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the "cartel" price-fixing laws in some countries, but members know very well that they must not undercut. (CX-1238.)

518. In 1986, the U.S. Region Treasurer (CX-616-Z-4) reported to AIIC that "The minimum rate on the non-governmental sector is unchanged and is not to be published on account of U.S. Government regulations." (CX-1346.)

519. About 1983, AIIC began publishing its minimum rates under the label of "market survey." (CX-71; CX-2446-C.) In 1987, Patricia Longley, then AIIC Treasurer (CX-616-Y), stated that in these "market surveys": "The figures represent the currently applied daily rates of remuneration, in other words the minima for a given local market." (CX-2466-C.) U.S. Region members understood that the "standard" figures on the market survey were the "standard" rates referred to in Article 8 of AIIC's 1991 Standards of Professional Practice (which specify what "the rate of daily remuneration shall be"). (CX-303-Z-62 (Moggio-Ortiz); CX-2-Z-43; CX-76.)

520. Before its 1991 Assembly, AIIC was "strongly advised" for antitrust reasons to adopt amendments that would have removed the "monetary" references from the basic texts. (CX-262-Z-42; CXT-262-Z-45 to Z-47, p.3.)

521. At the 1991 Assembly, Malick Sy, now AIIC President, insisted that the monetary conditions could not be removed by simple majority. (CX-305-Z-244 to Z-245 (Sy); CX-301-Z-129 to Z-131

(Bishopp); CX-266-S.) The Assembly did not achieve the two-thirds majority "necessary to remove all mention of fee scales on the private market" from the Basic Texts. (CX-441-B; CX-270-K.)

522. In 1994, Malick Sy was elected president of AIIC on a platform of solidarity. According to Mr. Sy, AIIC is "like pillars of universality, rigorous professionalism, the solidarity between the members serving as cement, the binding material between the two pillars." (CXT-279-T-U.)

### *C. Changes to the Basic Texts*

523. AIIC's new rules, the 1994 Professional Standards, "carefully" addressed "financial matters." (CX-1-Z-40 to Z-46; CX-1556-A.) An interpreter "may ask for the inclusion of" AIIC's form-contract cancellation clause (CX-1-Z-41, Art. 3); professional address (still changeable only once in six months and with three months notice) "shall be used, *inter alia*, as a basis for setting up Regions" (CX-1-Z-40, Art. 1); journeys (depending on their length) "call for the scheduling of [one to three] rest days" (CX-1-Z-45, Art. 10); members "shall" receive subsistence allowance and travel expenses unless "the parties agree otherwise" (CX-1-Z-45, Art. 9, 11); members "shall request a briefing day whenever appropriate," and non-working days "that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45, Art. 8, Z-39.)

524. Reporting on the results of the 1992 Assembly the U.S. Region Representative did not indicate that freelance interpreters should change their practices as a result of any of AIIC's changes to its Basic Texts (CX-448-B; CX-303-Z-100, Z-99 (Moggio-Ortiz).)

525. The committee that drafted the 1994 rules, "eliminated the monetary conditions while taking care to preserve the great principles which the association holds to, such as the professional address. . . ." (CXT-279-K, p.4.)

526. While drafting the 1994 Professional Standards, AIIC prepared a "Vademecum" (CXT-2484-A-C, pp. 2-3) defined as a "pocket compendium of basic AIIC rules and recommendations" (CX-206-D) and "for internal use." (CX-277-Z-4; CX-245-C.) The purpose of the Vademecum is to "speak more openly on financial or related questions" ("since this document is not a basic text and has only an informative character") and "specify in maximum detail all the circumstances that are appended to each article of the Standards

as an annex, as well as all the 'rules' that should not be forgotten in the case of an assignment." (CXT-2484-A-C, pp. 2-3.) The Vademecum indicates that interpreters should include in their cost estimates the following factors: indivisible daily rate, commission, travel expenses, subsistence allowances, remuneration for days of travel, remuneration for rest days, remuneration for nonworking days, remuneration for days of briefing, recording ("copyrights"), cancellation, and non-interpretation duties. (CXT-2609-A to C, pp. 3-5.)

527. After the FTC investigation began (F. 538), AIIC introduced "health and quality" into the preambles to its rules. The preamble to the Standards of Professional Practice, Version 1991, reads in part, AIIC "herewith adopts the following Standards of Professional Practice applying to the work of its members." (CX-2-Z-40.) The 1994 Version adds, "whose purpose is to ensure an optimum quality of work performed with due consideration being given to the physical and mental constraints inherent in the exercise of the profession." (CX-1-Z-40.)

528. AIIC's 1994 Professional Standards are virtually identical to the 1991 texts with restraints on staffing strength (CX-1-Z-42 to Z-44, CX-2-Z-43 to Z-46), hours (CX-1-Z-45; CX-2-Z-42), double-dipping (CX-1-Z-37, Art. 3(c); CX-2-Z-37), recording (CX-1-Z-40, Art. 2(b); CX-2-Z-41) and performing non-interpretation services (CX-1-Z-39, Art. 7(h); CX-2-Z-39). The "Guidelines for Recruiting Interpreters" remains appended to the Standards, with the same rules on advertising, commissions, exclusivity, package deals, and trade names that it contained prior to the vote to remove monetary conditions. (CX-1-Z-49; RX-2.) In July 1994, the AIIC Council "confirm[ed] the binding character of the Professional Standards [Normes professionnelles]." (CXT-501-T, p. 2; CXT-249-C-D.)

529. According to AIIC's president, AIIC's monetary conditions can no longer be published "openly." (CX-1580.)

530. AIIC's standard form contract provides a template for members to continue to adhere to AIIC's price fixing rules. (CX-2060-A to B.) The contract has blanks for filling in daily remuneration, remuneration for travel days, rest time, recording, per diem for period away from the professional domicile, and first class travel. (CX-2060-A.) The "General Conditions of Work" on the contract (CX-2060-B) enumerate AIIC's rules about package deals (§ 1), non-interpretation duties (§ 2), working hours/overtime (§ 3), recording fees (§ 4), travel arrangements (§ 7), and cancellation (§ 9).

(CX-2060-B.) The quadruplicate format, which provides a copy for the consulting interpreter, interpreter, recruiter, and conference sponsor, allows any of these parties to verify compliance with rules on same team same pay and package deals. (CX-2060.)

531. AIIC's March 1994 Bulletin contained a recommendation for interpreters to specify to clients that "interpreters' fees are unchanging." (CXT-279-Z-2 to Z-5, p.2.) This and other recommendations came in reports of "sales techniques" sessions that the NAS set up in August 1992 to learn to operate in light of the antitrust laws. (F. 510; CX-273-U; CXT-276-E to G, p.2.)

532. Rates remain stable among interpreters. (Weber, Tr. 1186; Clark, Tr. 614.)

533. The pricing of AIIC members in the United States in 1992-1995, during which AIIC did not publish suggested minimum prices, was similar to 1988-1991. (Wu, Tr. 2205-06; CX-3004; Silberman, Tr. 3068; CX-3004-A.)

#### *D. Agreement Sector*

534. AIIC continues to negotiate "agreements" with intergovernmental and international organizations, which govern the pay rates and working conditions for all freelance interpreters working for those employers. (F. 492-97; Stip. 75; Bowen, Tr. 1031.) AIIC publishes in its Bulletin the rates negotiated under its Agreement Sector agreements, including rates for the United States. (Luccarelli, Tr. 1840; CX-305-Z-347 (Sy).) Meetings pursuant to these agreements have taken place in the United States. (Luccarelli, Tr. 1600; CX-2597; CX-2598.)

535. By entering into an agreement with labor unions, referred to as the International Trade Secretariats (ITS), AIIC decided prices to charge private sector users. (Stip. 79-80.) ITS used such terms for conferences it organized in the United States. (CX-2597-98.) The March 1995 AIIC Bulletin, published 795 Swiss Francs as the daily rate applicable in the United States when interpreters are working for the unions. (CX-284-U; CX-2066-A.)

536. Members use the agreements for remuneration and working conditions in the rest of the private sector. (CX-226-C; CX-231-C; CXT-2484, pp. 2-3.) AIIC used the UN per diem levels as a floor in the private sector. (CX-226-C; CX-231-C.)

### *E. Underground Practices*

537. AIIC's suspension of publishing rates in the United States during the 1980's created an irregular rate. (F. 524; CX-1348-B; CXT-244-H.) In 1986, the U.S. Region "decided to request the inclusion of a 'suggested minimum rate' on the annual 'market survey sheet,' as the lack of a figure for the US Region caused a number of problems (imported teams, use of the 'elsewhere rate', etc.)." The Council agreed, and the rate was scheduled to be published on the next market survey as the suggested minimum rate for the United States. (CX-1348-B.)

### *F. Changes to AIIC's Basic Texts Made In Response to Antitrust Investigation*

538. AIIC knew of FTC investigations of interpreters in June 1991, when two U.S. Region members (also members of TAALS) responded to a Commission document request of TAALS concerning horizontal restraints. (Saxon-Forti; Valiyova; CX-608-Z-77; CX-935-B.) AIIC discussed the TAALS investigation at its January 1992 Non-Agreement Sector meeting in Washington, D.C. (CX-270-F) which agreed to organize a debate and find a lawyer. (CX-1480-A.) FTC Staff took testimony from U.S. Region member (and past TAALS President) Anna Saxon-Forti regarding AIIC (Saxon-Forti, Tr. 2687), contacted three U.S. Region members prior to May 1992 (CX-441-A), and took their testimony. (CX-301-B (Bishopp); CX-300-A (Motton); Swetye, Tr. 2804.)

539. The FTC investigation of AIIC led to AIIC's 1992 decision to remove monetary conditions from its Basic Texts. (CXT-1534.)

540. The AIIC Assembly voted in 1992 and in 1994 not to approach "DG-IV" (the European Union's antitrust enforcement department) for antitrust "exemption" and recognition of the right to establish working conditions for AIIC members. (CX-302-Z-362 to Z-363 (Luccarelli); CXT-280-P-Q, pp. 1-4; CX-273-H.) AIIC recognized that notifying the DG-IV implies "the impossibility of AIIC negotiating collective (bargaining) agreements with intergovernmental employers." (CXT-280-P-Q, p.4.)

541. Despite antitrust concerns raised in Germany, Canada, and the European Union, AIIC did not change its basic texts until the FTC investigation began. (F. 523, 528-39; CX-84; CX-301-Z-59-60 (Bishopp).)

542. AIIC is dedicated to fighting to improve interpreter pay. (CXT-268-T-V.) Rates are one of AIIC's "most precious professional attainments." (CXT-268-T-V, p.3.)

#### LEGAL DISCUSSION

The profession of interpreting -- orally converting one language into another -- has long served to ease diplomacy, international trade and cultural exchange.<sup>5</sup> Consecutive interpreting grew from the League of Nations in the 1920's and simultaneous interpreting was first used in the Nuremberg Trials after the Second World War. In 1952, interpreters -- both civil servants and freelance -- decided to found a professional association "to regulate the profession, to impose standards and ensure their application." (CX-245-C.) This is the history of AIIC.

#### SUMMARY

For more than forty years, AIIC has regulated the livelihood of its members. AIIC specified the length of the working day and the number of interpreters to be hired at a conference. AIIC members agreed on minimum daily rates to be charged in the United States. AIIC required that all interpreters at a conference be paid the same daily rate.

AIIC rules protected its local freelance members from competition from other AIIC members, and prevented intermediaries from forming firms of interpreter employees. AIIC prohibited advertising by members of "commercial forms of one-upmanship." Its Basic Texts specified minimum fees AIIC members should charge, and for what amount of work. AIIC members adhered to those rules and AIIC and the U.S. Region took action on the rules in the United States.

AIIC required payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." AIIC defined a "normal working day" of six hours. Each effective restraint was part of a scheme to raise prices.

AIIC's restraints had anticompetitive effects. The conspiracy accomplished its purpose: fixing and raising the fees paid to AIIC

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<sup>5</sup> "And they knew not that Joseph understood them; for he spoke unto them by an interpreter." Genesis, Ch. 42 v.23.

members. As a result, AIIC interpreters earned more and worked less. The evidence obviates extensive inquiry into market power, market definition or market share. California Dental Ass'n, FTC Docket No. 9259 (1995) ("CDA"), slip op. at 28 n.19; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("IFD"); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109-10 (1984) ("NCAA").

Endeavoring to improve interpreters' working conditions and income, respondents exist for the profit of their members. Their actions to improve the economic welfare of the interpreters resemble closely union activity which might be exempt from antitrust scrutiny. AIIC has determined, however, that it is a professional association -- not a union -- and respondents waived the defense by failing to raise it in pleadings or during the presentation of evidence.

A finding of violation shows that the Commission has jurisdiction over AIIC for acts performed in, or with effects in, the United States. And the Commission may proceed against the U.S. Region, an unincorporated association, as part of a AIIC.

Respondents continue to maintain rules on fees and working conditions that deprive consumers of the benefits of competition and violate the antitrust laws. AIIC tried to conceal price-fixing agreements in "gentlemen's agreements" and "market surveys," "unpublished" rates and a little book called a "Vademecum." Despite the removal of some offending rules from their Basic Texts after the commencement of the investigation that led to this case, respondents and their members continue to fix prices, allocate markets and violate the antitrust laws.

#### FACTS

AIIC's records show its intent to raise prices by eliminating competition between AIIC's members and to prevent intermediaries from coming between interpreters and clients. These documents are persuasive evidence of AIIC's beliefs as to the effects of its rules and practices.

##### 1. Rates and Terms

Since the 1950's, AIIC members have forced employers to meet AIIC's rates and terms of employment. (F. 92.) As founding member and past president, Christopher Thiery (Weber, Tr. 1137) stated on AIIC's 20th anniversary in 1973 (F. 361):

It was in 1957 that AIIC decided for the first time that the daily remuneration should go up. The base rate had been \$25 since the end of the war, and it was decided to increase it to \$30. It had to be a unilateral decision: for the private market there was no "interlocuteur valable" (nor is there now) and the intergovernmental organizations refused even to acknowledge letters. . . . When AIIC's united front forced the decision upon them (members simply refusing contracts at earlier rates), we suddenly came to be considered as very reasonable people who entirely deserved a long due increase in pay. In fact, that was the first test of AIIC's strength. And when, in 1963-64, AIIC decided to increase the daily rate from \$30 to \$40, large as the rise was it went through much more smoothly.

In 1976, the U.S. Region demanded and got its rates from the Organization for American States. AIIC and TAALS boycotted OAS until AIIC's U.S. Region council member struck a deal that would pay the AIIC minimum rate. (F. 365.) The AIIC rate increased every year; businesses like Berlitz and Brahler called a TAALS or AIIC member to find out the price for the year. (F. 328.)

AIIC's rates became the price for interpreters to charge worldwide -- except in the United States, where the mandatory minimum rate was higher. (F. 99.) The U.S. Region agreed to AIIC's rates for the United States by vote. (F. 100, 307.) In 1977, the U.S. Region adopted the rate voted on at TAALS' General Assemblies. (F. 307-08.) AIIC became concerned about regional differences in rates. The Non-Agreement Sector (freelance) came into existence to try to reduce these differences. (F. 105.) Competition began to arise from differing team strength tables resulting in competing bids. (F. 172.) AIIC adopted a uniform team strength table, increasing the minimum number of interpreters for a job. (F. 172-75.)

AIIC's price-fixing prevailed in the United States. Members of AIIC's U.S. Region feared that if they were branded as undercutters by not charging the U.S. rate they would lose the referrals from other members on which they depend. (F. 105.)

In November 1975, after *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), AIIC "set up a committee to study the question in liaison with TAALS." (F. 513.) In 1983, they changed their rate sheets to documents called "Market Surveys." (F. 519.) A 1987 AIIC memorandum makes clear that the "Market Surveys" are in fact the mandatory minimum rates. (F. 519.) The U.S. Region adopted a "gentlemen's agreement" not to charge less than a particular rate. (F. 516.) In 1983, AIIC's secretary general wrote to Wilhelm Weber,

who was recruiting interpreters for the 1984 Olympic Games in Los Angeles:

Members all know that [sic: what] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the "cartel" price-fixing laws in some countries, but members know very well that they must not undercut.

(F. 517.) In 1986, when the U.S. Region treasurer reported to AIIC on rates in the U.S. Region, she wrote, "the minimum rate in the non-governmental sector is unchanged and is not to be published on account of US Government regulations." (F. 518.)

In 1986 the U.S. Region decided it too should publish rates in the "market survey," and included what it called a "suggested minimum" (F. 537), again sending the TAALS rates to Geneva for publication. (F. 308.)<sup>6</sup> AIIC continued to publish rates for the U.S. Region, provided to AIIC by the U.S. Region, which used the rates voted on by TAALS, until AIIC ceased publishing its "Market Survey" in 1992. (F. 308; CX-17-84.)

## 2. Recruiting Guidelines

AIIC felt that intermediaries (organizers of interpreters for conferences) would erode interpreters' fees in the private market. According to Christopher Thiery, "once we accept impresarios and professional conference organizers and conference halls as employers, we lose control over the situation and end up by being paid what they decide is good for us. Hence the gradual introduction of the 'direct contract' and 'direct payment' principal . . . ." (F. 259.) Mr. Thiery later observed, "We must never forget that when the chips are down an intermediary may well have to cut costs to stay in business. And if we happen to be one of the 'costs,' then that's just too bad for us." (F. 259.)

In 1963, AIIC's 10th Assembly resolved that contracts should be between interpreters and conference organizers. "Step by step, this provision was later included in the Code" and in 1979 into the "Guidelines for Recruiting Interpreters." (CX-206-C.)<sup>7</sup>

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<sup>6</sup> Those rates had been voted on at TAALS meetings (F. 307); about half of the TAALS members were also members of AIIC (CX-3006).

<sup>7</sup> Five restraints are in the Recruiting Guideline: AIIC's bans on package deals and lump-sum payments, commissions, exclusive agency arrangements, trade names, and comparative advertising. (CX-1-Z-49.)

The Recruiting Guidelines were adopted by AIIC Assembly in 1983 (F. 34), and sent to AIIC members as a binding annex to the 1991 Basic Texts. (F. 32-33.) The same document is also included in the 1994 Basic Texts. (CX-1-Z-47 to Z-50; RX-2 at 61-62, 65-66.) The Recruiting Guidelines have never been repealed. (F. 33.)

### 3. Abandonment

AIIC has never abandoned its price fixing. (F. 331, 333-34, 532-33.) It stopped publishing rates, removed some rules from its "Basic Texts," and rewrote other rules to avoid antitrust scrutiny. (F. 523, 528.) In 1991, AIIC rejected a proposal to remove its "monetary conditions." (F. 520-21.) AIIC's 1992 resolution reaffirms AIIC's commitment to collective action. (F. 509.) Council members exhorted "skeptics" and U.S. colleagues that the "rights" incorporated into the "monetary conditions" should be "respected in the future as they were in the past." (F. 512.) AIIC made certain that its "old" rules continue to be communicated to its members. (F. 523-33.)

AIIC's 1994 rules did not remove AIIC's monetary conditions; they rewrote them. (F. 523, 528.) Under AIIC's new rules, an interpreter "may ask for the inclusion of" AIIC's form-contract cancellation clause, which contains the same terms as the "removed" AIIC rule on cancellation fees (CX-1-Z-41); depending on length, journeys may "call for the scheduling of [one to three] rest days"; members "shall" receive subsistence and travel expenses unless "the parties agree otherwise"; members "shall request a briefing day whenever appropriate"; and non-working days "that may be compared to normal working days shall be negotiated by the parties." (CX-1-Z-45, Z-39.) The rewritten "professional address" rule still allows an interpreter to change her domicile only once every six months and then with three months notice. (F. 233.) At its meeting during the 1994 Assembly, NAS "reaffirm[ed] its moral commitment to the concept and application of the principle of professional address." (F. 233.)

In 1994 AIIC introduced "health and quality" language into its team size, working day and non-interpretation duties rules, leaving the substance of the rules unchanged. (CX-279, 527.) In July 1994, the AIIC Council "confirm[ed] the binding character of the Professional Standards." (F. 528.) AIIC's president stated in 1994 that monetary conditions "can no longer be published openly." (F. 529.)

AIIC prepared a "Vademecum," a "pocket compendium of basic AIIC rules and recommendations" for "internal use." (F. 526.) The purpose of the Vademecum is to "speak more openly on financial or related questions." (F. 526.)

AIIC's Vademecum suggests that interpreters should include in their cost estimates the fee elements they included under the old rules: remuneration, indivisible daily rate, commission, travel expenses, subsistence allowances, recording ("copyrights"), cancellation, non-interpretation duties and remuneration for days of travel, rest days, non-working days, and days of briefing, and explains how to calculate those charges. (F. 526.)

AIIC still maintains its standard form contract, which provides a template for members to continue to adhere to AIIC's price fixing rules. (F. 476.) The contract still has blanks for filling in daily remuneration for travel days, rest time, recording, per diem allowances for the period away from the professional domicile, and first class travel. The standard contract's "General Conditions of Work" spell out AIIC's rules about package deals, non-interpretation duties, working hours, recording fees, travel arrangements, and cancellation. (F. 530.)

AIIC's Bulletin continues to explain AIIC's price restraints. Two months after the new rules were adopted, the Bulletin recommended that interpreters tell clients that "interpreters' fees are unchanging." (F. 531.) The June 1993 Bulletin recommended that interpreters negotiate indivisible rates for "conferences of short duration" by saying that "one cannot take other assignments in the course of a free half-day"; negotiate travel day charges by "explaining that the interpreter is at the client's disposal during the travel days"; and "promote our profession without noisy publicity" in light of some countries' prohibitions on comparative advertising. (F. 531.) These recommendations came in reports of a "sales techniques" session that NAS instituted when it met in August 1992 to learn to operate in light of the antitrust laws. (F. 531.)

"Going rates" still exist and remain stable among interpreters. (F. 331, 333-34.) Prices in the years 1992-1995, when AIIC did not publish suggested minimum prices, closely resemble those in 1988-1991. (F. 320.) Published rates rose \$25 per year. (F. 533.)

AIIC continues to negotiate collectively with large international organizations, which govern the pay rates and working conditions for all interpreters working for those employers. (F. 492-97.) AIIC publishes the rates negotiated under its Agreement Sector agreements,

including rates for the United States. (F. 534.) AIIC has collectively entered into an agreement with international federations of labor unions. (F. 494, 535.) That agreement has governed fees and terms for conferences in the United States. (F. 535.) In March 1995, AIIC published a daily rate for the United States for interpreters working for those unions. (F. 535.)

## I. AGREEMENT

At the heart of any conspiracy is an unlawful agreement. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). The evidence shows agreement by AIIC, the U.S. Region, and the interpreters to enforce its restrictive rules.

### A. Conspiracy

An organization controlled by competitors is the agent of the group, and its conduct is a conspiracy of its members.<sup>8</sup> Respondents' members are competing conference interpreters (F. 453-54), and respondents' conduct in restricting competition constitutes a conspiracy of its members. A code of ethics, alone, "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." CDA, Slip op. at 10, citing *AMA*, 94 FTC at 998 n.33. Here, AIIC's members voted on the Association's Basic Texts and agreed to abide by "the rules and regulations of the Association" as a condition of membership. (F. 43, 48-52, 63-67.)

#### 1. Vote

The restraints were created by majority vote at AIIC General Assembly meetings attended by U.S. members. (F. 29-30, 37-38.) AIIC's rules are in the "Basic Texts," which include the Code of Professional Ethics and the Standards of Professional Practice. (F. 25.) Attached to the Basic Texts are binding annexes: AIIC's Guidelines for Recruiting Interpreters, Staff Interpreters' Charter, and

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<sup>8</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("Professional Engineers"); *American Medical Association*, 94 FTC 701, 997-98 (1979) ("AMA"), aff'd by an equally divided Court, 455 U.S. 676 (1982); *Goldfarb*, 421 U.S. at 781-82.

Videoteleconferencing rules. (F. 28.) AIIC members and candidates sign commitments that they will follow the rules adopted by AIIC.<sup>9</sup>

The 1994 Code of Professional Ethics states that members are bound to respect the Code in their work as conference interpreters.<sup>10</sup> (F. 51.) Members are bound by the rules and follow them, recruiting other interpreters to follow AIIC rules. (F. 52, 58.)

AIIC enforces its work rules with penalties for breach, including warning, reprimand, suspension, and expulsion. (F. 62.) Members charged with violating the rules have been investigated and penalized, or have resigned. (F. 66, 68, 229-30, 301, 316.) The AIIC Council grants "waivers," to suspend a particular rule to a specific individual. (F. 56-57.)

## 2. Enforcement and Understanding

AIIC and its members understood that all of the price-fixing rules applied in the United States. (F. 26, 52, 362.) From 1972 until 1982, and again from 1988 through 1991, AIIC published rates specifically applicable in the United States. (F. 93, 516-21.) AIIC stated that "members all know what the local rate is and any bargaining with clients can only be upwards and not downwards." (F. 108.) Respondents successfully pressured the 1984 Los Angeles Olympics to meet AIIC rates and terms in the United States. (F. 108, 344-60.)<sup>11</sup>

Wilhelm Weber was threatened because of the terms on which he recruited interpreters to work at the 1984 Olympics (F. 359), and for working without charging phantom travel charges. (F. 228-29.) Jeannine Lateiner was investigated for hiring permanent interpreters rather than local freelancers. (F. 285.) AIIC attempted to expel U.S. Region member Marc Moyens for violating the professional address rule and failing to charge for travel expenses, in connection with work in Europe, and reprimanded him when the expulsion vote failed to obtain a two-thirds majority. (F. 230.)

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<sup>9</sup> Applicants for membership in AIIC follow AIIC's rules for 200 working days prior to application. (F. 44-47.) Members can object to applicants' membership for not following AIIC's rules. (F. 46, 359.) Applicants must sign a pledge that they will continue to abide by the AIIC Code of Ethics and Standards. (F. 44.)

<sup>10</sup> "Members of the Association shall neither accept nor, a fortiori, offer for themselves or for other conference interpreters recruited through them, be they members of this Association or not, any working conditions contrary to those laid down in this Code or in the Professional Standards." (CX-1-Z-39.)

<sup>11</sup> Enforcement is not an element of conspiracy. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950).

AIIC also used rumor and blacklisting to secure members' adherence to the rules. Interpreters feared being labeled as undercutters. (F. 72, 106.) When interpreters deviated from the AIIC rules, they kept their agreement secret, for fear of retaliation by other interpreters. (F. 73, 106, 148.) Conference interpreters rely on their colleagues for referrals. Interpreters fear being blacklisted by colleagues because much of their referral work comes from other interpreters. (F. 71-72, 106.) In 1989, AIIC's U.S. Region and AIIC warned their members about three intermediaries who did not follow AIIC rules, hinting that some regions have actually decided to refuse work from these agencies. (F. 88.) The U.S. Region also "remind[ed] AIIC in general that it never had the petite equipe. . . . It is determined to expose all outside interpreters who accept this practice in our region." (CX-405-C.) AIIC leaders warned U.S. members against moonlighting. (F. 283.)

In 1987, AIIC's then-president stated, in a speech about work rules that if AIIC no longer had a "universally valid Code of working conditions," clients would benefit by playing interpreters against each other "in a poker game of undercutting." (CX-245-D.) Interpreters cite the rules in negotiating with clients. (F. 54-55, 59.)

AIIC's members, including AIIC's U.S. members, agreed to join AIIC and be bound by its rules. They met to discuss prices and price-related agreements, and voted on those prices and agreements and set minimum daily rates. (F. 98, 100, 516-19.)<sup>12</sup> They adhered to the prices published by AIIC 90% of the time. (F. 319.) Such simultaneous price moves indicate conspiracy. (*United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 182 (3d Cir. 1970) ("American Standard"), *cert. denied*, 401 U.S. 948 (1971).)

### *B. U.S. Region's Participation*

AIIC is a professional association comprised of regions. (F. 444-45.) The U.S. Region nominated officers to serve as members of AIIC's governing Council. (F. 447.) The AIIC Council recommends amendments to AIIC's Basic Texts for ratification by vote of the entire membership at its triennial General Assemblies. (F. 39.) The Council issues interpretations of respondent's rules, and institutes

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<sup>12</sup> The meetings and votes on rates took place at TAALS meetings (F. 307) and AIIC meetings (F. 98, 100.) Intermediaries observed that in the 1980's, the "going" rate represented the TAALS/AIIC rate, charged by all interpreters, regardless of the affiliation. (F. 328-34.)

disciplinary proceedings against interpreters who violate respondent's Basic Texts or any other rule. (F. 39, 61-62.)

AIIC members in the United States adhere to the rules. (F. 58-59, 85-89.) The U.S. Region delegates vote at the AIIC General Assemblies and Councils that created the AIIC fees, standards and codes of ethics. (F. 80.) It has also reminded U.S. members of their obligations to follow the AIIC rules. (F. 82.) The U.S. Region's members adopted a "gentlemen's agreement" providing that members should not charge below a stated price. (F. 77, 516.) The U.S. Region threatened to "expose all outside interpreters" who did not follow its staffing strength rules. (F. 171.) The U.S. Region enforces AIIC's rules. (F. 83.)

The U.S. Region participated in the anticompetitive conduct in this case.

## II. ANTITRUST LAW AND AGREEMENTS AMONG COMPETITORS

Antitrust law prohibits agreements among competitors that "unreasonably" restrain trade, "either from the nature of the contract or act or where the surrounding circumstances were such as to justify the conclusion" that they are unreasonable. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). AIIC's restraints are unreasonable restraints of trade by their nature.

### *A. Per Se Violations*

The *per se* rule against price fixing condemns agreements among competitors intended to affect prices, and "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The restraints in this action were adopted as part of AIIC's price fix, and have the tendency to support that price fix.

CDA rejected a reading of Mass. Board that price fixing *per se* violations of the antitrust laws can be defended by efficiencies. Slip op. at 38 n.26. CDA makes clear that *per se* unlawful conduct may not be defended on the basis that it is reasonable, efficient, procompetitive or harmless. Slip op. at 15-16.

Price fixing, output fixing and market allocations can be categorically condemned:

In sum, price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social

benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public.

7 P. Areeda, *Antitrust Law* ¶ 1509, at 412-13 (1986); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 n.16 (1990) ("SCTLA").

### 1. Combined Effect

Respondents prevented competition on conference interpreting by agreements that required: minimum daily rates; all interpreters at a conference paid the same; an "indivisible day" to prevent lower remuneration for shorter meetings; standard team sizes and length of day rules to equalize the work performed for the daily rate; same pay for travel, rest, briefing, non-working days (to equalize payments to interpreters); uniform per diem allowances and travel expenses, rather than actual cost; and uniform cancellation and recording fees. Respondents' "professional address" rule, with prescribed fees, fixed prices and divided markets, as did AIIC's rules on pro bono services and moonlighting. Respondents' rules extended AIIC's rules to all interpreters working with an AIIC member, and respondents coordinated its agreement with TAALS.

In order to understand the combined effect from all practices used by respondents to aid a price fix:

plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544. "[I]n a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it."

*American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. [1944]); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899, 905 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946). Acts in aid of the price fix include agreements to specify product quantity or quality, *National Macaroni Manufacturers Ass'n v. FTC*, 345 F.2d 421, 426 (7th Cir. 1965); reporting to detect cheaters, *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399, 410

(1921); and boycotts aimed at obtaining a higher price. *SCTLA*, 493 U.S. at 422-23.

## 2. Monetary Rules

### *a. Fees*

The core of this case is the agreement between AIIC's members not to charge less than a daily rate. This falls squarely within the *per se* rule against price-fixing. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (*per curiam*).

#### (1) Minimum rates

AIIC required its members working in the U.S. private sector to charge the daily rate. (F. 90, 92-93.) From 1972 until 1981, and again from 1988 until 1992, respondents set rates for the United States. (F. 92.) Since the AIIC Code requires AIIC members to "respect local conditions" (CX-409-A), the U.S. Region decided in 1977 that AIIC's rates would be identical to TAALS' rates (F. 100) -- as they were whenever AIIC published rates from then until 1992. (F. 93.)

AIIC began calling its rate sheet a "Market Survey." In 1982, to escape antitrust scrutiny, the U.S. Region members adopted a "gentlemen's agreement" to adhere to rates not published by AIIC. (F. 516.) Since 1992, when AIIC ceased publishing rates, there continues to be a "going rate," and U.S. Region members continue to adhere to a rate that rose \$25 a year in 1992, 1993 and 1994. (F. 533.)

AIIC's agreements with "Agreement Sector" consumers also include rates and other terms. (F. 492-97.) These include the International Trade Secretariats. (F. 494.) These agreements are illegal *per se*. *NCAA*, 468 U.S. at 106-107, 113.<sup>13</sup>

#### (2) Same team, same rate

Until 1992, AIIC's rules provided that "any member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." (F. 150.) U.S.

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<sup>13</sup> Complaint counsel do not contend that the Commission's jurisdiction extends to enforcement of the antitrust laws against agreements to which the United Nations or other intergovernmental organizations are parties. (Proposed Findings at p.44, n.31.)

Region members observed this rule. (F. 153.) Intermediaries understood the AIIC rate to mean that everyone is charged that rate. (F. 329, 339.) They paid interpreters -- whether AIIC members or not -- AIIC's rate.<sup>14</sup>

The "same rate" rule prohibits an individual interpreter from competing on price for a place on a team. AIIC requires more than one interpreter for any simultaneous interpretation assignment in the United States exceeding 40 minutes (F. 86, 180, 423), and an individual interpreter cannot offer a lower fee than the fee acceptable to the rest of the team. The rule also prevents individual interpreters from charging more than their team-mates. (F. 156.) This rule removes the incentives an interpreter might have to strengthen skills and compete on quality. (F. 152, 154, 157.) It impedes entry, making novices as expensive as seasoned interpreters. (F. 154, 157, 250.) By comparison, the United Nations pays beginners less than experienced interpreters, providing an opportunity to gain experience. (CX-220-M.)

AIIC's same team, same rate rule is illegal *per se*. *Sugar Institute v. United States*, 297 U.S. 553, 601-02 (1936) It constitutes an agreement to provide the same rewards to all practitioners "regardless of their skill, their experience, their training." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) ("Maricopa").

### (3) Non-working days

Since 1972, AIIC's rules have specified when interpreters would be paid for travel time (F. 133), briefing days (F. 135), rest days after travel (F. 134), and weekends or other days off during a conference. (F. 132, 136.) Different interpretations of these rules resulted in competition among AIIC members. (F. 143.) At a 1980 NAS meeting, the chairman called for a rule to "avoid the disastrous effect of this sort of bargaining." (CX 223-L.)

In 1981, a complaint against a member concerning non-working days was found to be "without foundation because the member concerned succeeded in amending the contracts." (F. 145.) Another AIIC member, Alain Misson, asked a client to amend his contract. Mr. Misson had inadvertently failed to charge an extra day's fee for

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<sup>14</sup> If one AIIC member is on a team with non-AIIC members all team members must be paid the same. (F. 150-51, 155, 339.)

time spent traveling, and he did not want to undercut his AIIC colleagues; the client agreed. (F. 148.)

In 1984, the Los Angeles Olympic Organizing Committee ("LAOOC") sought to reduce the costs for interpreters at the Olympic Games by not paying interpreters fees for non-working days. (F. 146, 344.) AIIC secretary general Patricia Longley wrote to Mr. Weber instructing him that contracts did not conform to AIIC's rules on rest and travel days. (F. 352.)<sup>15</sup> Mr. Weber told the LAOOC that it was "part of our code of professional conduct and that it was also current practice in the profession," and the Committee agreed to pay for non-working days. (F. 146, 345, 356-58.)

Intermediary Joseph Citrano testified that interpreters insist on being paid a half day's travel in each direction, on top of their full day's interpretation fee, when they work and travel on the same day. (Citrano, Tr. 552-53.) Interpreters viewed the rules "like a bible. That was how the business was conducted." (F. 147, 335.)

AIIC's rules requiring payment for non-working days are horizontal agreements to fix prices. *Catalano*, 446 U.S. at 647-48.

#### (4) Per diem

AIIC required that interpreters charge their clients a per diem for the period away from the interpreter's professional domicile. (F. 110-16, 536.) The rule prevents discounting: AIIC was concerned that interpreters working for two clients holding consecutive conferences might try to split expenses as a "sales argument," which would "constitute unfair competition"; AIIC's freelance interpreters wanted to avoid the "disastrous effect" of "bargaining" away the per diem. (F. 118.)

Fixing any element of price, including per diem, is *per se* illegal price-fixing. *Catalano*, 446 U.S. at 648.

#### (5) Travel

AIIC's rules required that "every contract signed with a member of the Association for a conference . . . must include payment for travel. . . ." (F. 287.) AIIC specified first class air travel and unrestricted tickets. In lieu of first class airfare, the interpreter was "entitled to" rest days, "equated to non-working days and

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<sup>15</sup> TAALS and AIIC coordinated their efforts to pressure Mr. Weber and the LAOOC. (F. 349, 351, 355.)

remunerated at the same rate." (CX-2-Z-47.) "For travel by air . . . business or club class, or, in its absence economy/tourist, may be accepted for journeys of less than nine hours." (CX-2-Z-48.)

By agreeing on travel expense, AIIC and its members have fixed prices in violation of the antitrust laws. *Catalano*, 446 U.S. at 645.

#### (6) Cancellation

AIIC's rules require "that once a commitment has been made to an interpreter . . . full payment is due in the case of a cancellation." (Weber, Tr. 1235.) A cancellation clause is in the standard AIIC contract. (CX-1-Z-41.) AIIC members consider an oral offer and acceptance to be a basis for collecting cancellation fees. (F. 243.)

The negotiations for the 1984 Olympics demonstrate the use of AIIC's cancellation clause. (F. 242.) When Mr. Weber first began organizing interpretation teams for the Olympics, "negotiations were still going on with the Eastern Bloc countries about a possible boycott . . . this is why [the LAOOC] did not want to commit to a 100% cancellation clause this early." (Weber, Tr. 1235.) Mr. Weber and LAOOC agreed on a staggered cancellation clause as a compromise. (F. 356.) Albert Daly, AIIC's president, wrote to Weber to say that he would hold Weber "personally responsible" for all the fees due AIIC interpreters if any contracts were canceled. (F. 354.) Mr. Weber ultimately did persuade the LAOOC to conform its contracts to AIIC's rules, including the cancellation clause, and was congratulated for that by Jean Neuprez, AIIC's U.S. Region council member. (F. 356-57.)

AIIC's agreement to use a standard cancellation clause is price-fixing, illegal *per se*. The clause prevents competition on cancellation fees among interpreters who might be willing to take greater risks of cancellation. (Wu, Tr. 2114-16.) Like the credit terms in *Catalano*, AIIC's rule on cancellations is an agreement to place on the purchaser a cost (or risk) of the transaction.

#### (7) Recording

AIIC and its members have agreed to charge fees for recordings: 100% of the daily fee, per interpreter per day, if the recording is to be sold; 25% of the daily fee if the recording is for internal, non-commercial purposes. (CXT-261-S.) AIIC reaffirmed the mandatory nature of the fee in March 1994, almost two years after AIIC

purportedly abandoned fixing prices. An amendment proposed by the Canadian Region, aimed at replacing the rule's "must" with "should," was rejected at the 1994 Assembly. (CXT-279-K-O.)

This rule is an agreement to charge for recording, and constitutes *per se* illegal price fixing. *Catalano*, 446 U.S. at 647-48.

#### (8) Ban on commissions

AIIC's Guidelines for Recruiting Interpreters prohibit members from accepting or paying commissions. (F. 251.) The rule prevents jobs from going to interpreters willing to pay the most commissions. (F. 252.) A 1981 meeting between AIIC members and representatives of the conference industry concluded that an intermediary's organizing fee must be charged to the conference sponsors, and must be "clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." (F. 253.) In March 1994, AIIC advised members to explain to hotel employees and technicians who usually receive commissions "that AIIC members do not do it because they would be obligated to raise their price" -- rather than absorb the commissions -- "and everyone would lose." (CXT-279-Z-2 to Z-5, p.2.)

AIIC's ban on the payment of commissions is an agreement to refrain from giving discounts from the fixed minimum rate, *per se* illegal. *Catalano*, 446 U.S. at 649.

#### (9) Restrictions on pro bono work

AIIC's rules required interpreters donating their services to pay their own travel and subsistence expenses. (F. 247-48.) Student interpreters worked at the 1984 Olympics without fee. They violated the AIIC rule because "the LAOOC paid the student interpreters' air fare from Monterey to Los Angeles." (Weber, Tr. 1232-33.) AIIC officers warned Mr. Weber about these student interpreters. (CX-236-G.) Jean Neuprez, then AIIC's U.S. Region Council Member, also wrote to Mr. Weber; warning that his actions "would go against a number of principles and rules of our profession." (F. 249.)

This rule prevents AIIC members from discounting their services by accepting "gifts" in lieu of payment (at the mandatory minimum rate), and from discounting their services unless they also pay their expenses. By prohibiting discounts and free services, the rule is a *per se* violation of the antitrust laws. *Catalano*, 446 U.S. at 647-48.

The rule also deters entry by discouraging new interpreters from working away from their professional address without charge. (F. 250.) Like the professional address rule, the pro bono rule divides markets and protects local interpreters, and is a *per se* violation of the antitrust laws. *Palmer v. BRG*, 498 U.S. 46, 49-50 (1990).

*b. Unit of output -- a day's work for a day's fee*

AIIC rules specify the unit of output for the daily rate, preventing AIIC members from competing by working harder, longer, in smaller teams. These output restrictions are unlawful *per se*. *NCAA*, 468 U.S. at 100. Output fixing is price fixing: "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered. . . . The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output." *SCTLA*, 493 U.S. at 423.

(1) Indivisible day

AIIC's rules provided that "remuneration shall be on an indivisible daily basis." (F. 120.) This rule requires an interpreter to charge a full daily rate regardless of the time worked. (F. 120-22.) The rule and the "normal working day," and team size rules fix the unit of output for which the minimum daily rate is to be paid.

This indivisible day rule has been followed in the United States. (F. 338.) Intermediaries understood that the AIIC rate was a rate for a day's services, regardless of the actual time required. (F. 127.) In 1987, the U.S. Region voted not to seek a waiver that would have allowed interpreters to charge 80% of a day's rate for a short meeting. (F. 125.) The rule is *per se* price fixing. *Catalano*, 446 U.S. at 645.

(2) Hours and team size

AIIC's rules detail team size, setting the minimum number of interpreters in simultaneous, consecutive, and whispered interpretation for conferences using specified numbers of languages. (F. 159-64, 171-75.) AIIC also defines the interpreter's "normal working day" and shorter maximum working days when teams are smaller, the interpreter is using portable electronic equipment, or for

video conferencing. (F. 158, 271, 36.) These rules define the unit of output for which an interpreter charges a daily fee.

When AIIC adopted the current team size tables in 1991, the tables set the number of interpreters at AIIC's "standard rate." (F. 159-62, 165, 169, 175.) When working alone, for example, the interpreter was instructed to impose a surcharge. (F. 170.) According to AIIC's current team size table, a two-language conference requires three interpreters, and a three-language conference requires five interpreters. For conferences in four languages or more, AIIC's rule requires two interpreters per conference language. (F. 160, 163, 177.)

AIIC's rules define a "normal working day" of not more than two sessions a day of 2 1/2 to 3 hours. (F. 158, 165.) "Shorter meetings" -- defined by the U.S. Region to be no more than four hours (F. 174, 177) -- may need one fewer interpreter than required for the two or three-language conference. (F. 160, 174.) AIIC allows interpreters in the United States to work alone for up to 40 minutes. (F. 86, 177.) Thus, for a bilingual meeting in the United States, AIIC specifies that one interpreter may work alone for up to 40 minutes, two interpreters may work the same meeting for up to four hours, and three interpreters can work up to six hours. (F. 86, 122, 177.) Interpreters using portable equipment are instructed not to work more than two hours and those involved in video conferencing not more than three hours. (F. 36, 271.) Under AIIC's rules, the interpreter tends to work less than half time, since interpreters take turns and since the floor language typically is not interpreted by that language's booth. At a six-hour bilingual meeting staffed with three interpreters, each interpreter will work two hours. (F. 176.) When a "short" bilingual meeting (up to four hours in the United States) is staffed with two interpreters, each is working on the microphone for two hours. (F. 176-77.) In conferences in four languages, each interpreter spends no more than three hours a day at the microphone. (F. 176.)

From 1972 until 1991, AIIC maintained two rates of remuneration for two team size tables. The rate paid to each member of the smaller team was higher than the rate paid to each member of the larger team, since the small team's workload is divided among fewer interpreters. The small team rate was 160% of the large team rate. (F. 170.) Under these complex team size tables and rates consumers received offers for different numbers of interpreters (and different costs). (F. 172.) In the 1970's, the U.S. Region voted to ban small teams in the United States. (F. 171.) AIIC's Council proposed in 1974 to adopt a single universal team size/rate, to eliminate competition and market

deterioration. (F. 173.) The 1979 General Assembly was unable to reach a consensus to increase the staffing on the two-into-two language conference (CXT-20, p.19), but standardized the length of the work day by adopting the current six-hour rule. (F. 158.) In 1981, AIIC adopted a new rate and team size table. (F. 174.) The new table increased the minimum number of interpreters for a bilingual meeting from two to three, and for a three-language conference from four to five interpreters. However, the "standard rate" was set to equal the former "small team" rate -- rather than the lower, large team rate. Under the new AIIC team size table for a bilingual meeting, consumers had to pay for a third interpreter at the "standard" rate when it formerly had paid for only two interpreters. Most of the regions had abolished the old small team size by 1991. (F. 175.) AIIC dropped the larger base rate team over the objections of the U.S. and Canadian Regions, who continued to require six interpreters for a three language conference, one more interpreter than the standard team size table required. (CX-250-E-F.)

The history of team size and hours shows that AIIC revised its rules to eliminate competition and to increase interpreters' incomes. Until 1994 the team size tables specified the daily rate charged for each interpreter on the team. The work rules set the threshold for collecting overtime. Interpreters can work longer hours and on smaller teams than prescribed by AIIC, charging more. (F. 166-68, 170.) AIIC members relied upon the team size tables and length of day rules to charge additional fees when they worked longer hours or on smaller teams. (F. 165-68.)

AIIC members lodged complaints involving alleged violations of the team size and length of day rules against Jeannine Lateiner, Wilhelm Weber, Marc Moyens and Janine Hamann-Orci. (F. 181-82, 306.) These complaints were published among AIIC members and other interpreters, and could have a chilling effect on anyone considering violating AIIC's team size and length of day rules. (F. 181-82, 306.)

AIIC's team size and hours rules are *per se* violations of the antitrust laws. They are agreements to charge additional fees when work exceeds specified amounts. *Catalano*, 446 U.S. at 647-49. They are agreements intended to affect price. *Socony-Vacuum*, 310 U.S. at 223. And they are agreements fixing units of output. *SCTLA*, 493 U.S. at 423.

### (3) Other services ban

Since 1972, AIIC Codes have stated that "members of the Association . . . shall not perform any other duties except that of conference interpreter at conferences for which they have been taken on as interpreters." (CX-1-Z-39.) There is slight evidence that members follow this rule. (F. 277; Luccarelli, Tr. 1672; CX-301-Z-26.) Perhaps not surprisingly, interpreters use it to avoid mundane, after-hours tasks. Joseph Citrano testified that AIIC members are a little more rigid about not making themselves available for extra services, such as helping a delegate check into the hotel or attending a cocktail party. (Citrano, Tr. 523-24; F. 279.) The State Department's Harry Obst, however, testified that "in the diplomatic environment situations arise when unexpectedly a text has to be drafted and translated on the spot for passing to the media or . . . another government wants to see it in their language. And if no translators are present we would expect those of our conference interpreters who also can handle written translations well to help with that chore and they usually do." (Obst, Tr. 301; F. 278.)

The allegation concerning a conspiracy to prevent interpreters from providing other services should therefore be dismissed.

### (4) Double-dipping

AIIC's Code provides that "members of the Association shall not accept more than one assignment for the same period of time." (F. 292.) At least part of the intent behind this rule was to avoid overbooking, leading to client deception and leaving a team shorthanded. (F. 294.) The evidence shows that the rule against double-dipping is generally ignored. (F. 295-96.) The allegation that respondents have conspired to prevent double-dipping should therefore be dismissed.

#### *c. Market allocation*

### (1) Professional address

AIIC rules require that members declare a single professional address, keep that address for at least six months, and provide three months advance notice before changing their professional address. (F. 212.) The professional address determines fees for travel, per

diem subsistence, and transportation (F. 217) -- whether or not that travel is taken or those expenses incurred:

--Margareta Bowen charged the New York Stock Exchange for travel from Vienna, Austria to New York and back, even though she only traveled from Washington to New York and back. (F. 223.)

--Wilhelm Weber was accused of violating the professional address rule for failing to charge for travel between Geneva, Switzerland and San Francisco, even though he only traveled from Monterey, California to San Francisco. (F. 229.)

--U.S. Region member Marc Moyens worked for two different employers in Europe without charging each for transatlantic travel from Washington. Mr. Moyens was reprimanded, and resigned from AIIC. (F. 230.)

The professional address rule divides markets. (F. 224.) Thus:

--Claudia Bishopp, then U.S. Region Council member, told one member that he was violating AIIC's rules by working in New York without "officially notify[ing] AIIC" of his change of address. The member was working in New York "for about a year" without charging each client for travel from his professional address in Washington. (F. 231.)

--Ms. Bishopp advised another member, who wanted to work for the World Bank after she had moved to Washington from Paris but before her professional address "officially change[d]," that she should either seek permission from AIIC or, "failing this, . . . telephone all other colleagues with your language combination in the Washington area, to verify that they were all indeed working on that date." (CX-1471.)

This agreement to divide markets is *per se* unlawful under the Sherman Act. *Palmer v. BRG*, 498 U.S. at 49-50. AIIC's rules regarding travel, per diem and payment for travel days, restrain interpreters from competing by absorbing travel costs or foregoing payment for travel days, or -- as in the case of Mr. Moyens -- splitting travel costs between clients. Charging "phantom freight" to coordinate prices is an unfair method of competition. *FTC v. Cement Institute*, 333 U.S. 683, 722 (1948).

## (2) Moonlighting

AIIC's "Staff Interpreters' Charter" provides that "staff interpreters should . . . act as interpreters outside their organization only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." (F. 281.) The rule requires AIIC members, when recruiting interpreters, to "bear in mind the following priorities: . . . freelance interpreters

rather than permanents having regular jobs as such." (F. 280.) The moonlighting rule protects the interests of freelance interpreters. (F. 287.)

AIIC's rules regarding moonlighting mean that permanent staff interpreters should not perform freelance work unless no freelance interpreter is available. (F. 281.) AIIC enforced the rule, suspending three members in Switzerland in 1984. (F. 285.)<sup>16</sup> AIIC members in fact adhered to the anti-moonlighting rules, and attempted not to compete with AIIC's freelance members who were unemployed. (F. 289.)

AIIC's moonlighting rules constitute an agreement between staff interpreters and freelancers that staff interpreters will not compete with freelancers. This agreement by staff interpreters not to compete in the freelance market, like the professional address rule, is a *per se* violation of the antitrust laws.

#### *d. Price advertising*

Article 4(b) of the Code of Ethics provides that AIIC members "shall refrain from any act which might bring the profession into disrepute." (CX-1-Z-38.) Although Article 5 permits members to "publicize the fact that they are conference interpreters and members of the Association,"<sup>17</sup> that article "exclude[s] activities such as commercial forms of one-upmanship." (F. 297.) The article prohibits AIIC members from advertising that their services are less expensive than those of other AIIC members. (F. 301-02.)

In 1994, an AIIC committee of inquiry concluded that a Canadian member of AIIC committed a "flagrant violation" of the Code by writing to a potential client that it would be less expensive to hire non-AIIC members for which the interpreter received a warning. (F. 301.) That same year, AIIC suspended another member for writing to an international organization and offering to work for a salary -- according to AIIC's president, an act that might bring the profession into disrepute. (F. 301.)

AIIC's Code of Ethics prohibits comparative price claims. Restrictions on price advertising are "naked attempt[s] to eliminate price competition and must be judged unlawful *per se*." CDA, slip op. at 19.

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<sup>16</sup> AIIC protects freelance members by discouraging international associations from hiring their own retired staff members on a freelance basis. (CS-230-M.)

<sup>17</sup> Until 1991, AIIC prohibited any advertising by members. (F. 300.)

### *B. Rule of Reason*

While most of the challenged restraints are *per se* violations, some, with a less obvious effect on competition, should be judged under the rule of reason. The issue here is whether the challenged restraint promotes or suppresses competition. *Professional Engineers*, 435 U.S. at 691. Its effect on other objectives (safety, quality, prevention of ruinous competition) is irrelevant.<sup>18</sup>

#### 1. Competitive Effects

##### *a. Portable equipment*

Since 1972, AIIC prohibited the use of portable equipment ("bidule"),<sup>19</sup> except "visits to factories, hospitals and similar establishments or remote field visits." (F. 270-71.) The rule limits the use of portable equipment to short meetings of no more than two hours, with no more than twelve participants. (F. 271.) In 1990, AIIC's NAS agreed that "while the 'bidule' serves a purpose in exceptional circumstances, its use must be strongly discouraged." (CX-259-U.) Portable equipment is much less expensive than using a booth, partly because no technician is required. (F. 273.)

Limiting the use of portable equipment is a direct restraint on output. (F. 275.) The limitations forbid the use of the technology from potential users of portable equipment with more than twelve conference delegates. (F. 271.) AIIC's rules restricting the use of portable equipment constitute anticompetitive restrictions on the "package of services offered to customers." *IFD*, 476 U.S. at 459. "Absent some countervailing procompetitive virtue . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." *Id.*

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<sup>18</sup> *Professional Engineers*, 435 U.S. at 695; *NCAA*, 468 U.S. at 116-17; *IFD*, 476 U.S. at 462-63; contra, *United States v. Brown University*, 5 F.3d 658, 672 (3d Cir. 1993) (Economic impact on consumers less predictable when professional association adopts restraints motivated by ethical or public service norms; not applicable, however, where the parties have strong economic self-interest, 5 F.3d at 667.)

<sup>19</sup> The bidule is a non-booth, conference interpretation system consisting of headsets for the conference delegates and microphones for the interpreters. (F. 269.)

*b. Ban on firms*

AIIC imposed restraints that prevent integration of interpreters into commercial firms. Three of those restraints are challenged here: AIIC's prohibitions of exclusivity arrangement, trade names and package deals.

The Guidelines for Recruiting Interpreters, including the rules on exclusivity, trade names and package deals, were designed to prevent intermediaries from "establish[ing] themselves in the field." (CX-206-C; F. 257.) Those Guidelines prohibit exclusive relationships between interpreters and intermediaries. (CX-1-Z-49; F. 262.) The Guidelines also prohibit members from selling interpretation services as part of a package deal. (F. 255.)

AIIC's prohibitions of trade names, exclusivity and package deals prevent interpreters and intermediaries from integrating into commercial firms. (F. 264.) Those prohibitions are motivated by a fear that competition among intermediaries will reduce AIIC's control of the market, and thereby reduce interpreter revenues. (F. 259.) The formation of firms could improve interpreters' abilities to differentiate themselves in the minds of consumers. (F. 264.) These restrictions on commercial practice reduce product heterogeneity, which makes it easier for members to reach and maintain pricing agreements. (F. 264.) By keeping interpreters from adopting what may be more economically efficient business formats the restraints have an adverse effect on competition. *AMA*, 94 FTC at 1018.

Respondents did not proffer any efficiency justification for these practices; therefore, these AIIC restraints on trade names, exclusivity and package deals violate Section 5.

*c. Advertising ban*

The AIIC rules prohibit AIIC members from claiming that they are better interpreters than other AIIC members. Members believed that this provision means that interpreters cannot disparage their colleagues in order to get work. (F. 298.)

Prohibitions against non-price advertising can be unlawful under the rule of reason. *CDA*, slip op. at 38-39. Analysis can be "simple and short." *Id.* at 25. The Commission "evaluates comparative advertising in the same manner as it evaluates all . . . industry codes and interpretations that impose a higher standard of substantiation for

comparative claims than for unilateral claims. . . ."<sup>20</sup> AIIC's bans on comparative quality (and other) advertising are not limited to prohibiting false or misleading advertising. AIIC's rules prohibit truthful quality claims -- even those claims that could be substantiated. The breadth of AIIC's rule, the likely anticompetitive effects of the advertising restraints, and the absence of any proffered justification demonstrate that this advertising restraint violates Section 5.

## 2. Efficiency Justification

Not all conceivable justifications for agreements among competitors are "efficiencies." *Professional Engineers*, 435 U.S. at 695. Public safety, interpreter health, or quality of interpretation, are not efficiencies. *SCTLA*, 493 U.S. at 423-24; *IFD*, 476 U.S. at 463. The argument that shorter hours make better car salesmen was held implausible in *Detroit Automobile Dealers*, 111 FTC 417, 498 n.22 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir. 1990), cert. denied, 506 U.S. 973 (1992). Moreover, the proffered justification must be tailored to the restraint. CDA, slip op. at 33.

### *a. Workload*

Respondents argue that their rules limiting interpreters' workloads (hours, team size, double-dipping and moonlighting) promote interpreters' health and the quality of their interpretation.

#### (1) History

The rule-of-reason analysis directs us to look at the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Historical examination may help us predict the restraint's consequences.

Respondents' expert Dr. Moser-Mercer, noted a 1957 memorandum of the UN Medical Health Officer and claimed that the six-hour work rule arose from practice at the United Nations. However, that memorandum recommends against any uniform

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<sup>20</sup> CDA, slip op. at 35.

workload rules for interpreters, and urges instead that workload be handled on an individual basis. (RX-668 at 2.)

At the 1994 AIIC General Assembly, members resisted "deregulation" of team size tables and length of day rules even after AIIC's president acknowledged that the working conditions may involve antitrust problems. (F. 511-12.) The members feared loss of "our most precious professional attainments," including minimum team strengths. In 1994, AIIC rewrote its rules to survive antitrust scrutiny, and adopted the self-serving preambles on which it now relies. (F. 191.)

### (2) Quality and health

The U.S. State Department has not found a decline in quality when interpreters are working more than six hours and expects interpreters to work as long as needed at the conference. (F. 198.) The European Commission of the European Union -- the world's largest user of conference interpretation services (Moser-Mercer, Tr. 3540/12-15) -- allows interpreters to work up to ten hours a day. (F. 196.) Other international organizations require interpreters to work more than AIIC's "normal working day." (F. 195.) Dr. Moser-Mercer testified that the length of day rules and team size tables in all of these AIIC agreements assure health and quality. (Moser-Mercer, Tr. 3540-41.) If the heavier workload rules found in AIIC's agreements with these international organizations do not jeopardize quality or impair health,<sup>21</sup> respondents' lighter workload rules for the non-agreement sector cannot be reasonably necessary to maintain quality and protect interpreter health.

### (3) Science

There are no studies showing that performance falls during a working day or when interpreters work outside the team strength tables. (F. 192.) No studies show a link between adverse health affects and working longer than six hours a day as a conference interpreter. (F. 192.) AIIC's members were not aware of any studies supporting their health and quality claims other than the UN Medical Officers' 1957 memorandum. (F. 194.) As noted at a 1995 AIIC Budget Committee meeting, the health evidence supporting AIIC's

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<sup>21</sup> European members (constituting most AIIC members) work more than 60% of the time in the Agreement Sector; members in the United States and Canada work in the Agreement Sector 45% of the time. (CX-285-G.)

claims in the FTC proceeding is "flimsy, to say the least." (CX-1658-G.)

Interpreters should be able to work longer hours and in small teams, so long as the interpreter has an opportunity for occasional breaks. Dr. Parasuraman found that air traffic controllers and commercial pilots performed more demanding tasks than conference interpreters, and can perform those tasks for eight to ten hours without a decline in performance or injury to their health.<sup>22</sup> (F. 207-08.) Based upon those studies, Dr. Parasuraman concluded that interpreters should be able to work at least eight to ten hour a days without risk of substantial declines in quality or risk to their health. (F. 209.)

#### (4) Connection

Respondents have failed to demonstrate a connection between workload and quality or health. Even if such a connection were shown, AIIC's workload rules are broader than needed to advance that purpose. There is a wide range of interpreters and markets that affect interpreter performance and health. One rule cannot fit all. (F. 199-200.) AIIC's team size table and length of day rules are not set for the "fittest" but for the great majority of interpreters. (Moser-Mercer, Tr. 3538-39.) The restraints restrict a more able interpreter from exploiting competitive advantage.

#### (5) Cognizability

"Quality" is not recognized as a valid efficiency under the antitrust laws. *Professional Engineers*, 435 U.S. at 695-96; *NCAA*, 468 U.S. at 116-17.

##### *b. Portable equipment rules*

Respondents argue that their portable equipment rules prevent a decrease in quality and a risk of detriment to the health and welfare of interpreters from the use of inferior equipment.

AIIC allows portable equipment to be used on visits to factories, hospitals and similar establishments or remote field visits, but not in

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<sup>22</sup> Reputable scientific studies, published in peer reviewed journals, have shown that air traffic controllers and commercial pilots can work eight to ten hour shifts per day, without performance decline or ill health. (F. 253.)

a conference room. (F. 271.) If quality decreases as the ambient noise increases, the rule should forbid all use of portable equipment. Portable equipment is reliable for the State Department, the White House, the World Bank, the International Monetary Fund and cost-conscious conference organizers. (Hamann-Orci, Tr. 48-49; Davis, Tr. 848; Obst, Tr. 303-04.)

Consumers are willing to tolerate lower quality, in exchange for lower prices. (Clark, Tr. 634-35.) Claims that the market will seek a lower level of quality are not cognizable efficiencies. *IFD*, 476 U.S. at 463-64. The rules do not take into account variables that affect whether portable equipment is practical for a job, or differences in ambient noise, or interpreters' abilities or hearing, and therefore are not reasonably tailored to their goals. *NCAA*, 468 U.S. at 119.

### 3. Effects and Market Power

#### *a. Anticompetitive effects*

Proof that conspirators achieved their purposes proves market power. For example, market power can be proven by a group of sellers raising prices over competitive levels for a significant period of time. (Silberman, Tr. 3172/19-23.) Here, AIIC's members followed AIIC's rules, and intermediaries had to obtain conference interpretation on AIIC's terms. Intermediaries learned of the TAALS/AIIC rates from TAALS or AIIC members (F. 328), understood that all AIIC and TAALS members charged that rate (F. 329), observed that the rates went up at the beginning of every year (F. 330-31), and almost invariably paid the TAALS/AIIC rate rather than attempt to negotiate lower rates. (F. 332, 334.) Intermediaries found that AIIC and TAALS members -- and other interpreters -- would not accept offers that did not conform to AIIC rules. (F. 335.) AIIC's rules on per diem, travel, the indivisible day, the same rate for all team members, and fees for recording, were all followed by interpreters and accepted by clients. (F. 336-40.) Some AIIC members were willing to work in smaller teams, or longer days -- for more money. (F. 341-43.)

In 1975, AIIC's U.S. Region caused the Pan American Health Organization to raise its rates. (F. 364.) In 1976, AIIC members boycotted the Organization of American States, causing a 25% increase in OAS's rates (from \$83 to \$105 per day). (F. 365.) In 1984, AIIC and TAALS pressured the Los Angeles Olympic Organizing

Committee to meet AIIC's rates (F. 356), cancellation clauses (F. 356-57), non-working days, same team-same rate, and recordings. (F. 356.) AIIC achieved this by sending a "warning" ("mise en garde") to the Olympics' chief interpreter, Mr. Weber, and published that warning to all AIIC members (F. 348); coordinating its efforts with TAALS (F. 355) and writing threatening letters to Mr. Weber and to the LAOOC. (F. 353-54.) As AIIC's then-U.S. Region Council member observed to AIIC's then-Secretary General, "I think that the pressure AIIC put to bear is getting results." (CX-1266-B; F. 357.) The results were that LAOOC had higher costs. (F. 358.)

AIIC and TAALS members demanded and received the rates and rules specified in their agreements, more than 90% of the time during 1988 through 1991. (F. 319.) In each of those four years, the most frequently charged price was the AIIC "suggested minimum" rate. (F. 318-20.) AIIC's members usually charged at least the "suggested minimum" rate. AIIC's rules affected these prices. AIIC could not have affected these prices without having market power. AIIC had market power. "[P]roof of actual detrimental effects, such as a reduction in output, can obviate the need for an inquiry into market power, which is but a 'surrogate for actual anticompetitive effects.'" *IFD*, 476 U.S. at 460-61.

### *b. Market share*

The relevant product markets in this case are conference interpretation language pairs in the United States. (F. 366.) Market shares for AIIC and TAALS members in these markets range from 24% to 60%. (F. 379-80.)<sup>23</sup> Taking a "quick look," because AIIC was able to secure its members' adherence to the rules these market shares support the finding that consumers' ability to look elsewhere is limited. (F. 381.) These facts establish anticompetitive effects of respondents' conduct. CDA, slip. op. at 29.

### *c. Entry barriers*

Entry into conference interpreting is slow and difficult. Conference interpreters need extensive training in the techniques of

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<sup>23</sup> Only 17% of the professional engineers in the United States were members of the National Society of Professional Engineers (55,000 of 325,000). *Professional Engineers*, 389 F. Supp. 1193, 1202 (D.D.C. 1974.)

simultaneous and consecutive interpretation and in the subjects of international conferences, such as medicine, economics, law and politics. (F. 387-88, 390.) The AIIC members who testified had formal training in interpretation, often for four years or more. (F. 388.) Intermediaries will not hire untrained conference interpreters. (F. 387.) Interpretation schools in the United States produce very few graduates (F. 386), and more interpreters have been leaving the profession than entering it. (F. 385.) AIIC has been able to maintain its practices without new entry eroding its market power.

### III. JURISDICTION

#### A. *Nonprofit*

Respondents each argue that it is not a "corporation" organized to carry on business for its own profit or that of its members within the meaning of Section 4 of the FTC Act.<sup>24</sup>

AIIC and the U.S. Region are each associations that exist for the profit of their members. (F. 453-97.) AIIC's purpose is "to define and represent the profession . . . [and] to safeguard the interests of its members." (F. 454.) This statement of purpose alone is sufficient to invoke jurisdiction over respondents. *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 487 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976). In addition:

- AIIC mailed schedules of rates for interpreters to charge in the United States. (Stip. 22-3; F. 93-96.)<sup>25</sup> AIIC exists for the profit of its members; whether or not those rates were mandatory in the United States, mailing the rate sheets and market surveys is for the profit of its members.<sup>26</sup>
- AIIC's minimum rate was the standard. (F. 320.)

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<sup>24</sup> Section 5 of the FTC Act directs the Commission to prevent unfair methods of competition by "persons, partnerships, or corporations." 15 U.S.C. 45(a)(2). Section 4 of the Act provides in relevant part that a "corporation" is, among other things, "any association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44 and 45(a)(2). The legislative history of the FTC Act suggests that the "profit of its members" language was included to confer Commission jurisdiction over trade associations. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969.)

<sup>25</sup> Even if these rates sheets were merely "market surveys," distributed to advise members of prevailing rates that they might expect to be paid, their dissemination was for the pecuniary benefit of AIIC's members, to assist them in deciding what fees to demand. The "market surveys" were in fact the minimum mandatory rate sheets. (F. 519.)

<sup>26</sup> *Egg Nutrition*, 517 F.2d at 487-88; *Community Blood Bank of Kansas City v. FTC*, 405 F.2d at 1017.

- AIIC members, and other interpreters, are paid on an indivisible daily basis in the United States. (F. 338.)
- All members of interpretation teams, except for Japanese and some other Asian interpreters, typically were paid the same rate. (F. 339, 150-53.)
- AIIC mandates payment for non-working days, travel, rest and briefing days, and payment of fees on cancellation. (F. 147-48, 243.) AIIC officers insisted that AIIC's non-working days and cancellation rules be adhered to in recruiting interpreters for the 1984 Los Angeles Olympics. (F. 356-57.)
- AIIC disseminates its membership lists to prospective employers to get employment for its members. (F. 467-68, 470.)
- AIIC refers members for employment to people organizing conferences. (F. 471, 473.) The AIIC Directory "provides valuable information to users or potential users of interpretation services." (Stips. 61-62.)
- AIIC holds meetings and seminars discussing employment issues and sales techniques, and sponsors lectures discussing the practice of interpretation. (Stip. 73.)
- AIIC "educates the public." (CX-2490-D-E; Luccarelli Decl. at 10; Weber, Tr. 1153.)
- AIIC represents interpreters in negotiations over wages, hours, and working conditions with governments and private organizations. (F. 493-97.)
- AIIC offers pension and insurance plans to its members, and maintains a "solidarity fund" for its members. (Stip. 81; F. 484-86.)

The Commission has jurisdiction over a nonprofit trade or professional association when its "activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *AMA*, 94 FTC at 983; accord *CDA*, slip op. at 5; *Michigan State Medical Soc'y*, 101 FTC 191, 284 (1983). AIIC was established to protect the pecuniary interests of its members. (F. 454-56.) Thus, it comes within Section 4 of the Act. *FTC v. National Commission on Egg Nutrition*, 517 F.2d at 487. Respondents engage in activities to improve members' incomes and working conditions. (F. 457-61.) That has always been AIIC's purpose, and AIIC's first actions were directed to raising interpreters'

pay. (CX-203-C.) AIIC's members are themselves profit seekers. AIIC's members are all professional conference interpreters who provide their interpretation services for pay. (F. 453.) AIIC promotes members' economic interests, including members' remuneration and work conditions. (F. 453-97.) Respondents fall within FTC jurisdiction as "corporations" within the meaning of the statute. CDA, slip op. at 6-7.

### *B. Personal Jurisdiction Over AIIC*

The Commission has jurisdiction to investigate and regulate activities of foreign corporations that affect U.S. commerce. *FTC v. Compagnie de Saint-Gobain-Point-a-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980). The FTC may exercise jurisdiction subject to the interstate commerce limitation and the limits imposed by due process. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). If the defendant is not present within the forum, due process requires that it have "minimum contacts" with the United States. *Id.* at 316. Minimum contacts are found, in antitrust cases, when the defendant's activity, directed toward the United States, has effects in the United States. AIIC has sufficient contacts with the United States for the Commission to exercise specific jurisdiction.<sup>27</sup> (F. 419-40.)

AIIC's conduct was intended to affect the prices charged by AIIC members for conference interpretation, and the terms under which they worked in the United States. (F. 412-13, 419-40.) AIIC has members in the United States (Stip. 27); AIIC adopted its workload and other rules (Stip. 9, 83-87), and AIIC expects those workload rules to be followed in the United States. (Silberman, Tr. 3132-33.) AIIC adopted rules specifically for the United States (F. 451-52), including price schedules for interpreters' daily fees and per diem (F. 419-21). AIIC's promulgating a schedule of fees, in United States dollars, for interpreters to charge when working in the United States, is sufficient conduct, purposefully directed toward the United States, to support jurisdiction over claims arising from that conduct. *Burger King v. Rudzewicz*, 471 U.S. 462, 479-80 (1985). AIIC adopted rules specifically to be adopted in the United States, including rules on

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<sup>27</sup> "When the cause of action sued on does not arise from the defendant's contacts with the forum state, general jurisdiction must be predicated on contacts sufficiently continuous and systematic to justify haling the defendant into court. Special [specific] jurisdiction is asserted when the defendant's forum contacts are sporadic, but the cause of action arises out of those contacts." 4 C. Wright & A. Miller, *Federal Practice & Procedure*, Section 1067 at 295-96 (1987); cf. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415-16 (1984).

staffing that were more stringent than the European rules (F. 171, 421-22), and a waiver permitting interpreters to work alone for 40 minutes. (F. 423.) AIIC conducted surveys and studies of the U.S. market (F. 426-27), mailed documents into the United States to promote its anticompetitive agreements (F. 439-40), and held meetings to promote its restrictions in the United States. (F. 436-38.) AIIC has a director working in the United States (the United States Region representative to AIIC, who as such is a member of the AIIC Council, Stip. 27, 43, 44, 46), who explains AIIC's rules to members in this country. (F. 431-34.)

As a result of these contacts with the United States arising out of AIIC's conduct, the Commission has specific personal jurisdiction over AIIC. *Consolidated Gold Fields, P.L.C. v. Anglo American Corp.*, 698 F. Supp. 487, 494-96 (S.D.N.Y. 1988), *aff'd in part and rev'd and remanded in part on other grounds sub nom. Consolidated Gold Fields, P.L.C. v. Minorco, SA*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989); *Pillar Corp. v. Enercon Indus. Corp.*, 1989-1 Trade Cas. ¶ 68,597 (E.D. Wis. 1989).

Respondents are not charged with untargeted negligence. Rather, their actions were expressly aimed at the United States, and give rise to jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).<sup>28</sup> AIIC has "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]," and is therefore subject to its jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).<sup>29</sup>

### C. Personal Jurisdiction Over the U.S. Region

Section 5 of the FTC Act broadly provides that the Commission can bring actions and issue orders against "corporations." Section 4 defines "corporation" to include "associations, incorporated or

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<sup>28</sup> *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1399 (9th Cir. 1986).

<sup>29</sup> Respondents rely on *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), as holding that "a defendant's mere awareness that its products will enter the forum is insufficient as a matter of law to support personal jurisdiction." (Respondent Br. at 118.) That was the position of Justice O'Connor and three other Justices, 480 U.S. 112, in a portion of the opinion that five Justices (Brennan, White, Marshall, Balckmun, Stevens, JJ.) rejected. 480 U.S. at 116-20 (Brennan, J., concurring in part); 480 U.S. at 121 (Stevens, J., concurring in part).

Cases in which courts did not find general personal jurisdiction (as different from specific jurisdiction) over defendants with few contacts with the forum include: *Donatelli v. National Hockey League*, 893 F.2d 459, 470-71 (1st Cir. 1990); *Health Care Equalization Committee v. Iowa Medical Soc'y*, 851 F.2d 1020, 1030 (8th Cir. 1988). *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994) involved an application of association rules in Europe to events taking place in Europe.

unincorporated." The Commission has proceeded against unincorporated associations.<sup>30</sup> The Supreme Court has defined "associations" to include: "a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." *Hecht v. Malley*, 265 U.S. 144, 157 (1924). The issue, therefore, is whether the U.S. Region is "a body of persons united without a charter," with "methods and forms used by incorporated bodies" for "the prosecution of some common enterprise."

AIIC's Basic Texts and AIIC Statutes expressly provide for the creation, recognition, representation, and governance of AIIC regions. (F. 5, 444.) The U.S. Region has adopted its own rules of procedure, including rules for its members' participation in the U.S. Region activities, establishing the U.S. Region's officers, setting down meeting schedules, and providing for budgetary disciplines. (F. 445-46.) The U.S. Region elects its officers and holds regular meetings where official minutes are taken. (F. 446-47.) The U.S. Region manages its own budget and has control over its own expenses. (F. 446-49.)

Members of the U.S. Region are united together to "prosecute a common enterprise." The U.S. Region was created by U.S. AIIC members to represent conference interpreters in the United States and to safeguard the interests of U.S. members. (F. 450-51.) The U.S. Region has advanced these goals that unite its members when it has recommended rates of remuneration, set per diem formulas, and issued team size tables for the United States. (F. 448, 451-54.) The Region prosecutes a common enterprise by negotiating rates with the OAS, urging members to respect AIIC working conditions in the United States, and enforcing the AIIC code against alleged violators in the United States. (F. 451.)

The evidence shows a series of acts committed by the U.S. Region, as a group, including: a "gentlemen's agreement" on rates (F. 77); decisions to take rate-making activities underground (F. 77, 79); efforts to increase team sizes in the United States and "expose" interpreters who violated the U.S. Region's team size and rate rules (F. 171); intercession by AIIC's U.S. Region council member in AIIC's efforts to conform rates and conditions at the 1984 Olympics to AIIC's rules (F. 83, 242, 146); efforts by another U.S. Region council member to have AIIC members conform to the professional

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<sup>30</sup> *SCTLA*, 107 FTC 510, 516-17, 564-65 (1986), rev'd on other grounds, 856 F.2d 226 (D.C. Cir. 1988), rev'd, 493 U.S. 411 (1990); *IFD*, 101 FTC at 74, 159.

domicile rule (F. 231); and the U.S. Region's agreement to cause AIIC to resume publishing "suggested minimum" rates for the United States. (F. 78.)

The United States Region holds meetings twice a year, which are attended by nearly half of the Region's AIIC members. (F. 446.) The United States Region has an elected treasurer, a regional secretary, and a regional representative serving on the AIIC Council. (F. 447-48.) The AIIC Basic Texts include a "General Document on Regions" and Articles 34-36 of the AIIC Statutes, which provide for the creation, recognition, representation, and governance of AIIC regions. (F. 444.) Pursuant to these documents, the United States Region has its own rules of procedure (Stip. 38), which govern its members' participation in the U.S. Region activities, identify the U.S. Region's officers, set down meeting schedules, and provide for budgetary disciplines. (Stip. 38, 43-44, 46; F. 445.) The U.S. Region maintains its own funds in a bank account in the United States, over which it has independent authority, and it collects and receives AIIC membership dues. (Stip. 49-50; F. 449.)

The Commission may, therefore, proceed against the U.S. Region as an unincorporated association. *Hecht v. Malley*, 265 U.S. at 157. The Commission also has jurisdiction to join U.S. Region as part of AIIC. *AMA*, 94 FTC at 1032.

#### *D. Labor Exemptions*

Respondents' "labor exemption" defense is rejected. It was not timely asserted.<sup>31</sup> Further, respondents have not shown that AIIC is a union or that its members are employees. They bear the burden of establishing their right to the exemption. Rule 3.43(a), 16 CFR 3.43(a).

The statutory labor exemption is available for unilateral union conduct. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). But respondents do not claim that AIIC is a labor union. Respondents do not qualify as a "labor organization" under the National Labor Relations Act's definition, since respondents are not employees.<sup>32</sup>

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<sup>31</sup> Respondents' answer did not contain "a concise statement of facts constituting [this] ground of defense," Rule 3.12(b)(1)(i), 16 CFR 3.12(b)(1)(i).

<sup>32</sup> The Act defines "labor organization" as "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates-of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5)(1973).

AIIC negotiates collective bargaining agreements for AIIC members employed by intergovernmental organizations. (F. 506.) But AIIC decided not to be a union. (F. 505.) AIIC's agreements specify terms and working conditions for freelance interpreters. (F. 501.) AIIC freelance interpreters are independent contractors. (F. 504.) Freelance interpreters are thus not employees entitled to the protection of the exemption. "A party seeking refuge in the statutory exemption must be a *bona fide* labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Associates v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981).<sup>33</sup>

Respondents are ineligible for the nonstatutory labor exemption. That exemption is available only for union-employer agreements. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 623-25 (1975); *HBO*, 531 F. Supp. at 604 ("the nonstatutory exemption . . . protects the terms of collective bargaining agreements").

#### IV. RELIEF

##### *A. Fashioning a Remedy*

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices. *Jacob Siegel v. FTC*, 327 U.S. 608, 611-13 (1946). In fashioning a remedy, it is appropriate to go "beyond a simple proscription against the precise conduct previously pursued." *Professional Engineers*, 435 U.S. at 698.

The substantive provisions of the order are based on orders issued by the Commission against TAALS and the American Society of Interpreters ("ASI"). The American Association of Language Specialists, C-3524 (Aug. 31, 1994) (consent order); American Society of Interpreters, C-3525 (Aug. 31, 1994) (consent order).

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<sup>33</sup> In *Home Box Office, Inc. v. Directors Guild of America*, the court described the defendant Directors Guild of America as a "collective bargaining representative." 531 F. Supp. 578, 581 (S.D.N.Y. 1982), *aff'd mem.*, 708 F.2d 95 (2d Cir. 1983 ("HBO")). The HBO court noted, 531 F. Supp. at 589:

not all combinations of unions with entrepreneurs or independent contractors fall outside the statutory exemption. . . . Even though a challenged combination includes independent contractors or entrepreneurs, it may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees. Here the non-agreement sector AIIC members and the agreement sector AIIC members do not compete by specific AIIC rule. (F. 280.)

*B. Abandonment*

Respondents contend no order should issue against their "removed" "monetary conditions." Their argument is rejected. Respondents have a history of knowingly concealing antitrust violations; respondents have not in fact abandoned their price fixing; and the minimal actions respondents took were only taken after they knew they were under investigation.

AIIC violated the antitrust laws for years before they claim to have removed the "monetary conditions" from their Basic Texts. (F. 513-21.) In 1991, despite advice from lawyers, AIIC again voted to codify its many anticompetitive rules. (F. 520-21.) Respondents do not acknowledge wrongdoing for any period. The likelihood of recidivism is great. *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1471-72 (M.D. Ala. 1993).

AIIC modified its Basic Texts by changing mandates to advice, trusting members to continue to adhere to the rules. (F. 523, 527-28.) The 1992 resolution "removing" the "monetary conditions," stated that AIIC remained "DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its actions in organizing the profession. . . ." (F. 509.) AIIC never told its members to stop agreeing on prices or terms. (F. 509-10, 524.) AIIC exhorted members to defend their individual "rights" to charge for per diem, non-working days, travel days, and "fees that are a fair reflection of the difficulty and importance of his work." (F. 512.) In March 1994, AIIC recommended that interpreters tell their clients, "interpreters' fees are unchanging." (F. 531.)<sup>34</sup>

AIIC's continues to ensure understanding about all of its rules:

- AIIC maintains team size and hours rules (F. 175, 184-86);
- AIIC still provides to its members its standard form contract, which shows interpreters how they can adhere to AIIC's monetary conditions. (F. 530.)
- In "removing" monetary conditions AIIC issued a vademecum to enumerate AIIC's price fixing rules, explaining what an interpreter's cost estimate "should" include. (F. 526.)

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<sup>34</sup> An agreement to adhere to previously announced prices is *per se* price fixing. *Sugar Institute*, 297 U.S. 553, 601-02 (1936).

- AIIC continues to collectively agree on rates and other terms to be applied in its Agreement Sector which include organizations in the U.S. private sector. (F. 534-36.)
- Members use AIIC's Agreement Sector terms to model their behavior in the remainder of the private sector. (F. 536.)

The AIIC or "going rate" is still in force. (F. 532-33.) The pricing practices of AIIC members in the United States continue. (F. 533.) AIIC's efforts do not constitute an abandonment of this unlawful conspiracy.<sup>35</sup> The antitrust laws look to substance, not to form, *United States v. Line Material Co.*, 333 U.S. 287, 357 (1948), and cannot be satisfied by cosmetic changes to "basic texts."

Changes to AIIC's Basic Texts came after antitrust inquiries in Germany, Canada, and the United States. (F. 541.)<sup>36</sup> AIIC failed to remove the "monetary conditions" at its January 1991 assembly. (F. 520-22.) In August 1992, when AIIC did vote to remove monetary conditions, it had known for over a year that Commission staff was investigating TAALS, and had subpoenaed and taken testimony from AIIC members in this country. (F. 538.) Abandonment depends on the *bona fides* of the intent to comply with the law in the future, the effectiveness of the discontinuance, and the character of the past violations. *Mass. Bd.*, 110 FTC 549, 616 (1988), citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984).

AIIC argues that, as an international organization, it is outside of the Commission's jurisdiction. Although aware for nearly two decades before this investigation began that its rules were illegal in the United States AIIC did not change any of its rules until after it became aware of the FTC investigation. A claim of abandonment is rarely sustainable as a defense when discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 FTC 1195, 1240 (1971); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Without a Commission order there will be nothing to prevent AIIC from continuing in its old ways of publicly regulating competition as to the price, output and marketing of interpretation services within the United States.

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<sup>35</sup> AIIC members continue to adhere to AIIC's travel, recordings, cancellation, indivisible day, same team-same rate, team size and hours rules. (F. 509-12, 523-33.)

<sup>36</sup> AIIC continued its price-fixing in Canada as well as the United States. (F. 301, 541.)

CONCLUSION

Respondents have violated Section 5 of the Federal Trade Commission Act, and an appropriate order must issue.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondents International Association of Conference Interpreters, a/k/a Association Internationale des Interpretes de Conference ("AIIC") and United States Region of the International Association of Conference Interpreters ("U.S. Region").

2. Each respondent is a corporation, within the meaning of Section 4 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 44, as amended. Respondent AIIC is an incorporated association organized for the profit of its members. Respondent U.S. Region is an unincorporated association organized for the profit of its members.

3. Each respondent is properly joined.

4. Respondents engaged in agreements, combinations, and unfair methods of competition by rules and practices fixing the prices for conference interpretation in the United States, reducing output and competition among themselves and with other conference interpreters, by *per se* unlawfully agreeing:

(a) To charge minimum rates; the same rate for all members of a team of interpreters at a conference; fees for travel, briefing, rest and non-working days; per diem allowances; travel expenses; fees for recordings; cancelled contracts; not to pay or receive commissions; and not to work without compensation but with travel and subsistence expenses paid.

(b) To refuse to sell conference interpretation services except on an indivisible daily basis; and to specify the number of interpreters required and the maximum number of hours worked for a daily fee.

(c) To allocate markets and protect local freelance interpreters from competition from other members of AIIC and other interpreters, by requiring members to declare a professional address and to base charges for travel, per diem allowances, and non-working days (including travel and rest days) from the professional address; and by

preventing staff interpreters from competing with freelance interpreters.

(d) Not to advertise or promote conference interpretation services by comparing the price or cost of members' services.

5. Further, respondents engaged in agreements, combinations and unfair methods of competition by rules and practices fixing prices for conference interpretation in the United States, reducing output and eliminating competition among themselves and with other conference interpreters, by agreeing to deter the formation of firms of interpreters (by rules prohibiting exclusive agency relationships, trade names, and package deals of interpretation services); and by agreeing not to use portable equipment nor to advertise conference interpretation services.

6. None of the agreements in the foregoing paragraph is supported by cognizable or demonstrated efficiency or other procompetitive justifications; under a rule of reason analysis, each agreement is an unreasonable restraint of trade.

7. The practices challenged in the complaint have had anticompetitive effects in the United States, and demonstrate the exercise of substantial market power in the United States in markets for conference interpretation.

8. Each effective agreement identified herein is part of an scheme to fix prices, and all are therefore unlawful *per se*.

9. Respondents have engaged in unfair methods of competition, in violation of Section 5 of the Act, 15 U.S.C. 45.

10. This order is necessary and appropriate to remedy the violation of law.

## ORDER

### I.

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

A. "AIIC" means the International Association of Conference Interpreters (also known as Association Internationale Des Interpretes De Conférence), officers, members, agents, employees, successors, and assigns; "U.S. Region of AIIC" means the United States Region of the International Association of Conference Interpreters (also known as Association Internationale Des Interpretes De Conférence),

officers, members, agents, employees, successors, and assigns; "respondent" or "respondents" means either AIIC or the U.S. Region of AIIC.

B. "*Fees*" means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, recording fees, compensation for time not worked, compensation for travel time, compensation for preparation or study time, and payments in kind.

C. "*Cancellation fee*" means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

D. "*Interpretation*" means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

E. "*Translation*" means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

F. "*Other language service*" means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

G. "*Interpreter*" means one who practices interpretation.

H. "*Translator*" means one who practices translation.

I. "*Language specialist*" means one who practices interpretation, translation, or any other language service.

J. "*Person*" means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

K. "*Exclusive employment arrangement*" means an employment arrangement in which interpreters or other language specialists are available for hire only through a particular individual or firm or in which interpretation teams of fixed composition are controlled by a particular individual or firm.

## II.

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

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees applicable in the United States for interpretation, translation, or any other language service, including but not limited to fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, participating in, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees applicable in the United States for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters or other language specialists to charge, pay, offer, or adhere to, for transactions within the United States, any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. Continuing a meeting of interpreters or other language specialists after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees, applicable in the United States, charged or proposed to be charged for interpretation, translation, or any other language service and failing to dismiss such person from the meeting, or 2) two persons make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition in the United States, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Discouraging, restricting, or prohibiting interpreters or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis for services performed within the United States;

G. Discouraging, restricting, or prohibiting interpreters from performing interpretation, translation, or other language services within the United States free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses; and

H. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any forms of advertising within the United States, including but not limited to comparative advertising by interpreters or other language specialists.

Provided that, nothing contained in this paragraph II shall prohibit respondents from:

- \* Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;

- \* Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees;

- \* Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.A and II.B of this order; or

- \* Formulating, adopting, disseminating to its organizational subdivisions and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

### III.

*It is further ordered*, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, participating in, promoting, assisting, enforcing or maintaining any agreement, understanding, plan, program,

combination, or conspiracy to limit, restrict, or mandate, within the United States:

A. The length of time that interpreters or other language specialists work in a given period, or for which they are paid for preparation or study;

B. The number of interpreters or other language specialists used for a given job or type of job;

C. The reimbursement of or payment to interpreters or other language specialists for travel expenses or time spent traveling, or the use of any terms, conditions, limitations or restrictions that would prevent consumers from receiving any advantages based on interpreters' or other language specialists' actual travel arrangements or geographic location;

D. The number or duration of residences, domiciles or professional addresses of members;

E. Any discounts, costs, or other advantages or disadvantages to consumers based on actual travel arrangements or geographic location;

F. The equipment used in performing interpretation, translation, or other language services;

G. The number or types of services offered or performed by interpreters, or other language specialists within a given period of time;

H. Exclusive employment arrangements or the use of trade names by interpreters or other language specialists;

I. The recruitment of interpreters, or other language specialists on the basis of whether or not they are permanently employed;

J. The payment or receipt of commissions; or

K. Package deals, lump sum payments, or any arrangements whereby payment or charges for more than one good or service are included in a single sum.

#### IV.

*It is further ordered,* That respondents shall, within thirty (30) days after the date this order becomes final, amend the Basic Texts and all sub-parts and appendices to conform to the requirements of paragraphs II and III of this order and amend the rules and bylaws to require each member, region, sector, chapter, or other organizational

subdivision, to observe the provisions of paragraphs II and III of this order.

V.

*It is further ordered*, That each respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each member, affiliate, region, sector, chapter, organizational subdivision, or other entity associated directly or indirectly with respondent, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that respondent revises pursuant to this order; and

B. Distribute to all new officers, directors, and members of respondent, and any newly created affiliates, regions, sectors, chapters, or other organizational subdivisions of respondent, within thirty (30) days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondent revises pursuant to this order.

VI.

*It is further ordered*, That each respondent shall:

A. Within sixty (60) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order, and any instances in which respondent has taken any action within the scope of the proviso in paragraph II of this order;

B. For a period of ten (10) years after the date this order becomes final, collect, maintain and provide upon request to the Federal Trade Commission: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of respondent; and all mailings of respondent to membership;

C. For a period of ten (10) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the Basic Texts or Appendices thereto, and any new rule, regulation or guideline of respondent applicable in the United States;

D. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission: (1) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, minutes, memoranda, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order, and (2) Upon five (5) days notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent; and

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

## VII.

*It is further ordered,* That the U.S. Region of AICC shall cease and desist for a period of one (1) year from maintaining or continuing respondent's affiliation with any organization of interpreters or other language specialists within thirty (30) days after respondent learns or obtains information that would lead a reasonable person to conclude that said organization has engaged, after the date this order becomes final, in any act or practice that if engaged in by respondent would be prohibited by paragraphs II or III of this order; unless prior to the expiration of such thirty (30) day period said organization informs respondent by verified written statement of an officer of the organization that the organization has ceased and will not resume such act or practice, and respondent has no grounds to believe otherwise.

## VIII.

*It is further ordered,* That this order shall terminate twenty (20) years from the date this order becomes final.

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Initial Decision

APPENDIX A

[DATE]

ANNOUNCEMENT

The Federal Trade Commission, an agency of the government of the United States of America, has determined that certain rules and practices of the International Association of Conference Interpreters ("AIIC") violate the antitrust laws of the United States.

Members are advised that agreements between competitors on rates and fees violate the antitrust laws of the United States, and may violate the laws of other countries. Other agreements between competitors on matters other than rates and fees may also violate the antitrust laws of the United States. Individuals who enter into such agreements may be subject to criminal penalties and fines under the laws of the United States of America. 15 U.S.C. 1, 18 U.S.C. 3571. Individuals who enter into such agreements may also be subject to civil liabilities to persons injured in their business or property as a result of violations of the antitrust laws. 15 U.S.C. 15.

AIIC and its United States Region are now subject to an order issued by the United States Federal Trade Commission. The order prohibits AIIC, including its members, regions, or organizational subdivisions, from engaging in various practices that would lessen competition in the United States. Copies of this order are attached to this Announcement.

## OPINION OF THE COMMISSION

BY VARNEY, *Commissioner*:

Respondents International Association of Conference Interpreters ("AIIC," as it is known by its French acronym) (IDF 1)<sup>1</sup> and its United States Region ("U.S. Region") are charged with violating Section 5 of the Federal Trade Commission Act ("FTC Act") by adopting and enforcing rules that govern how their members compete. We find that respondents' price-fixing practices and market allocation rules are *per se* unlawful agreements in restraint of trade and a violation of the FTC Act. We further find that the rules governing non-price terms and conditions of employment, business arrangements, and advertising must be analyzed under the rule of reason. Because the record evidence is insufficient to demonstrate a violation of law under the rule of reason, we dismiss the complaint allegations that those rules unlawfully restrain trade. In reaching these conclusions, we also find that AIIC's actions, which form the basis for this lawsuit, affect interstate commerce in the United States and are sufficient to confer specific personal jurisdiction; that respondents do not qualify for the "not-for-profit" exemption to the FTC's jurisdiction; and that respondents do not qualify for either the statutory or non-statutory labor exemption.

The order we enter prohibits respondents for a period of twenty (20) years from imposing any price-related or market allocation restraints in the United States.

## I. BACKGROUND

The Commission's complaint in this matter, issued on October 25, 1994, charges the respondents with restraining competition among conference interpreters in the United States in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1994), by conspiring with their members to fix the price and output of interpretation services in the

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<sup>1</sup> The following abbreviations are used in this opinion:

- ID -- Initial Decision of the ALJ
- IDF -- Numbered Findings in the ALJ's Initial Decision
- CX -- Complaint Counsel's Exhibit
- CXT -- Complaint Counsel's Exhibit -- English Translation
- RX -- Respondents' Exhibit
- Tr. -- Transcript of Trial before the ALJ
- Stip. -- ALJ's order setting forth joint stipulations of Fact

United States. After pretrial discovery, 26 days of trial testimony, and pre- and post-trial motions, the record closed on May 16, 1996. Administrative Law Judge ("ALJ") James P. Timony issued a decision and proposed order on July 26, 1996.

The ALJ found that for more than forty years, AIIC regulated the employment of its members by adopting and enforcing an elaborate series of work rules governing, *inter alia*, the minimum daily rates to be charged in the United States, length of the working day, number of interpreters to be hired at a conference, ability of out-of-town and staff interpreters to compete with local freelance interpreters, advertising, and payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." ID at 95.

The ALJ found that each restraint was part of a scheme to raise the price of conference interpretation services and that these restraints had anticompetitive effects. Although the ALJ found that the "evidence obviates [the need for] extensive inquiry into market power, market definition or market share," ID at 95, he nevertheless went on to determine that some of the restraints are also unlawful under the rule of reason, specifically finding that the respondents have market power. ID at 122-23.

The ALJ concluded that respondents endeavor to improve interpreters' working conditions and income and therefore exist for the profit of their members. ID at 95. The ALJ noted that although some of respondents' actions resemble union activity, they are not exempt from antitrust scrutiny under the statutory or nonstatutory labor exemption because AIIC specifically chose to be a professional association -- not a union. ID at 95-96; IDF 505. The ALJ further found that "respondents waived the [labor exemption] defense by failing to raise it in pleadings or during the presentation of evidence." ID at 96. The ALJ also found that the Commission has specific jurisdiction over AIIC for acts performed, or with effects, in the United States and that the Commission may proceed against the U.S. Region, an unincorporated association, as part of AIIC. ID at 96.

Finally, the ALJ rejected respondents' arguments that they have abandoned all of the rules that were arguably unlawful (ID at 131), finding that respondents continue to maintain rules on fees and working conditions despite their attempts "to conceal price-fixing agreements in 'gentlemen's agreements' and 'market surveys,' 'unpublished' rates and a [draft pamphlet] called a 'Vademecum.'" ID

at 96. The ALJ was unpersuaded that respondents' removal of some offending rules from their Basic Texts after the commencement of this investigation made an order unnecessary. ID at 131-33.

The respondents filed their appeal from the ALJ's Initial Decision on August 28, 1996. The respondents appeal all of the ALJ's jurisdictional findings, including his findings that the Commission has specific *in personam* jurisdiction over AIIC and that neither the statutory nor the nonstatutory labor exemption is available as a defense. Brief for Respondents-Appellants at 77-82. Respondents also appeal from the ALJ's finding that an order is necessary as to the monetary conditions that were contained in respondents' Basic Texts, arguing that the rules governing monetary conditions never applied to the U.S., were not enforced in the U.S., and were abandoned altogether in 1992. *Id.* at 1, 23-27. Finally, the respondents argue on appeal that the rules governing working conditions must be analyzed under the rule of reason and cannot be found unlawful because complaint counsel have not proven that respondents had power in the market for conference interpretation in the U.S. or that the rules had any anticompetitive effect in the U.S. *Id.* at 18-22, 36-61.

## II. RESPONDENTS

Respondent AIIC is an association of professional conference interpreters organized under French laws, with its Secretariat located in Geneva, Switzerland. Stips. 6-7. AIIC's rules are in its "Basic Texts," which include AIIC's Statutes, Code of Professional Ethics, and Professional Standards (also referred to as Standards of Professional Practice). Stip. 9; CX-1; CX-2; Brief for Respondents-Appellants at 9.

AIIC's supreme body, the Assembly, consists of all Association members and meets once every three years. IDF 2; Stip. 10. AIIC's Assembly is responsible for setting policy, including voting on Basic Texts and expelling members for rule violations. IDF 37-38. AIIC has a "Council," consisting of the president, three vice presidents, a treasurer, and representatives from each of the Association's regions, each nominated by their regions and elected by the Assembly. IDF 2; Stip. 11. The Council implements Assembly decisions, investigates disciplinary matters, approves the rates and per diems published by AIIC, grants waivers from AIIC rules, and adopts the annual budget. IDF 2, 39-41; *see also* Stip. 12. AIIC also has a "Bureau," consisting of the president, the three vice presidents, and the treasurer, that

exercises the Council's functions between meetings. IDF 2; Stip. 13. AIIC has approximately 2,500 members worldwide and 141 in the United States. Brief for Respondents-Appellants at 6; Stip. 36; *see also* CX-600-K; IDF 2; Luccarelli, Tr. 1626-32.

AIIC publishes a Bulletin for members (IDF 3; Stip. 67), which is sent to the United States to report on the business of AIIC, including matters relating to the rates of remuneration and work rules. IDF 3; Stip. 17. Proposed amendments to AIIC's Basic Texts are published in the Bulletin. IDF 3; Stip. 18.

Organizationally, AIIC is divided into two sections known as sectors. The "Agreement Sector" negotiates agreements for freelance interpreters with international and intergovernmental organizations. These agreements address a variety of issues of importance to AIIC's freelance interpreter members, including issues related to rates and working conditions. CX-2085-E; IDF 492-97; Brief for Respondents-Appellants at 6. The Agreement Sector currently has negotiated agreements with: 1) the United Nations, 2) Interpol, 3) the European Union, 4) Coordonnées, and 5) various international trade secretariats. IDF 492; Stip. 77; Respondents' Post-Trial Brief at 7. The "Non-Agreement Sector," or "NAS," meets twice each year to address "issues of interest to members who have private sector, governmental or intergovernmental clients with which AIIC does not have an agreement." CX-278-Z-2; CX-245-F; CX-242-E; Brief for Respondents-Appellants at 6; IDF 42.

Members of AIIC in any country with 15 or more members may form a "region," the membership of which consists of the AIIC members then having their professional address in that region. Stips. 32-33. AIIC has 22 regions, including the respondent U.S. Region. IDF 5; Stip. 35.

### III. JURISDICTION

#### *A. The Commission Has Specific Personal Jurisdiction Over Respondent AIIC*

Respondent AIIC contends that the Commission lacks *in personam* jurisdiction over it.<sup>2</sup> As explained below, we conclude otherwise. At the outset it should be noted that counsel for AIIC

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<sup>2</sup> Neither the agency's exercise of personal jurisdiction over the U.S. Region, nor the Commission's subject matter jurisdiction under Section 5 with respect to either respondent, has been challenged in respondents' appeal. We adopt the ALJ's conclusions with respect to each of these issues. *See* ID at 134.

stated at oral argument and in a subsequent written submission that it would not appeal any order that the Commission might issue, provided that such order would not constrain respondent's ability to retain four of the challenged restraints (*viz.*, the length of day, team size, professional address, and portable equipment rules). Oral Argument Tr. 7; *see also id.* at 8-10; Supplemental Brief for Respondents-Appellants at 6 (Oct. 26, 1996). Further, during argument and in its supplemental brief, respondent's counsel acknowledged its earlier proffer of a consent order encompassing all but four challenged restraints. *Id.* Such conduct may constitute a waiver of respondent's *in personam* jurisdiction objections in light of the Commission's decision to issue an order that does not enjoin those four rules (albeit for reasons other than respondent's offer). *Cf. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703-05 (1982) (party can waive its personal jurisdiction defense and "actions of the defendant may amount to a legal submission to . . . jurisdiction . . . whether voluntary or not").<sup>3</sup> Nevertheless, in an abundance of caution, we address the issue of *in personam* jurisdiction.

### 1. Legal Standard for Exercise of *In Personam* Jurisdiction Over Foreign Respondent

The Supreme Court in *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945), presented a two-pronged test that established and continues to underlie the due process requisites for *in personam* jurisdiction. First, "minimum contacts" must be shown.<sup>4</sup> Second, the

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<sup>3</sup> *See also English v. 21st Phoenix corp.*, 590 F.2d 723, 728 n.5 (8th Cir.) (*in personam* jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver), *cert. denied*, 444 U.S. 832 (1979); *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974) (stipulation and agreement to settle that were filed in federal court constituted a consent to the personal jurisdiction of the court); *Joseph V. Edeskuty & Assocs. v. Jacksonville Kraft Paper Co.*, 702 F. Supp. 741, 745 (D. Minn. 1988) (statements of counsel at hearing deemed tantamount to consent to personal jurisdiction).

<sup>4</sup> Because the claims against respondents are based on federal antitrust laws, as opposed to state law, the inquiry is whether respondent AICC has sufficient contacts with the United States, rather than with any one state. *See Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Dooley v. United Technologies Corp.*, 786 F. Supp. 65, 71 (D.D.C. 1992); *Consolidated Gold Field, PLC v. Anglo Am. Corp. of So. Africa*, 698 F. Supp. 487, 493 (S.D.N.Y. 1988), *aff'd in part and rev'd in part sub nom. Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). Respondent's reliance on *Friends of Animals, Inc. v. American Veterinary Medical Ass'n*, 310 F. Supp. 620 (S.D.N.Y. 1970), is inapposite in this analysis. Constitutional due process for *in personam* jurisdiction requires only "minimum contacts" with the forum. The Clayton Act venue provision, challenged in *Friends of Animals*, focused on a requirement of substantiality, which was a component of the "transacting business" test applicable only to analysis of the venue provision. *See* 310 F. Supp. at 624.

court must find that "fair play and substantial justice" would not be offended by the assertion of jurisdiction. *International Shoe*, 326 U.S. at 316, 320. Both prongs of this test must be satisfied. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The "minimum contacts" prong of the analysis focuses on whether the connection between the defendant, the forum, and the litigation is such that "[the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 288, 297 (1980); *see also Burger King*, 471 U.S. at 472 (Due Process Clause requires that individuals have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign sovereign, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). That requirement is met if, for example, the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen*, 444 U.S. at 297 (a defendant that "purposefully avails itself of the privilege of conducting activities within the forum[,]" quoting *Hanson v. Denckla*, has "clear notice that it is subject to suit there").

If the defendant's conduct satisfies the "minimum contacts" requirement, the courts then consider whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *See, e.g., Burger King*, 471 U.S. at 476. Under this prong of the *International Shoe* analysis, the courts evaluate the "reasonableness" of asserting personal jurisdiction under the particular circumstances of the case, and may consider not only the defendant's contacts with the forum, but also "other factors" (*e.g.*, the respective interests of the plaintiff and the forum, judicial efficiency). *Id.* at 477; *see also Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) (outlining factors to be considered in reasonableness determination, where personal jurisdiction over foreign entities was at issue).

## 2. Specific Jurisdiction

As the case law implementing these basic principles of jurisdiction has developed, two species of *in personam* jurisdiction over foreign respondents have emerged: "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction attaches if there is a

sufficiently close relationship between the cause of action and the nonresident's activities within the forum.<sup>5</sup> General jurisdiction requires a higher degree of involvement with the forum than does specific jurisdiction, and allows a plaintiff to sue a defendant on virtually any cause of action, including those that do not arise from the defendant's contacts with the forum. Thus, normally, there would be no reason to determine whether general jurisdiction exists if the cause of action at issue and the forum are sufficiently related to trigger specific jurisdiction.

In determining whether specific jurisdiction exists in this instance, we must ask: (a) whether the conduct was "purposefully directed" to the forum, *Burger King*, 471 U.S. at 471 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); (b) whether the cause of action "arise[s]" from or relates to that conduct, *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)); and (c) whether the assertion of specific jurisdiction is reasonable as a matter of due process, *Burger King*, 471 U.S. at 471; *see also Asahi*, 480 U.S. at 113. As set forth below, we affirm the ALJ's conclusion that the agency may properly exercise specific jurisdiction over respondent AIIC.

*a. Conduct Purposefully Directed Toward the United States*

With respect to the first aspect of specific jurisdiction analysis, we find that respondent AIIC intentionally engaged in conduct that caused consequences in the United States market for interpretation services. In so finding, we focus primarily on AIIC's conduct, not on that of its members. The conduct of AIIC's U.S. members is relevant only to the extent that the members were acting as agents of AIIC. Specifically, AIIC engaged in four courses of conduct that were intended to affect both the prices charged by AIIC members for conference interpretation and the terms under which they worked.

First, respondent published rates of remuneration for interpretation services performed in the United States and prepared

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<sup>5</sup> *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.*, 587 F. Supp. 1446, 1449 (D.N.J. 1984). In the specific jurisdiction analysis, the tribunal must inquire whether the relationship between the transaction at issue and the forum justifies the forum's assertion of jurisdiction over the defendant. *Id.* Specific jurisdiction is asserted when the defendant's forum contacts are sporadic, but the cause of action arises out of those contacts. In determining whether there are sufficient minimum contacts to satisfy due process requirements, we focus upon the relationship among the defendant, the forum and the cause of action. *Burger King*, 471 U.S. at 471, 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Shaffer v. Heimer*, 433 U.S. at 204.

schedules of *per diem* charges with entries unique to this country. *See generally* CX-71, 75, 76, 79, 81 to 84; CX-2446-C; CX-301-Z-42 (Bishopp); CX-305-Z-49 to 51 (Sy); CX-55 to -65; CX-247-Z-2, Z-5; CX-124-E; CX-125-E; CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton). Similarly, AIIC tailored its work and monetary rules, and waivers for such rules, for application in the United States. *See generally* CX-71 to -73, 75 to 77, 79, 81 to 84 (rates); CX 55 to 65 (rates); CX-124-E (per diem); CX-125-E (per diem); CX-130 (per diem); CX-247-Z-2, Z-5 (per diem); CX-301-Z-152.41 to Z-152.42 (Bishopp) (per diem); CX-268-E (per diem); CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton) (per diem); CX-245-I, F (indivisible day waiver); CX-405-C (team size); CX-407-F to G (team size); CX-50 (team size); CX-56 (team size); CX-1384-A (solo interpreter waiver applicable to U.S.); CX-268-F (solo waiver); CX-301-Z-152.43 (Bishopp) (solo waiver); CX-300-Z-33 to Z-36, Z-128 to Z-129 (Motton) (solo waiver); CX-432-G to H (solo waiver). AIIC also adopted its workload and other rules with the expectation that those rules would be followed in the United States. *See generally* Stips. 9, 83-87; Silberman, Tr. 3132-33.

Second, respondent AIIC sought, in conjunction with efforts of the U.S. Region, to ensure the uniform application of the AIIC Code and its Annexes in the United States. For example, the U.S. Region discussed and sent to AIIC in Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." *See* CX-439-A, D to F; CX-1408-A, C to E. In addition, AIIC investigated complaints against U.S. Region members for violations of its rules. *See generally* CX-1693-A to C; CXT-1693-A to C; CX-1300-A; CXT-1320-A to C; CXT-239-I; CX-304-Z-128 to Z-131 (Motton); CX-1066-A to E; CX-1086; CX-1090; CX-1100; CX-1138-A to B; CX-1256-B; CX-236-C. AIIC also solicited complaints from the U.S. Region concerning members who violated AIIC's moonlighting rules, including the names of such members and copies of contracts demonstrating such violations. *See* CX-432-G to H, M. The U.S. Region representative to the AIIC Council also advised U.S. members how to comply with AIIC rules and issued warnings to members regarding noncompliance with association rules. *See* CX-1471; CX-1470-A. U.S. Region members also serve as agents of AIIC when serving on the bodies responsible for creating and enforcing AIIC rules. *See* CX-300-O to Q (Motton); CX-2490-A to

G; CX-1-G to H (1994 AIIC Statutes Article 24(6)); CX-2-G to H (1991 AIIC Statutes Article 24(6)).<sup>6</sup>

Third, AIIC cooperated with The American Association of Language Specialists ("TAALS") with respect to conduct in the United States challenged in the complaint. *See generally* CX-409-A; CX-218-J; CX-266-Z-6 (coordination of AIIC and TAALS activities); CX-405-C (in 1975 AIIC agreed to work with TAALS to examine issue of U.S. antitrust laws); CX-1728-B (appointment of official liaison from TAALS to AIIC, with eight-year term). In particular, AIIC and TAALS worked together to enforce their overlapping rules in the U.S. *See generally* CX-1066-A; CX-1090; CX-1138-A to B; CX-237-H; CX-239-B; CXT-1731-B. Further, TAALS and AIIC shared information on enforcement and on their mutual efforts to effect changes in the terms of the contracts for interpretation services at the 1984 Olympic Games. *See* CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1728-B; CX-1733; CX-1735.

Fourth, respondent AIIC held its General Assembly in New York City in 1979 and voted there to adopt several of the provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. *See* CX-6-A to M; CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D. In addition, AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before other General Assembly meetings. *See* CX-1406-B to C; CX-266-Z-5; CX-260-A to B.

*b. Claims Against Respondent AIIC Arising From U.S. Activities*

With respect to the second aspect of specific jurisdiction analysis, it is settled that "[a]n action will be deemed not to have arisen from

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<sup>6</sup> We find unpersuasive respondent's reliance on cases in which an association failed to exercise substantial influence over the members' activities in the forum. *See* Brief for Respondents-Appellants at 77-78. Two of the cited cases involved general jurisdiction analysis, which calls for a heightened degree of contact with the forum. *See* *Donatelli v. National Hockey League*, 893 F.2d 459, 468-72 (1st Cir. 1990); *Rhodes v. Tallarico*, 751 F. Supp. 277, 279 (D. Mass. 1990) (citing "minimum contacts" test applied in *Donatelli*). Further, the court in *Rhodes* concluded that the defendant organization lacked minimum contacts with the forum because there was no evidence that the organization lacked minimum contacts with the forum because there was no evidence that the organization exercised any influence over its members' decision to perform services in the forum. In contrast, AIIC's professional address rule required its members to remain at a professional address for a minimum of six months. In addition, AIIC's conduct described above in the text had a substantial influence over its members' conduct in providing interpretation services in this country.

the defendant's contacts with the forum state only when they are unrelated to the operative facts of the controversy." *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). In this case, the cause of action arose from the very same conduct conferring jurisdiction. The Commission's complaint alleges that respondent AIIC and its United States affiliate members conspired to fix the fees that they could charge for interpretation services performed in the United States, and that they imposed a variety of restrictions that illegally restrained competition among U.S. interpreters. Specifically, AIIC and its U.S. Region allegedly enforced fee schedules, work rules and other restrictions on members operating in the United States.

The alleged price-fixing herein includes minimum rates that members must charge within the United States: for performance of interpretation services; for cancellations; for recording of interpretations; as compensation for travel time, rest, and conference recesses; for performing whispered interpretation or working alone; and as reimbursement for travel, lodging and other expenses. The complaint also challenges the respondents' work rules in the U.S. requiring that all interpreters on the same job obtain the same pay regardless of skill level or experience; that interpretation fees be paid on a full-day basis; and that member interpreters must pay their own subsistence and travel when they do volunteer work. The following additional restrictions imposed on U.S. interpreters by AIIC and its U.S. Region were also challenged in the complaint: specified minimums as to the number of interpreters per job; limitations on the number of hours members may work per day; limits on member use of portable equipment; a requirement that interpreters declare a single professional address that they can change only once every six months with three months' notice; a prohibition against accepting non-interpreter duties at a conference where members are performing interpretation services; a prohibition on comparative advertising; restrictions against certain exclusive employment arrangements; a prohibition on offering package deals of interpretation and other services; a ban on commissions; a requirement that members selecting an interpretation team give preference to freelance interpreters over interpreters with permanent positions; limits on accepting multiple assignments within a period of time; and prohibitions on the use of trade names by members who coordinate interpreters.

We therefore find that the claims in the Commission's complaint arise from, or are related to, the foregoing AIIC contacts with the United States.

*c. Reasonableness*

The third aspect of specific jurisdiction analysis is to determine whether, under the particular circumstances of the case, the exercise of jurisdiction is reasonable as a matter of constitutional due process. We conclude that the Commission's exercise of personal jurisdiction here would satisfy that standard.

Asahi Metal Industry Co. is the Supreme Court's most recent pronouncement on *in personam* jurisdiction over foreign defendants. The Court explained that determining "reasonableness" of the exercise of jurisdiction in a given case depends on an evaluation of several factors, which the Court had previously articulated in *World-Wide Volkswagen* (a case involving personal jurisdiction over domestic defendants):

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

*Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

As to "the burden on the defendant," we recognize that AIIC is a foreign association, organized under French law and having its only office in Geneva, Switzerland. Nonetheless, the Commission does not believe that requiring AIIC to appear through counsel in the present action imposes on AIIC an unusually severe or unreasonable burden.<sup>7</sup> In any event, "when minimum contacts have been established," as they have been here, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even . . . serious burdens placed on the alien defendant." *Asahi*, 480 U.S. at 114.

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<sup>7</sup> In *Asahi*, the Court found that litigation in California would severely burden the Japanese defendant (and that there was no showing that litigation in California, rather than Japan or Taiwan, would be more convenient for the Taiwanese plaintiff). In the present case, by contrast, litigation in the United States offers some convenience due to AIIC's relationship with the U.S. Region. Indeed, the interests of AIIC and its U.S. Region are sufficiently parallel that they are represented by the same counsel. The feasibility of common representation substantially mitigates the severity of the burdens imposed on AIIC by litigation in a foreign forum.

As to the "interests of the forum" and the "plaintiff's interest in obtaining relief," we find that the interests of the forum and the plaintiff in the assertion of jurisdiction over AIIC are substantial. The objective of the present action is to ensure that respondents' anticompetitive restraints in this country will cease. Although much of respondent AIIC's conduct occurred outside this country, the intended effect of its actions in establishing work rules, including rules having unique application to this country, was to restrain competition in the United States. *See supra* at 6-8. This agency was established to enforce federal antitrust laws to protect competition in this country, and we therefore assert a strong interest in challenging respondents' alleged anticompetitive conduct.<sup>8</sup>

Finally, the "interest in obtaining the most efficient resolution of controversies" also strongly favors the resolution in the United States of questions respecting AIIC's conduct. The Commission is exercising jurisdiction over AIIC's United States Region, and, in any event, the challenged conduct by AIIC is closely related to that region.<sup>9</sup>

On balance, in this case, we conclude that the Commission's interest in protecting competition within the United States, and considerations of efficiency, are sufficient to outweigh the burdens

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<sup>8</sup> A Plaintiff's interest in relief may sometimes be satisfied by the availability of redress in a foreign tribunal. Here, there is no reason to believe that a foreign sovereign will act to protect the market for interpretation services in the United States, and the Commission is unaware of any pending action by a foreign sovereign to remedy the competitive injury alleged in this case. Further, even were it shown that a foreign sovereign had some enforcement interest in this matter, that consideration, while relevant, *see infra* note 9 (discussing *Asahi*), is only one of several factors to be weighed in determining whether personal jurisdiction would be "reasonable." *See, e.g., Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995) (declining to find that personal jurisdiction over membership association organized under Swiss law and based in Argentina was unreasonable, even though plaintiff failed to demonstrate that effective remedy was unavailable in alternative forum); *Roth v. Garcia Marquez*, 942 F.2d 617, 624-25 (9th Cir. 1991) (declining to find that personal jurisdiction over Spanish defendants was unreasonable, even though interests of foreign sovereignty weighed slightly in favor of defendants, and plaintiff did not show that he could not litigate in alternative forum); *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199-1201 (9th Cir. 1988) (finding personal jurisdiction over Swiss clinic to be reasonable, even though plaintiff failed to show that alternative forum was unavailable); *Taubler v. Giraud*, 655 F.2d 991, 994-96 (9th Cir. 1981) (finding personal jurisdiction over French wine maker to be reasonable, citing as factors but not specifically discussing foreign authorities' interests or availability of alternative forum, instead noting that "[s]tate and federal antitrust violations should not go without a domestic remedy").

<sup>9</sup> Nor would assertion of personal jurisdiction here impinge adversely upon the values reflected in the last *Asahi* "reasonableness" element relating to "the shared interest of the several States in furthering fundamental substantive social policies." *See Asahi*, 480 U.S. at 115 (acknowledging the need to weigh procedural and substantive policies of other nations whose interests are affected by the U.S. court's assertion of jurisdiction). To the extent that concerns about efficiency and substantive social policies are relevant here, our analysis considers other national interests, as discussed *supra* note 8.

that may be placed on AIIC to defend itself in this forum. Thus, we conclude that the assertion of personal jurisdiction over AIIC here is reasonable under the Due Process Clause.

Accordingly, because AIIC's unlawful conduct was purposefully directed towards the United States, because the claims alleged in this case arose from such activities, and because the assertion of jurisdiction here would be reasonable under the Due Process Clause, we hold that the Commission may lawfully exercise *in personam* jurisdiction over AIIC in this case.

### *B. The Not-for-Profit Exemption Is Inapplicable*

We disagree with respondents' claim that they are entitled to the not-for-profit exemption. Respondents claim that "[n]either AIIC nor the U.S. Region is 'organized to carry on business for its own profit or that of its members' under Section 4" of the FTC Act, 15 U.S.C. 44 (1994), as interpreted by the Commission in its opinion in *College Football Ass'n*, D. 9242 (July 8, 1994), 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"). Respondents' Post Trial Brief at 126-27. In *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form alone places it beyond the Commission's jurisdiction. The Eighth Circuit explained that the FTC Act's Section 4 nonprofit exemption extends only to corporations that are "in law and in fact charitable." *Id.* at 1019. We applied this standard in *American Medical Ass'n*, 94 FTC 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"), and have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations, most recently in our opinion in *California Dental Ass'n*, D. 9259 (Mar. 25, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,007 ("CDA"). *See also Michigan State Med. Soc'y*, 101 FTC 191, 283-84 (1983).

Nonetheless, AIIC argues that it is "a *bona-fide* tax-exempt, non-profit association under French law" and that this case is even stronger than in CFA because, "[u]nlike in CFA, AIIC does not obtain revenues or profits on behalf of its members and distribute those profits to them." Respondents' Post-Trial Brief at 126-27. Our decision in CFA does not afford immunity to respondents in this case. CFA addressed whether a nonprofit organization, all of whose members are not-for-profit entities, is subject to the Commission's

jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. Our jurisdictional analysis in CFA did not call the holding in AMA into question. *See* CFA, slip op. at 20-26, 5 Trade Reg. Rep. (CCH) at 23,361-64; CDA, slip op. at 6, 5 Trade Reg. Rep. (CCH) at 23,782.

AIIC falls within our jurisdiction for many of the same reasons the AMA and CDA did. *See generally* CDA, slip op. at 6-7, 5 Trade Reg. Rep. (CCH) at 23,782-83; *AMA*, 94 FTC at 986-88. AIIC and the U.S. Region exist and engage in activities to improve members' incomes and working conditions. AIIC and the U.S. Region adopted minimum daily rates for use in the U.S. and adopted other rules governing the working conditions for interpreters. AIIC publishes a directory of AIIC members, which AIIC sends to AIIC members and purchasers of interpretation services to facilitate the hiring of AIIC members. IDF 467, 468; Stips. 61-62. AIIC also negotiates member discounts for such items as airfare, hotels, and publications. IDF 483. AIIC also provides its members with insurance plans for health, loss of earnings, and retirement, and manages two retirement plans for members. IDF 484, 485. AIIC has contacted various governmental entities, including a U.S. Senator, to improve the financial situation of its members. IDF 487, 488. The ALJ found numerous other examples of how AIIC serves the pecuniary benefits of its members, and we agree with his findings in this regard. *See generally* IDF 453-97. Finally, because AIIC and U.S. Region members are themselves profit seekers, this case is more akin to CDA and AMA and unlike CFA, where the members were not-for-profit educational institutions.

### *C. AIIC Does Not Qualify for the Labor Exemption*

Respondents argue that "the statutory labor exemption immunizes all challenged Basic Texts provisions from antitrust liability [and] the nonstatutory labor exemption so immunizes AIIC's agreements." Brief for Respondents-Appellants at 82 n.84. The statutory labor exemption is designed to protect union conduct, and the Supreme Court has said that "a party seeking refuge in the statutory exemption must be a *bona fide* labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981) (citing *Meat Drivers v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)). The nonstatutory labor exemption

protects from antitrust liability certain labor agreements that are part of, or result from, the collective bargaining process. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2121 (1996).

AIIC is an association of professional interpreters who have, through the association, promulgated a series of rules and regulations governing competition among themselves concerning the provision of conference interpretation services. As the ALJ found, the association members have expressly declined to organize AIIC as a labor organization (IDF 504-05), and we find that the weight of the evidence shows that the freelance AIIC members, for whom the pay and working conditions have the most relevance, are self-employed entrepreneurs and not employees. For example, AIIC members individually arrange their jobs and have complete discretion as to which jobs they will take and which they will decline. IDF 503. Moreover, the respondents, who carry the burden of proof with respect to establishing the applicability of this exemption, have offered no evidence to support the position that freelance AIIC members are employees. In fact, respondents have stipulated that 68 percent of "AIIC members in the United States are self-employed (*i.e.*, freelance) interpreters." Stips. 57, 60. Moreover, Mr. Luccarelli, one of respondents' key witnesses, testified that outside of the permanent employees of various international organizations, interpreters are generally not considered employees. Luccarelli, Tr. 1694; *see also* IDF 504.

We therefore find that AIIC is an organization of competing self-employed professionals and not a *bona fide* labor organization. Accordingly, we reject AIIC's argument that its Basic Texts are shielded by the statutory labor exemption. *See H.A. Artists & Assocs.*, 451 U.S. at 717 n.20. *See generally* 1 Phillip E. Areeda & Donald F. Turner, Antitrust Law ¶ 229c (1978); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 229'c (Supp. 1996).

Respondents also argue that they have negotiated several collective bargaining agreements on behalf of AIIC members with institutions that employ freelance AIIC members alongside their regular employees. Stips. 75, 78, 81. AIIC asserts that its agreements are immunized from antitrust challenge by the nonstatutory labor exemption. Because we are not challenging the agreements that AIIC relies upon for the nonstatutory exemption, we do not have to reach the question whether those agreements are in fact the product of a

collective bargaining process or are something else, such as employment contracts or contracts for the provision of services.<sup>10</sup>

#### IV. LEGALITY OF RESTRAINTS OF TRADE

Restraints of trade are unlawful under Section 5 of the Federal Trade Commission Act, as well as Section 1 of the Sherman Act, 15 U.S.C. 1 (1994), when they are *per se* illegal or when they are unreasonable under the rule of reason. The law does not condemn some practices that restrain trade in a literal sense -- as, for instance, all contracts do to varying degrees -- when those practices have no significant anticompetitive effect or even promote competition. In each case "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition." CDA, slip op. at 14, 5 Trade Reg. Rep. (CCH) at 23,786; *see also National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("NCAA"); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978). Recent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ("SCTLA").<sup>11</sup>

Although respondents do not specifically appeal from the ALJ's finding that their rules resulted from a conspiracy, before examining respondents' restraints and the analysis to be accorded each, we address this element of a Section 5 case. As we noted recently in CDA, it is well-established that "professional associations are 'routinely treated as continuing conspiracies of their members.'" CDA, slip op. at 9, 5 Trade Reg. Rep. (CCH) at 23,783 (quoting 7 Areeda, Antitrust Law, *supra* note 11, ¶ 1477, at 343, and citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). *See also National Soc'y of Prof'l Engineers*, 435 U.S. at 692

<sup>10</sup> While the ALJ incorrectly said that the nonstatutory labor exemption "is available only for union-employer agreements" (ID at 131), *cf., e.g., Brown v. Pro Football, Inc.*, 116 S. Ct. at 2123-24, we think it clear that the only agreements that the nonstatutory labor exemption reaches are those that grew out of the collective bargaining process, *see id.*

<sup>11</sup> We note that some earlier Supreme Court cases had suggested the merging of the *per se* and rule of reason analyses. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("BMI"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("IFD"). Areeda also has suggested that there may have been some convergence of the *per se* category (*see, e.g.,* the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (*see, e.g.,* the "quick look" approach of IFD) so that at times the two antitrust approaches do not differ significantly. *See* 7 Phillip E. Areeda, Antitrust Law ¶ 1508c, at 408 (1986).

(Court noted, in declaring a professional association's ethics rule a violation of Sherman Act Section 1, that "[i]n this case we are presented with an agreement among competitors"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455 (1986) ("IFD") (members of IFD had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies); *NCAA*, 468 U.S. at 99.

Respondents herein, as in CDA, clearly promulgated their Basic Texts, which "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." CDA, slip op. at 10, 5 Trade Reg. Rep. (CCH) at 23,784 (citing *AMA*, 94 FTC at 998 n.33). Moreover, as in CDA, respondents herein require both members and candidates for membership to expressly pledge to abide by AIIC's Basic Texts. IDF 43-45; CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 to Z-10 (Motton). AIIC's Council also interprets and enforces AIIC's Basic Texts. *See* IDF 39-41.

We therefore affirm the ALJ's finding that the restraints at issue in this case are the result of an agreement among competitors -- namely, the members of AIIC, acting through their Assembly and other representative entities. *See* ID at 101-04. We turn to the specific restraints imposed by respondents and analyze each under the appropriate antitrust standard to determine whether it is an unreasonable restraint of trade.<sup>12</sup>

#### *A. Restraints on Price Competition -- Per Se Unlawful*

*Per se* categories of unlawful conduct consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial procompetitive justifications. The law accords *per se* treatment to certain kinds of behavior that longstanding experience has shown to be beyond justification, and courts generally will not consider arguments that such conduct is harmless or procompetitive. Thus, the courts have concluded that such agreements are illegal without further examination of the particular circumstances under which they arise or the effects thereof -- "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is

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<sup>12</sup> Because AIIC made numerous changes to its rules between 1991 and 1994, we discuss both versions where necessary to provide a complete understanding of the practices challenged in this proceeding. In general, we discuss the 1991 version of the rules in the text and the 1994 version in footnotes, noting whether we have concerns with the revised rules.

unreasonable." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (footnote omitted). See also *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). As we recently made clear in CDA, "[e]xamples of such practices are horizontal price fixing," citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and SCTLA; "territorial divisions among competitors," citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972); "and certain group boycotts," citing *Northwest Wholesale Stationers*. CDA, slip op. at 15, 5 Trade Reg. Rep. (CCH) at 23,786 (also citing *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

It is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws. See, e.g., *Maricopa*, 457 U.S. at 344-48; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).<sup>13</sup> Thus, any alleged "reasonableness" of an agreement to fix prices will not justify the resulting interference with competition. See *Trenton Potteries Co.*, 273 U.S. at 397-98; *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified*, 175 U.S. 211 (1899). Lack of market power to effect the agreement is not a defense to the *per se* illegality of the agreement. *SCTLA*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224-25 & n.59.

## 1. Facts

AIIC and the U.S. Region adopted a wide variety of rules that affected and eliminated price competition among AIIC members in the United States. Since AIIC was founded in 1953, it has established binding rules governing its conference interpreter members, including rules concerning the remuneration charged. AIIC rules are found in its Basic Texts, which include Governing Statutes (CX-2-A (1991); CX-1-A to M(1994)), a Code of Professional Ethics (CX-2-Z-37 to 39(1991); CX-1-Z-37 to 39(1994)), Standards of Professional Practice (CX-2-Z-40 to 49 (1991); CX-1-Z-40 to 46 (1994)), a Staff Interpreters' Charter (CX-2-Z-54) (1991)), and various Annexes to the Basic Texts, including the Guidelines for Recruiting Interpreters.

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<sup>13</sup> But see BMI (price agreement that was essential to the market availability of the product reviewed under the rule of reason); U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (Aug. 28, 1996) (Statements 8 & 9), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153 (price agreements that are ancillary to the formation of an integrated joint venture analyzed under the rule of reason).

CX-2-Z-50 to 53 (1991); CX-1-Z-47 to 52 (1994). For the reasons discussed *infra* at 25-29, we find that the following rules are individually and collectively part of an overall price-fixing scheme and we declare each of them *per se* unlawful under Section 5.

*a. Minimum Daily Rates*

From 1953 until 1973, AIIC published universal minimum daily rates applicable world-wide, with certain exceptions for particular countries where the mandatory minimum rate was higher. In 1973, when the U.S. dollar and other currencies were no longer traded at fixed exchange rates, AIIC began a program to establish individual rates for each country on the basis of recommendations from AIIC members in those countries. IDF 99; Weber, Tr. 1142-44, 1147. However, in 1983 AIIC became aware that certain countries were applying their antitrust laws to rules adopted by professional associations and began to send out lists of minimum daily rates under the title "Market Survey," which was widely understood to reflect a "gentleman's agreement" on the minimum rate to be charged.<sup>14</sup> IDF 516. In 1982 the U.S. Region became particularly concerned about the application of U.S. antitrust laws and asked AIIC to stop publishing a minimum daily rate for the United States. *See* CX-1226-A ("gentleman's agreement not to ask for less than" \$250 per day; antitrust lawyers advised U.S. Region not to have fixed rate appear on the rate sheet). From approximately 1982 until 1988, there was a tacit "gentleman's agreement" to abide by minimum daily rates for the U.S. Region. IDF 77; ID at 106. However, in 1988 AIIC again began publishing, at the U.S. Region's request, minimum daily rates for the U.S. *See* IDF 78.

Article 8 of the 1991 AIIC Basic Texts, Standards of Professional Practice, stated:

The rate of daily remuneration shall be the standard rate applicable in the region concerned and, more precisely in the appropriate cases, in the country concerned. All the standard rates must be approved by the Council, which shall inform all members. In those countries where it is impossible to apply a standard rate, the Council shall adopt whichever alternative provisions it deems necessary and shall also inform all members.

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<sup>14</sup> In 1977, in order to standardize rates for the U.S., AIIC's U.S. Region decided to adopt the minimum daily rate established and voted on by TAALS and transmit that rate to AIIC's headquarters for publication as the official rate applicable in the United States. *See* ID at 106; IDF 308, 100. The Commission issued a consent order against TAALS on August 31, 1994. Docket No. C-3524, 5 Trade Reg. Rep. (CCH) ¶ 23,537.

The base rate, which shall equal two-thirds of the standard rate, shall be applied in the cases provided for in Articles 12 and 14 below.<sup>15</sup>

AIIC became aware of the FTC investigation of interpreter associations in June 1991, when two U.S. Region members responded to a Commission document request sent to TAALS. IDF 538; CX-608-Z-77; CX-935-B. At its General Assembly meeting in 1991, AIIC's membership voted on whether to remove the monetary conditions from its Basic Texts, but the vote failed to achieve the required two-thirds majority. IDF 520-21; CX-270-K. AIIC then decided to hold an Extraordinary Assembly in 1992 to reconsider eliminating the monetary rules. One day before its 1992 Extraordinary Assembly, the Non-Agreement Sector held an off-the-record meeting to examine how, in light of the antitrust laws, it was possible to "operate in another way."<sup>16</sup> IDF 510; CX-271-C, F; CX-273-U. The next day the Assembly voted on the following resolution:

DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation, FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world, DECIDES on the following principles:

1. To remove all mention of monetary conditions (*e.g.* rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . .

CX-273-G; IDF 509. The Council subsequently decided that "[a]ll provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . .The Basic Texts shall be amended consequently at the next ordinary Assembly." CX-279-I (March 1994 Bulletin); *see also* CX-273-O; CXT-273-O, p.1. Subsequently, at the 1994 Assembly, necessary changes to remove the monetary conditions were incorporated into the Basic Texts. IDF 97; CX-970-A.

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<sup>15</sup> CX-2-Z-43. Article 4 of the 1994 version of the Professional Standards states: "Except for those cases where the Association has signed an Agreement, members are free to set their level of remuneration." We have no objection to this formulation of the rule.

<sup>16</sup> The June 1992 AIIC Bulletin set forth the agenda for the Extraordinary Assembly. It contained this message from AIIC's president:

We urge as many members as possible to attend this meeting on cartels which has been proposed by the NAS and will be attended in the morning by a lawyer. Colleagues from Canada and Germany will explain how, in practice, it is possible to "operate in another way." Since there will be neither minutes nor recording of the proceedings, your presence is essential if you wish to fully informed. . . . On the basis of this information, you will be able to take the relevant decisions which will enable the Assembly to achieve its aims.

*b. Indivisible Daily Rates*

Article 6(a) of the 1991 AIIC Standards provided that "[r]emuneration shall be on an indivisible daily basis." CX-2-Z-42.<sup>17</sup> AIIC's rules meant that "you charge per day no matter how long you work." CX-303-Z-109 (Moggio-Ortiz); *see also* CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).

Even where interpreters received a waiver from AIIC allowing them to work alone for meetings lasting 40 minutes or less in the U.S., they were nonetheless required to charge the full daily rate. CX-301-Z-152.1 (Bishopp); CX-432-G. The June 1993 Bulletin presented sales arguments interpreters could use in light of the deregulation of AIIC's Basic Texts, noting that they should argue that with respect to "conferences of short duration . . . one cannot take other assignments in the course of a free half-day." CXT-276-E-G, pp.1-2.

U.S. Region interpreters charge indivisible daily fees, regardless of the number of hours worked. IDF 126; Swetye, Tr. 2826-28, 2830-31; CX-300-Z-143 (Motton); Weber, Tr. 1264. Intermediaries understood the AIIC rate to mean an indivisible daily rate, which they paid. IDF 127, 126; Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53.

*c. Fees for Non-Working Days*

Article 12 of the 1991 Standards of Professional Practice stated:

a) When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate.

b) When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate.

CX-2-Z-46. As noted above, the "base rate" was defined in Article 8 of the 1991 Basic Texts as being at least two-thirds of the standard minimum daily rate. CX-2-Z-43 (Article 8). Article 14 specified, *inter alia*, that for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and

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<sup>17</sup> There is no provision specifying that remuneration shall be for an indivisible day in the 1994 Basic Texts.

remunerated at the same rate." In lieu of rest days, the interpreter could accept first class airfare. CX-2-Z-47.<sup>18</sup>

*d. Same Team, Same Rate*

Article 6(c) of the 1991 AIIC Standards of Professional Practice provided that "[a]ny member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." CX-2-Z-42.<sup>19</sup> The rule further stated that "[a]ny interpreters recruited separately for a language which is not one of the normal working languages of the organization concerned may be regarded as not being members of the teams." *Id.* Thus, the rule did not apply when interpreters were recruited for an "exotic" language, such as Russian, Japanese, or German, or another language for which "there is difficulty finding interpreters." IDF 151; CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).

*e. Travel Arrangements*

Article 15(a) of the 1991 Standards provided:

Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel by the shortest possible return (or circular) route between the place of her or his professional address and the conference venue (or venues).

CX- 2-Z-48. The rule further specified that payment for travel by air shall be for first class, business class, or club class and that tickets are not to be restricted to a particular carrier nor can an interpreter be forced to travel by charter flight. *Id.* Article 15(b) further required

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<sup>18</sup> Article 8 of the 1994 Standards provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." Article 10 of the 1994 Standards further provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours)." CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to set remuneration for non-working days and to specify the forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. See discussion in Section VI, *infra* at 48-49.

<sup>19</sup> There is no provision specifying that remuneration shall be the same for all members of a team in the 1994 Basic Texts.

that for successive conferences away from the interpreter's professional address, unless there is "full and separate payment of the return travel from each [conference], the interpreter shall receive a fee and a subsistence allowance for every day" between conferences. *Id.*

AIIC's rules governing travel arrangements were binding in the U.S. IDF 239. In fact, the 1991 paper, "Working conditions for interpreters in USA," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states that "[i]n addition to professional fees, each interpreter shall be entitled to: . . . return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. interpreters are entitled to business class or first class tickets. When train service is more convenient, first class tickets." CX-439-E, ¶ 6; IDF 239.<sup>20</sup>

### *f. Per Diem*

Article 13 of the 1991 Standards of Practice provided:

a) For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence.

b) The Association shall regularly publish a list of subsistence allowances for the various countries. They shall reflect the prices charged by first-class hotels.

c) The interpreter may agree to the conference organizers paying up to half the subsistence allowance in kind by providing a hotel room, including breakfast, or up to eighty percent by providing full-board.

d) One half of the subsistence allowance shall be due when the interpreter's absence from the place of her or his professional address is less than twelve hours between 8:00 and 20:00 hours (which may vary slightly as a function of local custom) and when it is not necessary for the interpreter to spend the night away from the place of her or his professional address.<sup>21</sup>

<sup>20</sup> In the 1994 Standards, Article 10 states: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey." Article 9 further provides: "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." CX-1-Z-45; IDF 238. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. See discussion in Section VI, *infra* at 48-49.

<sup>21</sup> Article 11(a) of the 1994 Professional Standards revised this provision to state:  
Unless the parties agree otherwise, the interpreter required to travel to the conference shall receive a subsistence allowance, calculated per night of absence. As a general rule, this allowance shall be paid on the first day of the conference and in the currency of the country where it is being held.

CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify the payment of *per diems* and formulas for calculating such *per diems*, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. See discussion in Section VI, *infra* at 48-49.

CX-2-Z-46. The record establishes that: AIIC rules required members to charge a per diem when they worked away from their professional address (IDF 110; CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp));<sup>22</sup> AIIC's Council approved the rates (IDF 113; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton)); and AIIC published a per diem rate for the United States (CX-247-Z-2, Z-5, CX-124-E, CX-125-E). In addition, the U.S. Region adopted a formula whereby the organizer pays the interpreter's hotel room, as well as a fixed percentage of the hotel rate for meals and incidentals. IDF 116; CX-301-Z-65, Z-150 to Z-152.1 (Bishopp); CX-432-F (50% of hotel rate in 1988); CX-439-F (40% of hotel rate in 1991).

*g. Cancellation Fees*

Article 2(c) of the 1991 Standards of Professional Practice provided:

Any contract for the recruitment of a member of the Association must specify that in the event of the organizer cancelling [sic] all or part thereof, whatever the reason for and the date of cancellation, the interpreter shall be entitled to the payment of all fees contracted therein (working and non-working days, briefing days as well as days allowed for rest and travel) in addition to the reimbursement of any expenditure already incurred.

CX-2-Z-41; *see* IDF 241. Article 2(d) of the 1991 Standards further stated that the interpreter cannot be forced to accept an alternative job to mitigate the organizers' liability. *Id.*<sup>23</sup>

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<sup>22</sup> According to one intermediary, Berlitz, "there has always been a standard rate that all interpreters charge for per diems." Clark, Tr. 614; *see also* Neubacher, Tr. 771.

<sup>23</sup> Article 3.2 of the 1994 Professional Standards states:

At the time the contract is being negotiated, the interpreter may ask for the inclusion of a clause whereby, in the event of all or part of the contract being canceled by the conference organizer, the remuneration envisaged would remain payable to the interpreter and she or he would, if applicable, be refunded any out-of-pocket expenses. A specimen cancellation clause that may be used for this purpose shall be included in the general conditions appearing on the back of the standard contract for individual interpreters.

CX-1-Z-41. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify a standard cancellation clause that provides for the payment in full of all remuneration contemplated to be paid under the contract, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to such payments in the event of cancellation, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

*h. Recording*

Article 2(b) of both the 1991 and 1994 Standards of Professional Practice provides:

Any contract for the employment of a member of the Association must stipulate that the interpretation is intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements.

CX-2-Z-41 and CX-1-Z-40. The ALJ found that "AIIC's rule on recordings is binding in the United States." IDF 244; Weber, Tr. 1251. Moreover, members at a NAS meeting held in Dublin in January 1989 voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale at 100% the daily rate. The results of the vote were published in AIIC's Bulletin. CX-253-D (Apr. 5, 1989 AIIC Bulletin); CXT-251-W at 2-3; IDF 245.<sup>24</sup>

*i. Pro Bono Work*

Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," stated:

Members of the Association may provide their services free of charge, especially for conferences of a charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed.

CX-2-Z-42. *See also* CX-9-F; CXT-6-E to M, p. 4 (1979 Code); Weber, Tr. 1232.<sup>25</sup>

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<sup>24</sup> The only testimonial evidence regarding the actions taken at the Dublin meeting was provided by Claudia Bishopp in her investigational hearing testimony. CX-301-Z-152.7 - 152.11. Ms. Bishopp stated with respect to the rates for recordings: "I don't think this was ever agreed. It has certainly never been put into practice. There is no agreement among members of what would be acceptable to each one." *Id.* at 152.8. Thus, there is no additional evidence as to whether this agreement was ever adhered to, or whether it is still in place or was disavowed as a result of the 1992 Assembly vote to eliminate all monetary conditions from AIIC's rules.

<sup>25</sup> Article 5 of the 1994 Professional Standards states that "[w]hen members of the Association provide their service free-of-charge for conferences of a charitable or humanitarian nature, they shall respect the conditions laid down in the Code of Professional Ethics and in these Professional Standards." CX-1-Z-41 (1994). We have no objection to this rule as currently written.

*j. Commissions*

Paragraph (c)4 of the AIIC Guidelines for Recruiting Interpreters (appended to the 1991 and 1994 Basic Texts),<sup>26</sup> under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." Article 6(d) of the 1991 Standards of Professional Practice further stated: "Remuneration shall be net of any commission." CX-2-Z-42 (1991).<sup>27</sup>

AIIC members discussed the issue of commissions at a meeting in the early 1980s. An AIIC Bulletin subsequently reported: "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organizers for expenses incurred in recruiting a team, but this must be charged to the organizer and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." CX-227-J (March 1981 Bulletin); IDF 253.

## 2. Legal Analysis

Based on the extensive history and publication of minimum daily rates, the record evidence of the price-fixing agreement, and the expert testimony, we conclude that there was an unlawful agreement among AIIC members as to the minimum price to be charged for conference interpretation in the U.S. We further find that respondents engaged in restraints that prevented price competition on virtually all aspects of conference interpreting, including minimum daily rates; an "indivisible day" that prevented lower remuneration for shorter meetings; specified payment for travel, rest, briefing, and nonworking days; a mandate that all interpreters at a conference be paid the same; standardized payments for full fare travel expenses; uniform per diem

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<sup>26</sup> There is some contradictory information in the record as to whether the Recruiting Guidelines continued as an Annex to the 1994 Basic Texts. The Guidelines are appended to CX-1-Z, which is the full set of 1994 Basic Texts. However, according to a letter dated October 21, 1994 from respondents' counsel to complaint counsel transmitting the then-current Basic Texts, the respondents had not yet completed revised Guidelines for Recruiting Interpreters, and the draft that was included eliminated all mention of commissions. The testimony is also contradictory: Mr. Luccarelli testified that the Guidelines were no longer in existence (Luccarelli, Tr. 1676-77) and Mr. Weber testified that as far as he knew, AIIC never announced to the membership that the Guidelines were repealed. Weber, Tr. 1156.

<sup>27</sup> The 1994 Professional Standards contain no similar provision mentioning that remuneration shall be net of commissions or any other references to commissions.

allowances; cancellation and recording fees; and restrictions on *pro bono* work and the payment of commissions. These restraints constitute a comprehensive price-fixing scheme and, individually and collectively, are *per se* unlawful.

The reason for condemning price fixing categorically was articulated by Professor Areeda in language quoted by the Supreme Court:

In sum, price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public.

7 Areeda, Antitrust Law, *supra* note 11, ¶ 1509, at 412, quoted in *SCTLA*, 493 U.S. at 434 n.16.

Agreements between AIIC and its U.S. members to promulgate and follow AIIC's rates constitute illegal agreements on price and are classic *per se* antitrust violations. It is irrelevant whether AIIC's rates are reasonable or unreasonable. *SCTLA*, 493 U.S. at 421 (although "[w]e may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants[,] the boycott and price fix are illegal *per se*"); *Trenton Potteries Co.*, 273 U.S. at 396. The *per se* rule against price fixing applies fully to professionals. *SCTLA*, 493 U.S. at 422, 427, 434; CDA, slip op. at 21-23, 5 Trade Reg. Rep. (CCH) at 23,789-90.

Although the core agreement is the one among AIIC's members not to charge less than an agreed-upon daily rate, the *per se* rule against price fixing is far broader. The *per se* rule embraces any agreement that has a substantial impact upon price, whether or not the agreement directly specifies prices to be charged. The conduct condemned in *Socony-Vacuum* was a concerted effort by oil companies to increase prices by buying up surplus gasoline. As the Supreme Court stated in *Socony-Vacuum*, "the machinery employed by a combination for price-fixing is immaterial." 310 U.S. at 223.

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), the Supreme Court held that an agreement to terminate the availability of free credit in connection with the purchase of goods is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price-fixing." *Id.* at 648. Even if the price of the underlying product is not fixed (as it was not in *Catalano*, but is here), an agreement substantially impacting the

price to be charged is unlawful. *Id.* at 647; *Sugar Institute v. United States*, 297 U.S. 553, 600-02 (1936) (agreement to adhere to announced prices and terms of sale unlawful, even though the specific prices and terms were not agreed upon). Similarly, the courts have held *per se* unlawful other methods of affecting price competition that fall short of fixing the actual price of the product. *See, e.g., Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 134 (9th Cir. 1960) (uniform trade-in allowances and standard requirements for cash down payments); *cf. United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 185-88 (3d Cir. 1970) (sufficient evidence to support jury finding that defendants illegally agreed to limit discounts), *cert. denied*, 401 U.S. 948 (1971).

The AIIC rule providing that remuneration be on an indivisible daily basis required interpreters to charge the full rate regardless of the amount of time worked. This rule prevented interpreters from discounting by charging an hourly rate or a discounted or *pro rata* fee for a meeting lasting less than a full day. This rule is a *per se* unlawful price-fixing restraint under *Catalano*, 446 U.S. at 645.

The provisions related to "same team, same rate" set the rate of compensation for every team member at or above the AIIC rate, regardless of the interpreters' varying levels of skill, experience, or specialized knowledge of the subject matter of a particular conference. Although a showing of adherence is not necessary to establish the antitrust illegality of the type of horizontal agreement that courts have uniformly condemned *per se*, several witnesses in this case testified about interpreters' general adherence to this rule. Swetye, Tr. 2819-20; CX-303-Z-110-11 (Moggio-Ortiz); Hamann-Orci, Tr. 40; but *see* Saxon-Forti, Tr. 2681 (some instances in which interpreters did not adhere to rule). Moreover, during the 1984 Los Angeles Olympics, several interpreters raised concern that they not be required to work with student interpreters who were working for free because they would be in violation of this rule. *See* IDF 351; CX-1246-A; CX-1283-B. The Supreme Court has held that the *per se* rule is violated by agreements tending to provide the same economic rewards to all practitioners "regardless of their skill, their experience, [or] their training[.]" *Maricopa*, 457 U.S. at 348. We find that the "same team, same rate" agreement is an agreement to charge the same price and is thus *per se* unlawful.

We find that AIIC's 1991 rules setting the rate of remuneration for non-working, travel, rest, and briefing days constitute unlawful price

fixing. These rules, by setting forth specific pricing formulas, are also similar to other *per se* unlawful pricing schemes that have used multiple-base-point systems and phantom freight systems. *See FTC v. Cement Institute*, 333 U.S. 683 (1948) (agreement among cement manufacturers to use a multiple-base-point system for freight charges an unfair method of competition in violation of Section 5); *cf. In re Plywood Antitrust Litigation*, 655 F.2d 627, 634 (5th Cir. 1981) (discussing evidence from which reasonable jury could find that phantom freight formula, whereby West Coast freight prices were used regardless of where the shipment originated, was *per se* illegal), *cert. dismissed*, 462 U.S. 1125 (1983).<sup>28</sup> The price-fixing formula used here also prevented interpreters from competing with one another by discounting their rates for non-working days. *See Catalano*, 446 U.S. at 644-45 (discussing role of discounts in competition among wholesalers).

The travel rules prevent conference organizers from realizing considerable economies by planning ahead and taking advantage of special offers.<sup>29</sup> More significant, absent the travel rules, competing interpreters or intermediaries could use savings on travel expenses as a term of price competition. By agreeing to forego competition on this element of price, AIIC and its members have fixed prices in violation of the antitrust laws. *See Catalano*, 446 U.S. at 645; *cf. In re Plywood Antitrust Litigation*, 655 F.2d at 634. We also agree with the ALJ's finding that "AIIC's travel rules help its members maintain their agreement by deterring cheating." IDF 240; Wu, Tr. 2093-94.

Similarly, we find that respondents' agreement contained in the 1991 Basic Texts to charge per diems and to standardize per diem charges, through the use of formulas or otherwise, is an agreement affecting price that is *per se* unlawful. *See Catalano*, 446 U.S. at 648 (agreement to terminate credit discounts that affected price); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F. Supp. 869 (E.D. Cal. 1986) (fixing of standardized component charges was *per se* illegal price fixing).

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<sup>28</sup> This case is distinguishable from *Vogel v. American Society of Appraisers*, 744 F.2d 598, 602-04 (7th Cir. 1984), in which Judge Posner, writing for the court, held an appraising society rule barring fees based on a flat percentage of appraisals to be lawful. Unlike the rules involved in the present case, the rule at issue in *Vogel* did not prescribe the charge to be made, but only prohibited a particular pricing formula.

<sup>29</sup> For instance, in the case of the 1984 Olympic Games, United Airlines had provided free air travel to the Los Angeles Olympic Organizing Committee ("LAOOC"), so the LAOOC wanted to use United for interpreters' transportation. Weber, Tr. 1247. AIIC advised that this effort by the LAOOC to reduce its costs was "usually unacceptable." CX-1283-A.

We further find that the agreement to abide by a standard cancellation clause, requiring a conference organizer to pay an interpreter his or her full fee in the event the conference does not take place, eliminates another form of price competition and as such is *per se* unlawful price fixing. The clause prevents competition on cancellation fees among interpreters, some of whom might be willing to take greater risks of cancellation.<sup>30</sup> Thus, AIIC's rule on cancellation is an agreement to place on the purchaser a cost of the transaction and is analogous to the agreements on credit terms in *Catalano* and on freight costs in *FTC v. Cement Institute*. *Cf. American Radiator*, 433 F.2d at 185-88 (evidence of conspiracies to limit maximum discounts and to eliminate a low-priced product line sufficient for jury to find illegal price fixing).

AIIC's rules, in combination with agreements reached at the NAS meeting in 1989, set the amount to charge for recordings and constitute another form of *per se* unlawful price fixing. *See, e.g., Catalano*, 446 U.S. at 647-48; *Northwestern Fruit Co.*, 665 F. Supp. at 871-72.

Complaint counsel's economic expert testified that the ban on commissions helped AIIC members reach and maintain their cartel agreement by preventing discounts on the minimum fee charged. Wu, Tr. 2150-51. Moreover, at a NAS seminar on sales techniques and negotiations held in January 1994, members were instructed to "[s]peak openly about the subject with hotel employees and technicians who usually get commissions and explain that AIIC members do not do it because they would be obliged to raise their price and everyone would lose." CX-279-Z-3; CXT-279-Z-2 to 5, p.2. Respondents' only defense of their ban on commission payments (*i.e.*, that it serves to inform customers of the respective earnings of the interpreter and the intermediary (Brief for Respondents-Appellants at 35)) is unpersuasive. Particularly when viewed in the context of

<sup>30</sup> For example, the situation that arose during the 1984 Los Angeles Olympics illustrates the application and impact of this rule. Wilhelm Weber, who organized interpretation services for the 1984 Los Angeles Olympics, initially did not offer the standard AIIC cancellation clause to interpreters. IDF 242; Weber, Tr. 1235-36, 1244-45; CX-1300-A to B. The LAOOC wanted a staggered cancellation clause to mitigate potential financial outlays because of concern about the threatened (later actual) boycott by the Soviet Bloc countries. AIIC warned Mr. Weber about his breach of the rules and stated that if the contract were not renegotiated to include the standard cancellation clause, Mr. Weber would be held personally liable for any money due to interpreters in the event of a cancellation. IDF 354, 242; Weber, Tr. 1243-48, 1255-56. As a result of the pressure by AIIC, an "acceptable" cancellation clause was included in the Olympics' contracts and Mr. Weber received a warning from AIIC for his actions. IDF 354, 356, 242; Weber, Tr. 1226-29; *see also* CX-1741-A (Nov. 26, 1984 letter from AIIC to Weber). The change in the cancellation clause substantially raised the costs to the LAOOC as a result of the Soviet Bloc boycott of the Olympics. *See* IDF 354; Weber, Tr. 1256-57.

AIIC's other efforts to set minimum rates, we find that AIIC's ban on commission payments is in effect an agreement to refrain from giving discounts from the fixed minimum rate and as such is *per se* illegal. See *Catalano*, 446 U.S. at 649; *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961) (agreement not to give trading stamps and other premiums to retail gas customers was *per se* illegal); cf. *American Radiator*, 433 F.2d at 185-86. The ban on commissions may also serve to deter entry by preventing new interpreters from paying commissions to intermediaries to help them gain experience, even if at a discounted fee. See IDF 254.

Similarly, the ALJ found that "AIIC's restrictions on *pro bono* work deter entry by novice interpreters working without charge. Absent the rule, student or novice interpreters could seek to work without charge in order to gain experience and make contacts in the profession." IDF 250; see also Wu, Tr. 2109. For example, this provision became an issue when student interpreters at the 1984 Olympics violated the Code by allowing the LAOOC to pay their airfare from Monterey, California to Los Angeles, California. IDF 249. AIIC's Council, as well as the U.S. Region, warned the organizer (Weber) that his actions "go against a number of principles and rules of our profession." CXT-1320-A to C, p.1.; IDF 249; see generally Weber, Tr. 1232-33, 1271-72. Thus, we find that AIIC's 1991 rule on *pro bono* work operated as a prohibition on discounts and is *per se* illegal under *Catalano*. Alternatively, AIIC's restraints on *pro bono* work can be viewed as setting a minimum price because AIIC members would have to charge some amount for their services in order to receive reimbursement for travel and other expenses associated with charitable work. Minimum price setting in the sale of services, as well as goods, is *per se* illegal price fixing. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782-83 (1975) (state bar association's minimum fee schedule held to be a naked restraint and unlawful price fixing).

### *B. Market Allocation -- Per Se Unlawful*

Agreements among competitors to divide or allocate markets are illegal *per se*. See *Palmer v. BRG*, 498 U.S. at 49-50; *Topco*, 405 U.S. at 608 (citing cases). The Supreme Court has held such horizontal market divisions *per se* illegal, even when unaccompanied by price fixing, *Topco*, 405 U.S. at 609 n.9, or when the market division was between potential, not actual, competitors, see *Palmer v. BRG*, 498

U.S. at 47 (non-competition agreement between former competitors). For reasons discussed *infra* at 30-31, we find that the respondents' moonlighting rules constitute market allocation and are *per se* illegal.

### 1. Facts

Paragraph b(2) of AIIC's 1991 "Guidelines for Recruiting Interpreters" required AIIC members to hire "freelance interpreters rather than permanents having regular jobs." CX-1-Z-48. Paragraph 6 of AIIC's "Staff Interpreters' Charter" states that staff interpreters should act as interpreters outside their organization "only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." CX-1-Z-53; CX-2-Z-54; IDF 281.

AIIC members understood these provisions to mean that staff interpreters with permanent jobs should not perform freelance work unless no freelance interpreter is available. IDF 283; CX-301-Z-106 to Z-107 (Bishopp); CX-300-Z-121 to Z-122 (Motton); Lateiner, Tr. 907. The U.S. Region agreed with AIIC's rules that staff interpreters should not work in the private sector unless no freelance interpreters were available. IDF 284; CX-405-C; CX-407-F. The U.S. Region, at a 1988 meeting, admonished its members: "[O]ur permanent colleagues are reminded that if they are offered a contract outside their organization they should check first whether there are any freelance interpreters available with the required language combination. They have a permanent, steady job and freelancers don't. Therefore they should show some 'restrain' [sic] in accepting work on the private market." CX-432-M; IDF 283.

### 2. Legal Analysis

We concur in the ALJ's findings that AIIC's moonlighting rules constitute an agreement that staff interpreters will not compete with freelance interpreters. *See* IDF 280-291; CX-300-Z-114 to Z-115, Z-121 (Motton); CX-301-Z-95 to Z-97 (Bishopp); *see generally* Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64; but *see* Lateiner, Tr. 905. This agreement is in effect a market allocation because it promotes and protects the economic interests of local, freelance interpreters from competition from permanently employed "staff" interpreters. Thus, the agreement effectuates a market division and is a *per se* violation of the antitrust laws.

Judge Posner's opinion for the Seventh Circuit in *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984), makes clear that horizontal market divisions have the same anticompetitive effects -- and are as unlikely to have efficiency rationales -- as price fixing and output restraints. In *General Leaseways*, the defendant was an association of local truck leasing firms that, *inter alia*, allowed the local firms to compete with national truck leasing firms by providing for reciprocal service agreements among the local companies across the United States. Other rules, however, limited competition among the member truck leasing firms by limiting the geographic area in which they could compete and restricting their ability to affiliate with the national truck leasing firms. The Seventh Circuit found these latter rules to amount to a *per se* unlawful market division. 744 F.2d at 595.

In 1990, the Supreme Court unanimously reconfirmed the vitality of the *per se* rule against horizontal market allocations in a case involving companies that offered competing bar review courses:

Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which they both do business or whether they merely reserve one market for one and another for the other.

*Palmer v. BRG*, 498 U.S. at 49-50 (citing *Maricopa*, 457 U.S. at 344 n.15 (market division is *per se* offense)); *see also Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (complaint allegations sufficient to survive motion to dismiss because, if proved at trial, the allocation of customers among competitors via a call forwarding scheme from phantom dealers would be *per se* unlawful). We therefore find that AIIC's rules to protect freelance interpreters from competition by staff interpreters are *per se* unlawful.

*C. Rules Governing Non-Price Terms and Conditions of Employment, Business Arrangements, and Advertising -- Rule of Reason Analysis*

The Supreme Court is generally reluctant to utilize a *per se* approach to review professional associations' codes of conduct and has admonished lower courts not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Maricopa*, 457 U.S. at 349 n.19. In fact, we recognized and applied this approach in our recent

decision in CDA. *See slip op.* at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. AICC's restrictions on the non-price terms and conditions of employment, business arrangements, and advertising are not in the categories of restraints traditionally considered *per se* illegal. Moreover, we cannot say that they appear "to be one[s] that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) ("BMI"). We believe it would be imprudent to expand the *per se* rule to these restrictions and, therefore, we apply the rule-of-reason analysis instead.

Under the rule of reason, a court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis' classic formulation remains the touchstone for rule-of-reason analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g., NCAA*, 468 U.S. at 103-10. Thus, the inquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See IFD*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10 & 109 n.39. As the cases make clear, however, a variety of factors go into conducting an appropriate rule-of-reason analysis, depending upon the particular facts of the case. Generally, a court will look to the following: product and geographic market definition;

market power; anticompetitive effects; barriers or impediments to entry; and any plausible efficiency justifications. Because the rules at issue here are not plainly anticompetitive and complaint counsel has not established anticompetitive effects or respondents' market power, we dismiss the complaint as to the rules governing length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.

### 1. Market Definition

In defining the relevant product market, the courts and the Commission generally examine what products are reasonable substitutes for one another. In the context of monopolization cases under Section 2 of the Sherman Act, the Supreme Court has stated:

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered.

*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (although du Pont had a 75 percent share of the cellophane market, cellophane was in the same product market as other flexible packaging materials and du Pont did not have monopoly power in this larger market).

In defining the relevant product market in connection with analyzing mergers, the antitrust agencies examine what products would be substitutes in the event of a "small but significant and nontransitory" increase in price. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines Section 1.11 (Apr. 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104. We look to what possible alternatives a consumer would have if, for example, the price of conference interpretation from English into French increased by five or ten percent.

The ALJ found that the "relevant product markets include conference interpretation of language pairs (English to Spanish, Spanish to English . . .)." IDF 366. Both parties have suggested that because an interpreter who interprets only from English into German could not substitute for the English into French interpreter, the appropriate product market is conference interpretation by language

pair. *See, e.g.*, Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, at 43 n.35 and Appendix C, p.1; Wu, Tr. 2057, 2391; Respondents' Proposed Findings, ¶ 113; Silberman, Tr. 2985; Oral Argument, Tr. 18-19. Based on the evidence in this record, as well as the admissions by both sides, it is likely that the proper product market definition is conference interpretation by language pair.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court discussed its approach to defining the relevant geographic market, noting that it was essentially the same as the approach taken to define the relevant product market and that "[t]he geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37 (footnote omitted). Thus, we generally look to the geographic area in which sellers of a service operate and to which purchasers can reasonably turn for those services. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

The Department of Justice and the FTC have set forth their approach to defining the relevant geographic market in the 1992 Merger Guidelines as that area within which a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price that would not be offset by a loss in sales. Horizontal Merger Guidelines Section 1.21. Thus, for example, we would look to whether conference interpreters from outside the United States would offer their services in the United States and whether customers in the United States would seek the services of foreign interpreters if faced with a price increase of five to ten percent.

The ALJ found that the "relevant geographic market is the United States." IDF 366; *see also* Wu, Tr. 2193-94. Respondents initially argued that the geographic market should include interpreters who reside in Mexico and Canada, as well as foreign interpreters who reside in the United States part of the year. Respondents' Proposed Findings of Fact, ¶¶ 142-45. Respondents, however, have not challenged the ALJ's conclusion on appeal. Although there is some evidence that employers and intermediaries may include foreign interpreters on the lists from which they attempt to hire, the rules related to travel and per diem leave us unpersuaded that foreign interpreters function as a constraint on price increases by interpreters

domiciled in the United States. Thus, our review of the record provides no reason to overrule the ALJ's finding in this regard.

## 2. Competitive Effects and Market Power

As we recently stated in CDA:

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined. We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed.

CDA, slip op. at 28, 5 Trade Reg. Rep. (CCH) at 23,792 (footnote omitted). Similarly, the Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See IFD*, 476 U.S. at 460-61; *NCAA*, 468 U.S. at 109-10.

Complaint counsel and the ALJ place substantial reliance on evidence that AIIC's members adhered to the price-fixing agreement to prove that AIIC had market power. More specifically, the ALJ found that the Wu Data Set established that the AIIC members "charged at least the 'suggested minimum'" 90 percent of the time. IDF 318.<sup>31</sup> The ALJ also found that the fact "[t]hat AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output." IDF 327.

We disagree with the ALJ's finding that AIIC had market power because AIIC members charged the agreed-upon price. The fact that AIIC members charge and receive a set price does not necessarily mean that they have market power. It could simply mean that they have made an ill-advised decision to set a price that some market participants accept but that in reality lowers overall demand for their services, or it could mean that the price fixed was set exactly equal to the competitive price. There is no evidence in this record to show, for example, what non-AIIC members charged or received or the percentage of overall private sector conference interpretation work

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<sup>31</sup> See IDF 317-27; ID at 122-23; Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, Brief in Support Thereof, and Orders, Volume II, at 115-22. Dr. Wu analyzed the contracts of 42 AIIC members over a seven-year period, finding that the "suggested minimum" was charged 90 percent of the time during the four years 1988 through 1991.

that AIIC versus non-AIIC members perform. Thus, in this case, we do not believe that it is appropriate to attribute market power to AIIC by the mere fact that its members found it in their interest to adhere to a price-fixing agreement. Moreover, if there were evidence of the amount being charged by interpreters who were not members of AIIC, that would not necessarily be dispositive proof of whether AIIC had market power. It is precisely the danger that business persons will find it in their economic interest to go along with a price-fixing agreement that makes price fixing so pernicious and a *per se* offense requiring no showing of market power.

Thus, to determine whether AIIC has market power, we look first to market share evidence. While the parties, as well as the ALJ, agree that the market is properly defined by language combination, there is no evidence in the record from which to determine market shares by language combination. *See, e.g.*, Reply Brief for Respondents-Appellants at 20; Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, Vol. I, at 43 n.35; Wu, Tr. 2391. The briefs, findings of fact, Initial Decision, and oral argument discuss at length the market shares held by AIIC members, but the shares discussed are all defined by singular languages or the overall number of interpreters working in the United States. For example, the ALJ found that AIIC (in combination with TAALS) has 24 percent of the estimated number of Portuguese conference interpreters and 44 percent of the French conference interpreters (with percentages for other languages between these extremes). IDF 379. Respondents, on the other hand, argue that their market shares for the five Western European languages focused on by the ALJ are "at most from the low to mid-teens to the low twenties." Reply Brief for Respondents-Appellants at 24 (emphasis in original). Without delving into the particulars of the different versions of market shares, we conclude, assuming that the product market is defined as language pairs, that neither the ALJ's, complaint counsel's, nor respondents' calculations can serve as the basis for a finding of market shares. Thus, complaint counsel has failed to carry the burden of proof concerning respondents' market shares by language combination, making it impossible to determine market power.

Even without a showing of market power, if the anticompetitive effects of the rules were clear, we still would be able to make a finding of liability under a rule-of-reason analysis. The competitive effects of the rules at issue here, however, are not obvious from the

rules alone, and the record in this case is virtually devoid of evidence of anticompetitive effects flowing from the non-price restraints. *See generally* IDF 317-65. With the exception of three findings (IDF 341-43), all of the effects discussed by the ALJ stem from the price-related restraints. Two findings address "Team Size" and demonstrate that AIIC members generally abide by AIIC's rules with respect to team size, and that to the extent they deviate from the recommended team strength, they receive additional compensation. IDF 341-42. However, it is not clear that this is an anticompetitive result. Almost all of the witnesses testified that AIIC's team size rules reflected the way conference interpretation works best and that they therefore generally utilize the same team sizes AIIC advocates in its rules. The third finding addresses the length-of-day rule and suggests that interpreters sometimes insist on receiving extra compensation if the conference "exceeds a normal workday." IDF 343. As discussed *infra* at 37-39, the evidence suggests that not all interpreters insist on overtime pay and, for the ones that do charge, the amount they charge varies. Moreover, many of the witnesses at trial testified that the length of day specified in AIIC's rules generally coincides with the reality of the time period after which interpreters begin to experience mental fatigue, which can affect the quality of the interpretation services being provided. *See discussion infra* at 37-38. Thus, in our view, the ALJ's findings in this regard are not sufficient to make a finding of anticompetitive effects flowing from the non-price restraints.

### 3. Efficiencies

Over the past few decades both the Commission and the courts have increasingly recognized the role of efficiencies in assessing the competitive impact of restraints of trade under the rule of reason. *See* CDA, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96. *See generally* 1 Federal Trade Comm'n Staff, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, ch. 2 (May 1996). The Supreme Court relied extensively on an analysis of the efficiencies of certain vertical contractual restraints in upholding such restrictions in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court's decision in BMI is another example of the role of efficiencies: the Court found that BMI's issuance of blanket licenses was not a *per se* violation of the antitrust laws because the activity appeared on its face

to "increase economic efficiency and render markets more, rather than less, competitive." 441 U.S. at 20 (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)); *see also NCAA*, 468 U.S. at 114 (citing district court's conclusion that restrictions on television rights to be offered to broadcasters were not justified by any "procompetitive efficiencies which enhanced the competitiveness of college football television rights").

Lower courts have also taken certain efficiencies into account when reviewing the activities of professional associations. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1491-92 (D.C. Cir. 1984) ("public service" argument); *Wilk v. American Med. Ass'n*, 719 F.2d 207, 221-22 (7th Cir. 1983) ("patient care" motive), *cert. denied*, 467 U.S. 1210 (1984).<sup>32</sup> Thus, in the examination of an industry standard or a professional standard under the rule of reason, efficiencies are part of the analysis. *See CDA*, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96.

Respondents argue that the restraints at issue in this case are justified by various efficiencies, to wit, that they ensure the quality of the interpretation services provided; maintain the health and safety of interpreters; and provide needed information to consumers about the appropriate way to staff conferences requiring interpretation services. Although our decision with respect to the issues of market power and anticompetitive effects negates the need to assess the adequacy of these justifications, at least some are not facially without merit.

#### 4. Conclusion

For the reasons discussed, we cannot condemn under the rule of reason any of the non-price rules disputed below.<sup>33</sup> Those rules include length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.<sup>34</sup>

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<sup>32</sup> This does not mean that an otherwise *per se* violation such as price fixing could be justified as quality enhancing; our discussion *supra* at 14-16, 25-31, makes it clear that it cannot. *Cf. National Soc'y of Prof'l Engineers*, 435 U.S. at 693-96.

<sup>33</sup> Our decision in this regard obviates the need to discuss issues related to entry or enforcement of the rules.

<sup>34</sup> Because the ALJ dismissed the complaint allegations challenging the rules on double-dipping and other services, we do not discuss these rules. However, we note that while we are upholding the dismissal, we disagree with the ALJ's analysis. He found the rules *per se* illegal but dismissed them for lack of enforcement; on the other hand, we believe the rules should be analyzed under the rule of reason and dismiss them because complaint counsel has not met its burden of proof.

## 5. Rules Being Dismissed

### *a. Length of Day*

The 1991 (Article 4) and 1994 (Article 7) Standards of Professional Practice state that "the normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours each." CX-2-Z-42; CX-1-Z-45. The ALJ found that AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime, and that many AIIC members charge overtime when working beyond six hours. IDF 166-68. The ALJ further found that one intermediary paid interpreters "about 20% more than the standard rate when interpreters worked more than six hours a day (Neubacher, Tr. 804-05)," while another paid interpreters an additional \$100-200 for anything over a seven-hour day. IDF 343; Citrano, Tr. 543-45. Some complaint counsel witnesses testified that AIIC members occasionally work longer days without charging overtime. Davis, Tr. 881 (interpreters do not always request additional compensation for working beyond the standard day -- it depends on how much additional time is being required); Lateiner, Tr. 973 (half-hour grace period). Other intermediaries testified that interpreters have refused work for hours that exceed the normal working day. IDF 178. Finally, complaint counsel's expert testified that "[s]ometimes, the overtime charge would be another half day of remuneration, sometimes there would be hourly charges." Wu, Tr. 2120.

The only arguable enforcement of this rule dates back to the 1984 Olympic Games, when AIIC wrote Wilhelm Weber a letter warning him to conform his contracts to AIIC's Code. An AIIC member had objected to a contract offered by Weber that provided for a seven-hour work day. IDF 181; CX-1300-A; Weber, Tr. 1252-53; *see generally* CXT-1693-A to C.

The rules themselves contain no mention of overtime or the appropriate level of remuneration for sessions that exceed AIIC's recommended length of day. Moreover, the evidence suggests that individual interpreters applied this rule in a wide variety of ways. Finally, many of the interpreter and intermediary witnesses (called by both respondents and complaint counsel) testified that this rule helped to maintain the quality of interpretation and the health of the interpreters because working beyond the "normal" working day often results in mental fatigue and interpreting mistakes. Hamann-Orci, Tr.

84-85; Davis, Tr. 871-73; Weber, Tr. 1187, 1292, 1297; Luccarelli, Tr. 1661. Since the evidence does not show that AIIC specified that overtime must be paid, that interpreters uniformly charged for overtime, or that uniform rates were charged for overtime, this does not constitute independent price fixing.<sup>35</sup> Moreover, this rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, the length of day rule has no price aspect on its face and there are some plausible justifications for setting forth what a "normal" day is. For example, even Wilhem Weber, one of complaint counsel's key witnesses, testified that the rules with respect to length of day and team strength ensure the health of the interpreters and the quality of the interpretation services. Weber, Tr. 1278-79, 1296-97.

Complaint counsel argue and the ALJ found that the length of day rule was an output restraint and therefore *per se* unlawful. We agree that if this rule were a strict limitation on output, it would likely be condemned as *per se* unlawful because output restrictions have the same basic economic effect as an agreement to increase prices. See *SCTLA*, 493 U.S. at 423; *NCAA*, 468 U.S. at 100. However, because the rule itself merely sets forth the "normal" length of day, does not prohibit interpreters from working overtime, and does not set any overtime pay, and because the evidence shows that interpreters work overtime (with and without additional compensation), the rule is not a strict limitation on output and we cannot say with confidence that it is a restraint that will always or almost always have anticompetitive effects.<sup>36</sup>

We believe AIIC's rule specifying the "normal" work day is somewhat similar to the standardization of products. As Areeda observed:

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<sup>35</sup> We note, however, that as recently as 1989 AIIC issued a document entitled "Conditions Governing Recruitment and Work at Intergovernmental Meetings Outside the Agreement Section," which could be used under certain specified circumstances "[i]n lieu of the corresponding rates and conditions laid down in Annex I to the AIIC Code of Professional Conduct and Practice." This document specified the compensation to be paid to interpreters who were required to work in excess of the daily or weekly workload levels set forth in the document. CX-2064-A to D. Because there is no testimony or other evidence in the record explaining this document, how it was developed, whether it was adopted by agreement among AIIC's membership, and in what countries it was applicable, a decision as to its legality is not before us.

<sup>36</sup> This flexibility, combined with evidence supporting AIIC's proffered justifications, distinguishes this rule from the absolute ban on operating automobile salesrooms during certain periods that we condemned in *Detroit Automobile Dealers Ass'n*, 111 FTC 417 (1989), *aff'd in relevant part*, 935 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 703 (1992).

Product standardization might impair competition in several ways. For example, producers of automobile tires might agree to produce only five tire varieties for which they adopt common specifications. Such standardization might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.

7 Areeda, *Antitrust Law*, *supra* note 11, ¶ 1503a, at 373. In examining the sufficiency of the evidence from which to infer the existence of a conspiracy, courts have recognized that "standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (citing *Milk and Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 492 (7th Cir. 1946)). The courts there said that some standardization is understandable, but too much leads to evidence that can be drawn upon to reach a conclusion of the existence of a conspiracy.

Standardization does not, in our view, fall under the *per se* rule, but should be examined under the rule of reason. For example, it hardly is *per se* illegal to sell gasoline by the gallon, although that unquestionably aids horizontal price fixing among gas stations. Here, the length of work-day rule by itself does not enable members to fix price or output; the problem is primarily with the fixing of the price itself. We believe that this rule must therefore be examined under the rule of reason. Therefore, for the reasons set forth *supra* at 33-36, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

#### *b. Team Size*

Articles 9, 10, and 11 of the 1991 Basic Texts, Standards of Professional Practice, set forth team size tables for consecutive, whispered, and simultaneous interpretation. CX-2-Z-43 to 46.<sup>37</sup> In the case of simultaneous interpretation, the rule is absolute, providing that "[t]he team strength indicated . . . must be respected." CX-2-Z-46 (Art. 11). Although AIIC at one point maintained two different team size tables with corresponding prices for simultaneous

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<sup>37</sup> Although little discussion in the briefs or at oral argument addressed this issue, two provisions of the team size tables set the remuneration for use of smaller numbers of interpreters at 125 percent of the remuneration for the larger team size. For consecutive and whispered interpretation, the 1991 Basic Texts rule provided that if fewer interpreters are recruited than the number recommended by AIIC (which should only occur "under exceptional circumstances"), the remuneration for each interpreter "should be at least equal to 125% of the standard rate." CX-2-Z-43. To the extent that this rule was applied to the United States, we find this aspect of the 1991 rule *per se* unlawful.

interpretation, that dual system was not used in the United States. Thus, the U.S. Region always had only the absolute written prohibition. *See* IDF 171.<sup>38</sup>

There is some evidence of adherence to the team strength rules. Some interpreters have refused work with intermediaries under working conditions that do not conform to staffing requirements (Davis, Tr. 869-70; Clark, Tr. 614-15 (Berlitz was expected to meet AIIC's working conditions)); intermediaries who have deviated from staffing requirements have paid interpreters extra compensation (Citrano, Tr. 539; Neubacher, Tr. 767-69); and individual interpreters have said that they adhere to the staffing requirements (Luccarelli, Tr. 1669; *see also* IDF 179-81). Nonetheless, the fact that interpreters adhere to the team size tables does not answer the question as to anticompetitive effects. Many witnesses testified that they adhere to the team size rules because they reflect the reality of how best to staff a conference and avoid excessive fatigue and maintain the quality of interpretation services. *See, e.g.*, Luccarelli, Tr. 1663-65, 1667-70; Davis, Tr. 885.

Complaint counsel argue and the ALJ found that the team size rule was an output restraint and therefore *per se* unlawful. Although the team size rule is closer to an output restraint than the length of day rule, as with the rule on length of day, the team size rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, this rule as currently written has no price aspect on its face and there are some plausible justifications for setting forth optimal team strength. This rule appears akin to a standard with respect to setting forth optimal staffing to maintain the quality of conference interpretation services, and this similarity to standard setting leads us to conclude that the team size rule should be examined under the rule of reason. Moreover, since we are condemning as *per se* unlawful all of the price-related agreements and prohibiting the implementation of price-related agreements in the future, we believe that once AIIC members begin to compete on price, it is unlikely that there will be anticompetitive effects from this rule. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

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<sup>38</sup> Article 6 of the 1994 Professional Standards contains AIIC's current rules governing team strength for whispered, consecutive, and simultaneous interpretation. CX-1-Z-42-44. The current rules do not reference any rates of remuneration either for the recommended team strengths or for team strengths of fewer than the recommended number of interpreters.

*c. Professional Address Rule*

Article 1 of AIIC's 1991 Standards of Professional Practice required that members declare a single professional address that they must maintain for at least six months and can change only upon three months' notice. CX-2-Z-40. The 1991 rules also explicitly required that all contracts be based only upon the official professional address of the AIIC member. *Id.* Under the 1991 rules, the professional address also provided the basis for remuneration for non-working days (Article 12), subsistence allowance (Article 13), travel days (Article 14), and travel expenses (Article 15). In addition, rule b(2)(b) of AIIC's Recruitment Guidelines suggested that organizers "bear in mind" selecting conference interpreters with a professional address at, or nearest, the conference venue. CX-2-Z-51; *see also* IDF 212-36.<sup>39</sup>

Under the 1991 rule, even if interpreters actually lived away from their declared professional addresses, they would charge their clients for travel to and from their professional addresses only, even when travel originated from their residences. IDF 221. *See also* CX-302-Z-140 to Z-141, Z-438 (Luccarelli); CX-2-Z-40; CX-301-Z-20 (Bishopp); but *see* CX-302-Z-140 (Luccarelli) (interpreters would sometimes declare their professional addresses to be away from their homes so they could get more work "because it would mean that they wouldn't charge for travel"). Thus, an interpreter with a professional address in Brussels would charge a client in the United States for a round trip ticket between Brussels and the U.S. Hamann-Orci, Tr. 45; IDF 222. *See also* CX-301-Z-21 to Z-22 (Bishopp).

One AIIC member traveled round-trip between Washington and New York to work for the New York Stock Exchange, but charged the client for round trip travel between Vienna and New York because Vienna was her professional domicile. Bowen, Tr. 1011-12; IDF 223. Another member was offered a job in Washington on November 15, 1991, but her professional address did not change from Paris to Washington until December 20. The U.S. Region

<sup>39</sup> Article 1 of the 1994 Professional Standards sets forth the rules governing the declaration of a professional address, requiring that

... in order to ensure that members are able to exercise their voting rights at statutory regional meetings and that the rules pertaining to dues are respected, any change in professional address from one region to another shall not be permitted for a period of less than six months. Any such change must be notified to the secretariat at least three months before the intended change in order to ensure that it can be published in the Association's list of members in good time. The secretariat shall inform the members of the Council and the regional secretaries of the two regions concerned.

CX-1-Z-40 (emphasis added).

Representative suggested that she either seek permission from AIIC in Geneva, or "telephone all other colleagues with [her] language combination in the Washington area, to verify that they were all indeed working on that date." CX-1471; IDF 225.

The ALJ found that AIIC members follow the professional address rule, unless they obtain a waiver, and that the AIIC Council enforces this rule. IDF 227; *see also* CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30; CX-237-H to I; CXT-237-H to I. On November 30, 1991, the U.S. Region Representative admonished one member that he was in violation of the AIIC rules because he had been working in the New York area although he had a Washington, D.C. professional address "without officially notifying AIIC of his change of address." IDF 231; CX-1470-A; *see also* CX-608-Z-221 (1991 AIIC Membership Directory). Wilhelm Weber, the intermediary who helped organize interpreters for the 1984 Los Angeles Olympics, was accused of violating the professional address rule for failing to charge for travel between Geneva, Switzerland, his professional domicile, and San Francisco, even though he only traveled from Monterey, California, where he resided. IDF 229; Weber, Tr. 1264-65.

We believe that the professional address rule, as reflected in the 1991 Standards, has been used by AIIC and its members to provide the reference point for the *per se* unlawful price fixes of per diem, non-working days, and travel arrangements. Nonetheless, once we have struck down respondents' unlawful price-fixing agreements that were tied to the professional address rule, we believe that the professional address rule itself, which requires that AIIC members give three months' notice before changing their professional address and that they retain the address for at least six months, is better analyzed under the rule of reason because there is nothing in the rule itself that suggests it will have anticompetitive effects and there are plausible efficiency justifications for the rule (*i.e.*, facilitates ability to ensure member is voting in and paying dues to the appropriate region), particularly as it is currently written and tied to the regional structure of AIIC. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

*d. Portable Equipment*

Article 7 of AIIC's 1991 and 1994 Code of Professional Ethics prohibits members from simultaneous interpretation without a booth "unless the circumstances are exceptional and the quality of interpretation work is not thereby impaired." CX-2-Z-37; CX-1-Z-38. Portable equipment costs less than standard booths. IDF 273; *see also* CX-270-G; CX-302-Z-282 to Z-283, Z-804 (Luccarelli); Clark, Tr. 632-33; Obst, Tr. 303, 307. In addition, unlike working with a soundproof booth, a technician is not required for the operation of the portable equipment. IDF 273; Hamann-Orci, Tr. 47; Neubacher, Tr. 777-78.

The ALJ, citing to IFD, found that the rule on portable equipment was a restriction "on the package of services offered" (ID at 117) and should be analyzed under the rule of reason. We agree that this rule must be analyzed under the rule of reason. This rule is akin to a typical professional standard, declaring the use of certain equipment to be inferior and recommending against its use except in certain limited circumstances. In fact, numerous witnesses testified that although the use of portable equipment is acceptable under certain limited circumstances, which AIIC's rules recognize, its use would not be appropriate for large or long conferences because the lack of a soundproof booth subjects the interpreter to environmental noise, compromises the quality of the interpretation services, and increases the interpreter's mental fatigue. *See, e.g.,* Respondents' Proposed Findings of Fact, ¶¶ 351-355, citing to Hamann-Orci, Tr. 49-50; Neubacher, Tr. 707; Luccarelli, Tr. 1701-02; Clark, Tr. 632, 643-44; Obst, Tr. 304 (State Department tries to avoid use of portable equipment). We also note that there are in fact international standards for built-in (permanent) booths (ISO 2603 (1983)), portable booths (ISO 4043 (1981)), and other equipment (IEC 914 (1988)). *See* CX-2064-D; CX-2062-G. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

*e. Advertising*

Both the 1991 and 1994 versions of AIIC's Code of Professional Ethics contain the following provisions:

Article 4 (b): They [Members] shall refrain from any act which might bring the profession into disrepute.

Article 5: For any professional purpose, members may publicize the fact that they are conference interpreters and members of the Association, either as individuals or as part of any grouping or region to which they belong.

CX-1-Z-38, CX-2-Z-38. The "Recruitment Guidelines" further state that "Article 5 of the Association's Code allows members to provide factual information to users about the nature and availability of interpreters' services, but is intended to exclude activities such as commercial forms of one-upmanship." CX-2-Z-52. The ALJ found that "[m]embers understand 'commercial forms of one-upmanship' to be about comparative claims" and that interpreters should not "disparage their colleagues in order to get work." IDF 298; CX-2-Z-52; CX-301-Z-103 (Bishopp); Luccarelli, Tr. 1682-83.

The ALJ found that AIIC's advertising rules and two 1994 instances of disciplinary action against AIIC members amounted to a prohibition of comparative price claims and thus were "naked attempts to eliminate price competition [that] must be judged unlawful *per se*." ID at 116 (citing CDA, slip op. at 19, 5 Trade Reg. Rep. (CCH) at 23,788). We disagree with the ALJ. We do not believe that the language of these rules is sufficient to support a finding that AIIC prohibited price advertising and therefore committed a *per se* violation. Moreover, the two instances of enforcement the ALJ cites do not support a finding that the rules were interpreted or enforced to prohibit price advertising.<sup>40</sup> Any restrictions on nonprice advertising and promotion must be analyzed under the rule of reason. *See* CDA, slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

#### *f. Package Deals*

The AIIC Guidelines for Recruiting Interpreters, attached as an annex to the 1991 Basic Texts, in paragraph (b)7, "Duties Towards Colleagues," provide that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular

<sup>40</sup> One of the instances had no relationship to the United States -- it involved an incident in Canada. *See* CX-305-Z-332 (Sy); CXT-501-W. Moreover, there was testimony that the disciplinary action taken in that case resulted from the member's failure to use the internal AIIC grievance procedures, rather than because of the alleged advertising rule violation. *See* Luccarelli, Tr. 1683-86; *see also* CXT-501-W, p. 2. The second incident involved a member who had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. CXT-502-Z-53 to 54; RX-815.

avoid lump-sum arrangements concealing the real fees and expenses due to individual interpreters." CX-1-Z-49; IDF 255. Paragraph (c)1 states: "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." *Id.* Paragraph (b)5 states that "[i]nterpreter's fees shall be paid directly to each individual interpreter by the conference organiser." *Id.*

In 1990 and 1991, the U.S. Region prepared and discussed a provisional paper on AIIC working conditions for interpreters in the United States. The paper stated: "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." CX-439-D; *see also* CX-435-A; IDF 256.

The ALJ found that "clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters." IDF 260; CX-227-J; CX-1633-B. Nonetheless, the ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. We agree and note that there is some evidence that some intermediaries who are AIIC members do occasionally offer lump sum payment arrangements and package deals, with no repercussions from AIIC. *See* Lateiner, Tr. 976. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

#### *g. Exclusivity*

The AIIC Guidelines for Recruiting Interpreters state: "The conference interpreter makes it clear that she or he does not 'provide' interpreters . . . [and] avoids creating the impression that certain interpreters are available only through her or him, or that she or he controls teams of fixed composition." CX-2-Z-52. The ALJ found that, in compliance with AIIC's rules, coordinating interpreters in the United States do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with interpreters as employees. IDF 263; Luccarelli, Tr. 1693-94; CX-2-Z-52 (1991); CX-301-Z-105 (Bishopp). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See*

ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason. In fact, there is evidence that some intermediaries have lobbied against laws in states that were considering whether subcontractors (such as freelance interpreters) should be considered employees of the companies with which they contract because the intermediaries apparently believed that it would be economically detrimental to them if the interpreters were considered employees. Luccarelli, Tr. 1693-96. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

#### *h. Trade Names*

The AIIC Guidelines for Recruiting Interpreters state that a coordinating interpreter "acts under her or his own name and does not seek anonymity behind the name of a firm or organization, although co-operative services may be offered by a group of interpreters who carry on business under a group name." CX-2-Z-52. The ALJ found that "there are no such 'cooperatives' of interpreters in the United States" and that this rule was a prohibition on the use of trade names. IDF 266, 268; CX-301-Z-104 (Bishopp). Nonetheless, there is testimony that several intermediaries called by complaint counsel have firms that operate under a trade name. *See* Weber, Tr. 1123 (started his own firm, Language Services International); Lateiner, Tr. 976 (operated under the name Lateiner International Associates since 1980); Neubacher, Tr. 761 (started own firm, Linx Interpretation Service). There are also other large intermediaries such as Berlitz and Brahler, both of which recruit freelance interpreters for conferences. *See* Neubacher, Tr. 760-62; Davis, Tr. 836-38 (worked for both Berlitz and Brahler). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See* ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason and in light of this, and of the fact that so many interpreters and intermediaries practice under trade names, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

## V. NEED FOR AN ORDER

Respondents argue that an order is inappropriate and unnecessary because their rules affecting price never extended to the United States and, even if they did, respondents abandoned the monetary conditions worldwide in 1992. The Commission has identified the following factors as relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities: the *bona fides* of the respondent's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations. *Massachusetts Bd. of Registration in Optometry*, 110 FTC 549, 616 (1988) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). *Cf. Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (citing *W.T. Grant* in discussion of proof necessary for relief against allegedly discontinued conduct). These factors all argue strongly in favor of placing respondents under order.

The facts do not support respondents' assertions that AIIC's rules did not apply in the United States and that, even if they did, AIIC has abandoned all monetary rules. The record shows that AIIC's rules were adhered to and enforced in the United States and that AIIC's members agreed to follow, and did follow, AIIC's price-fixing and market allocation rules in the United States. *See* discussion *supra* at 15-31.<sup>41</sup> Despite AIIC's adoption of a "resolution" in 1992 to remove all monetary conditions and a commitment to change its Basic Texts in 1994, there continued to be widespread adherence to a standard rate. Dr. Lawrence Wu, complaint counsel's economic expert, found that many AIIC members continued to set their fees with reference to the AIIC rate even after AIIC stopped publishing a rate for the U.S. Region in 1992. Wu, Tr. 2205-06; IDF 533. For 1992 to 1994 the rates continued to be clustered near the AIIC rate, and through 1993 the most frequently charged rate continued to increase yearly by \$25. Although in 1994 and 1995 there was no increase in the most frequently charged rate and there was a greater distribution of prices, most prices for a day's work were still in the \$500-550 range, and the clustering found suggests that AIIC's "discontinuance" of the price-fixing agreement was not particularly effective, at least through 1995. Wu, Tr. 2204-05, 2207; *see also* Clark, Tr. 614.

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<sup>41</sup> Dr. Lawrence Wu, complaint counsel's economic expert, examined conference interpreting contracts of freelance interpreters in New York and Washington, D.C., and found that from 1988 to 1991 two-thirds of the contracts examined were at or \$50 above the published AIIC rate. Wu, Tr. 2016-17; IDF 104.

Moreover, many of AIIC's other "repealed" rules are still contained in AIIC's Basic Texts (phrased in less mandatory language) and in the standard form contracts AIIC provides for its members' use. Although the evidence in the record is insufficient to determine whether AIIC and its members actually agreed to the terms in its standard form contracts, the standard form contract nevertheless contains many of the same (or similar) provisions we are declaring unlawful. Thus, the continued use of these provisions in the standard form contract seems inconsistent with AIIC's expressed intent to comply with the law in the future.<sup>42</sup>

For example, AIIC's standard form contract provides for fees for non-working days. CX-2059-A; CX-2060-A; IDF 139; Weber, Tr. 1221. In addition, although the 1994 rules eliminate any ties between the professional address and payments for travel, subsistence, and non-working days, the standard form contract continues to tie travel reimbursement to the professional address. The "General Conditions of Work," which are part of the form contract, state:

Unless both parties have agreed otherwise, the interpreter shall have the free choice of route and dates of travel. He/she is not bound to use chartered flights. He/she shall however only be refunded the costs for the mode(s) of transport laid down in clause VII.1 for direct return travel between his/her professional address and the conference venue . . . As a general rule and unless the parties have agreed otherwise, the interpreter shall travel first class on air journeys of long duration and in business class for a journey of less than 9 hours.<sup>43</sup>

The standard contract also provides for the appropriate remuneration in the event of cancellation in two separate clauses. CX-2059-B. The relevant portions of the contract state that the conference organizer shall be obliged to pay an interpreter the amount provided for in the contract regardless of the reasons for cancellation and whether they were beyond the control of the organizer. CX-2059-B, ¶¶ 6&9. Paragraph 6 of the General Conditions of Work further provides in relevant part that "[t]he remuneration shall be paid net of commission."

With respect to the "character of respondents' past violations," respondents engaged in *per se* unlawful price fixing and attempted to

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<sup>42</sup> The Recruiting Guidelines appended to the Basic Texts and Statutes state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council." CX-1-Z-49; IDF 139.

<sup>43</sup> CX-2059-B, ¶ 7. Clause VII.1 of the contract provides for the "cost of a first-class return ticket by rail/air/sea from. . . at the current tariff." CX-2059-A.

hide their price-fixing agreements in the past: during the 1980s in the United States, rates were unpublished but no less binding.<sup>44</sup> As one AIIC Council member wrote in a 1995 AIIC Bulletin: "At Brussels [in 1992] we deregulated our monetary conditions and trusted our members to keep the faith. Now why on earth can we not trust our members today to maintain the other working practices even though they may not be mandatory . . . . ?" CX-285-S. *See also* IDF 509-12.

A claim of abandonment is rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 FTC 1195, 1240 (1971); *see also Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). In light of all of the circumstances of this case, an order prohibiting respondents from continuing to engage in price fixing is necessary and in the public interest. The remedy we impose has a "reasonable relation to the unlawful practices found to exist" and therefore is within our authority. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

## VI. FINAL ORDER

Paragraph I of the order sets forth the applicable definitions. Paragraphs II and III of the order prohibit respondents from agreeing, *inter alia*, to provisions governing: fees, including minimum daily rates; indivisible daily rates; rates for nonworking days, including travel, briefing, and rest days; per diem rates or formulas; reimbursement for travel expenses; standard cancellation clauses; recording fees; commissions; and the recruitment of interpreters based on whether or not they are permanently employed. The order applies only to conduct that would affect activities in the United States.

Paragraph IV of the order requires respondents to discipline individuals who at their meetings engage in discussions about fees applicable in the United States. The required discipline includes warning a participant or participants to refrain from engaging in the prohibited discussions and, if the warning is not effective, removing

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<sup>44</sup> *See, e.g.*, CX-1238 (letter from AIIC's Secretary General to Wilhelm Weber in connection with the Los Angeles Olympics, stating how it was inconceivable that anyone could read the standard form contract to mean that rates could be negotiated downward: "[M]embers all know that [sic] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut.").

the person or persons from the meeting. If such disciplinary actions prove unsuccessful, the meeting must be adjourned.

Paragraph V of the order clarifies that nothing in our order prohibits respondents from performing under or entering into any negotiated agreement, as that term is defined in paragraph I (L). Paragraph VI requires respondents to amend, *inter alia*, AIIC's Basic Texts to conform to the requirements of the order. Because of the longstanding nature of many of respondents' price-related restraints, paragraph VIII requires respondents to distribute to their members, officers, directors, and affiliates an announcement about the Commission's action, a copy of the complaint and order, and any of respondents' documents that are amended pursuant to the order.

Paragraph VII of the order is a "fencing-in" provision and requires respondents for a period of five years to eliminate from their Basic Texts and standard form contracts provisions related to certain payments and travel arrangements. In light of the longstanding and comprehensive nature of respondents' price-fixing agreements, fencing-in relief is particularly warranted. As the Supreme Court has observed, "[t]he purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)). The Court further found in *National Society of Professional Engineers* that a district court is "empowered to fashion appropriate restraints on . . . future activities both to avoid a recurrence of the violation and to eliminate its consequences," even if that entails "curtail[ing] the exercise of liberties that [respondent] might otherwise enjoy." 435 U.S. at 697. The same is true when the Commission, as opposed to a federal court, fashions the remedial order. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957).

Thus, the Commission can proscribe unlawful activity that the respondent has not yet undertaken, as well as activity that would itself be considered lawful but for the fact that it threatens to perpetuate or revive a violation of law. For example, in *National Lead Co.*, the Commission prohibited the individual adoption of zoned pricing plans because it had found *per se* unlawful horizontal collusion on zoned pricing plans. The Court upheld a temporary and conditional prohibition of individually adopted zoned pricing plans aimed at "creating a breathing spell during which independent pricing might

be established without the hang-over of the long-existing pattern of collusion." 352 U.S. at 425. Since the plan could easily be subject to unlawful manipulation and had been used for nearly 25 years, and since the respondents had been found to have violated the antitrust laws, the provision bore a reasonable relation to the underlying unlawful practice. *Id.* at 421, 429. In light of the temporary nature of this provision, the order was upheld.

Similarly, respondents here have engaged in a longstanding, comprehensive scheme to eliminate price competition on virtually all aspects of conference interpreting. The Commission finds that it is necessary to prohibit respondents, for a period of five years, from maintaining any provisions in their Basic Texts or form contracts, even if phrased in non-mandatory language, that relate to: payment in the event of cancellation of a contract; payment of commissions or a requirement that remuneration shall be paid net of any commissions; payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel; payment for non-working days, travel days, or rest days; payment for a subsistence allowance while on travel; and payment for recordings of conference interpretation.

Finally, the order contains standard reporting and record keeping requirements that will allow the Commission to monitor respondents' compliance with the order, as well as a 20-year sunset provision.

## VII. CONCLUSION

The International Association of Conference Interpreters and its U.S. Region adopted a comprehensive price-fixing scheme that restrained competition among conference interpreters in the U.S. in violation of Section 5 of the FTC Act. We find that AIIC's contacts with the U.S. are related to this cause of action and are sufficient to allow the Commission to exercise specific personal jurisdiction over AIIC. Moreover, we find that respondents provide their members with sufficient pecuniary benefits to bring them within our jurisdiction. We further find that AIIC is not entitled to either the statutory or the non-statutory labor exemption for the conduct we find unlawful and hereby enjoin. The respondents' restrictions on all forms of price competition cannot be justified on any grounds, and we condemn these restrictions as *per se* unlawful. The rules governing certain non-price terms and conditions of employment, business

arrangements, and advertising, however, are entitled to an examination under the rule of reason. Because complaint counsel has not carried its burden of proof under the rule of reason, we dismiss the complaint as to those rules. The findings and Initial Decision of the ALJ are upheld in part and reversed in part, consistent with our opinion and final order.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III,  
CONCURRING IN PART AND DISSENTING IN PART

In an opinion issued just about a year ago, the Commission held that respondent California Dental Association ("CDA") committed a *per se* violation of the antitrust laws by promulgating and enforcing restrictions on members' advertising of prices for dental services in California.<sup>1</sup> Although I agreed with my colleagues that CDA's restraints on both price and non-price advertising merited antitrust condemnation, I disagreed with their *per se* approach, which in my view applied -- by its language and its logic -- not only to CDA's particular price advertising restraints but also to "all agreements among competitors to restrain truthful, nondeceptive price advertising."<sup>2</sup> I pointed out in CDA that *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988) ("Mass. Board") -- frequently and fruitfully relied on until CDA, then cast aside (if not explicitly overruled) by the CDA majority for reasons never clearly spelled out -- still provides a dependable framework for the analysis of horizontal restraints.<sup>3</sup>

Once again I agree with the result reached by my colleagues but disagree with elements of their analytical methodology. I concur in the Commission's determinations that (1) the Commission has personal jurisdiction over respondent International Association of Conference Interpreters; (2) the Federal Trade Commission Act's not-for-profit exemption is unavailable to respondents; and (3) neither the

<sup>1</sup> California Dental Ass'n, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007 (Mar. 25, 1996) ("CDA"), appeal pending, No. 96-70409 (9th Cir., filed May 20, 1996). The Commission also concluded that CDA's restrictions on both price and non-price forms of advertising were unlawful under the antitrust rule of reason. CDA, slip op. at 37-39 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,796-97].

<sup>2</sup> CDA, Opinion of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part, at 1 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,815].

<sup>3</sup> "[I]f the majority considers Mass. Board beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in Mass. Board analysis that might be remedied, why not apply Mass. Board in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?" *Id.* at 9 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,818].

statutory nor the nonstatutory labor exemption immunizes respondents' conduct. I also have no objection to the order appended to the majority's opinion, because in my view the majority reached the correct determination as to which restraints should be declared unlawful. I simply do not share the majority's eagerness to replace Mass. Board's prudent approach to horizontal restraints with a system in which reference to categories of conduct -- some condemned *per se*, others judged under the rule of reason -- supplants discerning analysis.<sup>4</sup>

In one footnote in its opinion, the majority makes passing reference to a point that I emphasized in CDA -- that the Supreme Court's horizontal restraints jurisprudence of the late 1970s and early 1980s established the foundation for an analytical methodology like that laid down in Mass. Board.<sup>5</sup> Nevertheless, judging from the juxtaposition of that footnote with the majority's observation (in the accompanying text) that "[r]ecent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses,"<sup>6</sup> my colleagues apparently believe that the Supreme Court decided for reasons unexplained to forsake the approach of IFD and BMI and has instead endorsed the use of categories whose legality falls on one side or the other of a supposedly bright *per se*/rule of reason line.

Obviously, I do not assert that the Supreme Court and the lower courts have never found a practice to be *per se* illegal. Naked price-fixing, bid-rigging, market or customer allocation, and certain types of boycotts are condemned *per se* upon proof of the existence of an agreement -- that is, they are conclusively presumed to restrain trade unreasonably. But over the last 20 years, Supreme Court jurisprudence pertaining to restraints of trade -- both horizontal and vertical -- has steadily evolved into a heightened sensitivity to the economic implications of the conduct at issue and a reluctance to base

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<sup>4</sup> The fact that my colleagues and I agree here -- as we did in CDA -- on which restraints are illegal does not mean that our disagreement over analytical methodology lacks practical significance. Some future cases will likely involve alleged restraints whose competitive ramifications are more ambiguous than those at issue in the present case. Whether the Commission applies a Mass. Board analysis or adheres to the more mechanical approach established in CDA (and followed today) could obviously make a difference to the outcome.

<sup>5</sup> "We note that some earlier Supreme Court cases had suggested the merging of the *per se* and rule of reason analyses. See, e.g., *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ('BMI'); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 ('IFD'). Areeda also has suggested that there may have been some convergence of the *per se* category (see, e.g., the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (see, e.g., the 'quick look' approach of IFD) so that at times the two antitrust approaches do not differ significantly. See 7 Phillip E. Areeda, *Antitrust Law* ¶ 1508c, at 408 (1986)." Slip op. at 14 n.11.

<sup>6</sup> *Id.* at 14.

condemnation of a particular practice on a superficial resemblance to price-fixing.

The Supreme Court decisions on which the majority relies (*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) ("SCTLA")) do not undermine my point that the consistent thrust of the Court's decisions since the late 1970s has been to eschew antitrust decision making on the basis of labels, categories, and mechanical line-drawing. It is hardly surprising that the Court found *per se* violations in *Palmer* and *SCTLA*, both of which involved conduct long viewed as plainly anticompetitive; nor is there any doubt that such cases will continue to arise as long as there is antitrust enforcement. But the Supreme Court has not signaled a retreat from the "presumption in favor of a rule-of-reason standard"<sup>7</sup> for analyzing restraints. *BMI*, *IFD*, and *NCAA*<sup>8</sup> still represent the general direction of the Court's thinking in this area; *Palmer* and *SCTLA* simply illustrate, against the backdrop of this overall trend, that anticompetitive conduct can occasionally be condemned *per se*.

The approach of the majority does nothing to mitigate -- and in fact perpetuates -- the principal weakness of *CDA*: that over simplistic analogizing to traditional *per se* categories is not a satisfactory substitute for the cautious analysis mandated by the Supreme Court.<sup>9</sup> By contrast, *Mass. Board*, with whatever imperfections it had, distilled the essential elements of the Supreme Court's teaching: that seeming restraints of trade may not be what they first appear to be; that it is necessary to devote adequate scrutiny to an alleged restraint's competitive effects unless one can say, with a very high degree of confidence, that it is unmistakably anticompetitive; and that this whole exercise should not be conducted through the use of labels and categories. As I observed above, if the *Mass. Board* analysis needs improvement, the instant case presents (as did *CDA*) an opportunity to accomplish that. What I cannot accept is the majority's unwarranted abandonment of the *Mass. Board* precedent.

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<sup>7</sup> *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

<sup>8</sup> *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

<sup>9</sup> *NCAA*, *supra* n.8; *BMI*, *supra* n.5.

## FINAL ORDER

## I.

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

A. "*AIIC*" means respondent International Association of Conference Interpreters, also known as Association Internationale des Interprètes de Conférence, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

B. "*U.S. Region*" means respondent United States Region of AIIC, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

C. "*Fees*" means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of services, including, but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, recording fees, compensation for time not worked, compensation for travel time, compensation for preparation or study time, and payments in kind.

D. "*Cancellation fee*" means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

E. "*Interpretation*" means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

F. "*Translation*" means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

G. "*Other language service*" means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing,

supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

H. "*Interpreter*" means one who practices interpretation.

I. "*Translator*" means one who practices translation.

J. "*Language specialist*" means one who practices interpretation, translation, or any other language service.

K. "*Intergovernmental Organization*" refers to any organization to which privileges and immunities have been extended pursuant to the International Organizations Immunities Act, 22 U.S.C. 288 *et seq.*, as amended.

L. "*Negotiated Agreement*" means any contract or other agreement negotiated between AIIC and any user of interpretation, translation or other language service setting forth, *inter alia*, the rates and working conditions for interpreters, translators or other language specialists working on a freelance basis for that user.

M. "*Person*" means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

N. "*Basic Texts*" means the various governing and policy documents of AIIC, including, but not limited to, AIIC's Statutes, Code of Professional Ethics, Professional Standards, and Appendices to any of these documents.

## II.

*It is further ordered*, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees applicable in the United States for interpretation, translation, or any other language service, including, but not limited to, fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, participating in, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees applicable in the United States for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, offer, or adhere to, any existing or proposed fee for transactions within the United States, or otherwise to charge or refrain from charging any particular fee in the United States;

D. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition in the United States, including, but not limited to, offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, offering discounted rates, or accepting any particular lodging or travel arrangements;

E. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis for services performed within the United States; and

F. Discouraging, restricting, or prohibiting interpreters from performing interpretation, translation, or other language services within the United States free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses.

Provided that, nothing contained in this paragraph II shall prohibit respondents from:

1. Compiling or distributing accurate aggregate historical market information concerning fees actually charged in transactions in the United States that were completed no later than one (1) year before the date of such compilation, provided that such compilation or distribution begins no earlier than three (3) years after the date this order becomes final, and provided further that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions; or

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies or pursuant to a Negotiated Agreement, if such publication states the qualifications and requirements for a person to be eligible to receive such fees.

### III.

*It is further ordered*, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection

with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, participating in, promoting, assisting, enforcing, or maintaining any agreement, understanding, plan, program, combination, or conspiracy to limit, restrict, or mandate, within the United States:

A. The reimbursement of or payment to interpreters, translators, or other language specialists for travel expenses or time spent traveling; or any discounts, costs, or other advantages or disadvantages to consumers based on actual travel arrangements or geographic location;

B. The recruitment of interpreters, translators, or other language specialists on the basis of whether or not they are permanently employed; or

C. The payment or receipt of commissions.

#### IV.

*It is further ordered*, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, in connection with any meeting being held, first warn and, if the warning is not heeded, dismiss from any meeting any person or persons who make a statement, addressed to or audible to the body of the meeting, concerning the fees applicable in the United States, charged or proposed to be charged for interpretation, translation, or any other language service. If the aforementioned disciplinary actions are not effective in stopping the prohibited discussion, then respondents must adjourn the meeting until such time as it may be conducted without such prohibited discussion.

#### V.

*It is further ordered*, That nothing herein shall prohibit respondents or their members from:

A. Performing pursuant to any existing agreement entered into between AIIC and any Intergovernmental Organization or any other existing Negotiated Agreement, unless such agreement is repudiated

by such Intergovernmental Organization or other user of interpretation, translation, or other language service; or

B. If requested to do so in writing in advance by such Intergovernmental Organization or other user of interpretation, translation, or other language service, negotiating a new or renewed agreement or Negotiated Agreement with any Intergovernmental Organization or other such user, concerning the wages, hours, and working conditions of freelance interpreters, translators, or other language specialists working for such Intergovernmental Organization or other user.

## VI.

*It is further ordered*, That respondents shall, within ninety (90) days after the date this order becomes final:

A. Amend the Basic Texts, including all subparts and appendices, to conform to the requirements of paragraphs II, III, and IV of this order; and

B. Amend their rules and bylaws to require each member, region, sector, chapter, or other organizational subdivision to observe the requirements of paragraphs II, III, and IV of this order.

## VII.

*It is further ordered*, That respondents shall, within ninety (90) days after the date this order becomes final, amend the Basic Texts, including all subparts and appendices, and their standard form contracts, to eliminate, for a period of five (5) years, all provisions related to:

A. Payments in the event of cancellation of a contract;

B. The payment of commissions or the requirement that remuneration be paid net of any commissions;

C. Payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel;

D. Payment for non-working days, travel days, or rest days;

E. Payment for a subsistence allowance while on travel; and

F. Payment for recordings of conference interpretation.

VIII.

*It is further ordered,* That respondents shall:

A. Within ninety (90) days after the date this order becomes final, distribute to each member, affiliate, region, sector, chapter, organizational subdivision, or other entity associated directly or indirectly with respondents, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order; and

B. Distribute to all new officers, directors, and members of respondents, and any newly created affiliates, regions, sectors, chapters, or other organizational subdivisions of respondents, within thirty (30) days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order.

IX.

*It is further ordered,* That respondents shall:

A. Within ninety (90) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order, and any instances in which respondents have taken any action within the scope of the provisos to paragraph II of this order;

B. For a period of ten (10) years after the date this order becomes final, collect, maintain, and provide upon request to the Federal Trade Commission: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports, or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of respondents; and all general mailings by respondents to their membership;

C. For a period of ten (10) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the Basic

Texts or appendices thereto, and any new rule, regulation, or guideline of respondents applicable in the United States;

D. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, minutes, memoranda, and other records and documents in the possession or under the control of respondents relating to any matters contained in this order, and (2) upon five (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents; and

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

#### X.

*It is further ordered,* That respondent U.S. Region shall cease and desist for a period of one (1) year from maintaining or continuing its affiliation with any organization of interpreters, translators, or other language specialists within thirty (30) days after the U.S. Region learns, or obtains information that would lead a reasonable person to conclude, that said organization has engaged, after the date this order becomes final, in any act or practice that would be prohibited by paragraph II or III of this order if engaged in by the U.S. Region unless, prior to the expiration of such thirty (30) day period, said organization informs the U.S. Region by verified written statement of an officer of the organization that the organization has ceased and will not resume such act or practice, and the U.S. Region has no grounds to believe otherwise.

#### XI.

*It is further ordered,* That this order shall terminate twenty (20) years from the date this order becomes final.

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Final Order

APPENDIX A

[DATE]

ANNOUNCEMENT

The Federal Trade Commission, an agency of the government of the United States of America, has determined that certain rules and practices of the International Association of Conference Interpreters ("AIIC") violate the antitrust laws of the United States.

Members are advised that agreements between competitors on rates and fees violate the antitrust laws of the United States and may violate the laws of other countries. Other agreements between competitors on matters other than rates and fees may also violate the antitrust laws of the United States or of other countries. Individuals who enter into such agreements may be subject to criminal penalties and fines under the laws of the United States of America. 15 U.S.C. 1; 18 U.S.C. 3571. Individuals who enter into such agreements may also be civilly liable to persons injured in their business or property as a result of violations of the antitrust laws. 15 U.S.C. 15.

AIIC and its United States Region are now subject to an order issued by the United States Federal Trade Commission. The order prohibits AIIC, including its regions and organizational subdivisions, from engaging in various practices that would lessen competition in the United States. Copies of this order are attached to this Announcement.

Modifying Order

123 F.T.C.

IN THE MATTER OF

## SCHWEGMANN GIANT SUPER MARKETS, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-3584. Consent Order, June 2, 1995--Modifying Order, Feb. 24, 1997*

This order reopens a 1995 consent order -- that required the Louisiana-based corporation to divest several supermarkets in the New Orleans area -- and this order modifies the consent order by replacing a provision requiring Schwegmann to obtain prior Commission approval for certain transactions, with a prior notice provision for any acquisition of retail supermarkets in the New Orleans area that Schwegmann makes through June 6, 2005. The Commission determined that the changed provisions are warranted and consistent with the Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions and therefore justified reopening the proceeding and modifying the order.

## ORDER REOPENING AND MODIFYING ORDER

On November 21, 1996, Schwegmann Giant Super Markets, Inc. ("Schwegmann" or "respondent"), the respondent named in the consent order issued by the Commission on June 2, 1995, in docket No. C-3584 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Schwegmann asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").<sup>1</sup> The order requires Schwegmann to seek the prior approval of the Commission to acquire any supermarket in the New Orleans metro area. The thirty-day public comment period on Schwegmann's Petition expired on December 26, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification

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<sup>1</sup> 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engaged in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Schnuck Markets, Inc. ("Schnuck") entered into an agreement with National Holdings, Inc. ("National") to acquire certain supermarkets and that

Schwegmann and Schnuck had entered into an agreement for the acquisition of certain supermarkets acquired from National that, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the retail sale and distribution of food and grocery items in supermarkets in the New Orleans metro area.

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Schwegmann and National in the relevant market; the increase in the likelihood that Schwegmann would unilaterally exercise market power in the relevant market; and the increase in concentration and in the likelihood of collusion or coordinated interaction.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant market is localized and the acquisition price of a supermarket could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Schwegmann could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.<sup>2</sup>

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph IV of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

*It is further ordered*, That, for a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Schwegmann shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any supermarket, including any facility that has been operated as a supermarket within six (6) months of the date of the offer by Schwegmann to purchase

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<sup>2</sup> Schwegmann has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

the facility, or any interest in a supermarket, or any interest in any individual, firm partnership, corporation or other legal or business entity that directly or indirectly owns or operates a supermarket in the New Orleans metro area.

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schwegmann or the purchase or lease by Schwegmann of a facility that has not been operated as a supermarket at any time during the six (6) month period immediately prior to the purchase or lease by Schwegmann in those locations.

"Prior Notification to the Commission" required by paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Schwegmann and not of any other party to the transaction. Schwegmann shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Schwegmann shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Schwegmann shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Complaint

123 F.T.C.

IN THE MATTER OF

## WORLD MEDIA T.V., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3717. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997*

This consent order prohibits, among other things, the California-based advertising production and distribution corporation from making pain relief or pain elimination claims in infomercials for any device without possessing competent and reliable scientific evidence to support such claims and prohibits the respondent from representing that any endorsement or testimonial represents the typical experience with the product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

*Appearances*For the Commission: *Lesley Anne Fair.*For the respondent: *Edward Glynn, Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

## COMPLAINT

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

PARAGRAPH 1. Respondent is a California corporation, with its principal office or place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, CA. respondent engages in the creation, production, and media placement of advertising, including but not necessarily limited to infomercials.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency, production company, and media buyer for Natural Innovations, Inc. and has directed, participated in, and assisted others in the creation and dissemination to the public of advertisements that offer for sale the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

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 prepared and disseminated or has caused to be disseminated advertisements for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain." This advertisement contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

K. DR. GANDEE: But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing. (Exhibit A, p. 3)

L. KEVIN CULVER (Consumer Endorser): I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since. (Exhibit A, p. 8)

M. RUTH MINARD (Consumer Endorser): I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either. (Exhibit A, p. 11)

N. BILL WALTON: I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine. (Exhibit A, p. 9)

O. JAMES LARIMORE (Consumer Endorser): Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. (Exhibit A, p. 6)

P. RON HARTLINE (Consumer Endorser): When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. (Exhibit A, p. 4)

Q. DR. GANDEE: Allergies, the runny eyes, the runny nose. [The Stimulator] really seems like it gives a lot of relief for that. (Exhibit A, p. 6)

R. BILL WALTON: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the

Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better. (Exhibit A, p. 4)

S. DR. GANDEE: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself. (Exhibit A, p. 4)

T. DR. GANDEE: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. (Exhibit A, p. 10)

U. UNIDENTIFIED WOMAN #6 (Consumer Endorser): Oh, I think it works much faster than any medication. (Exhibit A, p. 3)

V. LINDA ANTHONY (Consumer Endorser): He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. (Exhibit A, p. 6)

W. UNIDENTIFIED MAN #2 (Consumer Endorser): It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly. (Exhibit A, p. 10)

X. JOHN TRIPPE (Consumer Endorser): I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this I haven't used any of it. (Exhibit A, p. 3)

Y. UNIDENTIFIED WOMAN #4 (Consumer Endorser): Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have. (Exhibit A, p. 3)

Z. GLEN MATZ (Consumer Endorser): Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve that pain and I don't have to swallow anything. (Exhibit A, p. 3)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that:

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

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

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

PAR. 8. Respondent knew or should have known that the misrepresentation 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(a) and 12 of the Federal Trade Commission Act.

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## Complaint

## EXHIBIT A

**Transcript of Stimulator Infomercial  
"Saying No To Pain"**

*Super: "The following program is a paid presentation from Natural Innovations, Inc."*

Voice-over: The following program is a paid presentation from Natural Innovations.

Voice-over: There are many stringent government regulations involved in selling a pain relief product on television, because some products sold in the past may have been ineffective, built false hope, and in some cases, could have been harmful. This product has not undergone the extensive testing that would allow us to satisfy all of the federal regulations. However, similar products have been in use for years with no record of ill effects; in fact, this concept has been used for centuries for pain relief. We make no medical claim that the Stimulator cures any disease, or does anything other than relieve pain for the people seen on this program. We simply believe that each of you has the right to try a product for yourself, and the opportunity to make your own decision to take active control of your own healthcare choices, including what gives you relief from your pain.

*Super: Simultaneous visual scrolling of voice-over.*

*Depiction: A man jogging with a red highlight pointing to his right ankle. A woman on a telephone in a kitchen rubbing her neck with her left hand.*

Bill Walton: Unfortunately I know far too much about pain.

*Depiction: A boy throwing a baseball and rubbing his right elbow.*

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool.

*Depiction: A man rubbing his hands.*

I fell off of a motorcycle on pavement going 100 miles per hour.

*Depiction: A woman grabbing her lower back in pain.*

Unidentified Woman #1: The pain is there.

*Depiction: A man playing tennis and grabbing his left elbow after hitting the ball.*

And it's going to scream at you, "Don't do that to me."

Lee Menwerth: Pain, pain go away. Stay tuned because you're about to meet a very special doctor who has brought us a key to unlock the grip of pain. And if you know someone who's living with pain, please, I'd like you to take a moment and call them right now. Ask them to join us as we hear some amazing stories from people who have been set free -- free to get on with the business of enjoying life and feeling good. Today, on "Say No to Pain."

## EXHIBIT A

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## EXHIBIT A

Joe Anthony: If they said that they were never going to be available again and somebody wanted to buy mine, and I couldn't replace it, I wouldn't sell it for \$5,000.

Evel Knievel: I think that this is a better product to use, and you can keep things that do not belong in your system out of your system.

Bill Walton: It's very effective in terms of enabling me to have a better life.

*Depiction: Still shots of the people depicted earlier.*

Voice-over: Back pains, headaches, joint pain, foot pain. Join Lee Meriwether as she talks with health practitioner Dr. Steven Gandee, NBA all-star player and announcer Bill Walton, special guest star Evel Knievel, and people just like you, whose only special quality is that they're living without pain. Today, on "Say No to Pain."

*Depiction: Still shots of Lee Meriwether, Dr. Gandee, Bill Walton, Evel Knievel, and consumer endorsers.*

*Super: The word "Pain" superimposed on the still shots, followed by the word "No" in large red letters.*

Lee Meriwether: Hi, I'm Lee Meriwether. And no matter who you are, what you do, you, me and the rest of world all have something in common. We hurt sometimes. Many of us ignore it, hope it goes away. Or we reach into the medicine cabinet for drugs. Generally, we do whatever we can to live around the pain. But what happens to your life in the meantime? You make sacrifices, don't you? Pain can literally take away our lives.

Unidentified Woman #2: Even like when I pick my child up, and she's ten months old now, when I first had her, it would sometimes cramp a lot. If I'd hold her for a long period of time, like in my elbow area.

Bill Walton: My goal was to get pain free. My goal was to have a life. I had no life.

Unidentified Woman #3: That wasn't me. I was very unhappy because I couldn't function the way I was used to functioning. I just couldn't do the things I was used to doing.

Lee Meriwether: I'd like to introduce a man who has been doing something about pain for almost 20 years.

*Depiction: Dr. Gandee examining a patient and presenting a speech.*

Dr. Steve Gandee has the largest single doctor practice in Ohio. Over 40,000 office visits a year. Now that puts him in the top one percent in the country. He's the Ohio state representative to the International Chiropractic Association. He's been featured in numerous medical publications as well as his own television series on chiropractic care. His mission has been to help people find a way to say no to pain. Now Dr. Gandee, I know most people seem to do one of two things when they're in pain. They either try to ignore it hoping it will go away. Or, well, unfortunately, they reach into the medicine cabinet.

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## Complaint

## EXHIBIT A

- Dr. Gandee: Lee, that's true and that's a shame. People nowadays search and reach for drugs first, instead of trying something different. But fortunately with the Stimulator people can take control of their life, of their pain, of their suffering themselves. People like that. I wish you could follow me around my office one day, just one day, and watch people's attitudes when they can start themselves, like you and I can take control of what we feel, what we want to do, and not go to the drug cabinet. It's great. It's a great feeling, great.
- John Trippe: I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this, I haven't used any of it.
- Unidentified Woman #4: Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have.
- Glen Matz: Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve the pain and I don't have to swallow anything.
- Lee Meriwether: What these people are talking about is this simple pain-relief device. It's called the Stimulator and it changes the lives of those who use it. You know, Doctor, when I first saw this product, well, and I heard the phenomenal effects it had on people, I thought, how in the world can something so small have such a phenomenal effect on the body?
- Dr. Gandee: I thought the same way. It is small, isn't it? But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing.
- Lee Meriwether: So you used it on yourself?
- Dr. Gandee: I certainly did. About three or four times a day over a period of a week, I have no more pain. And you know what I did? At that point in time, I made a conscious effort that I was going to get this product to society, to America. Not only America, the world.
- Unidentified Woman #5: That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out.
- James Larimore: It works for me in the area of the sinus problem. It works for me in the area of the muscle problem.
- Unidentified Woman #6: Oh, I think it works much faster than any medication.

## Complaint

123 F.T.C.

## EXHIBIT A

- Linda Anthony: The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that gives you that instant relief. I mean I'm talking instant.
- Bill Ramsell: My wife could tell you, I came home and I felt wonderful. I told her, "I just don't believe it. That little thing there could work a miracle [inaudible]. And it was.
- Bill Walton: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better.
- Lee Meriwether: Doctor, how does the Stimulator actually create such amazing results?
- Dr. Gandee: Very simple. You put the Stimulator up to wherever you hurt, wherever it is. You press in the plunger and a little spark comes out. Feel that?
- Lee Meriwether: Oh, yes.
- Dr. Gandee: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself.
- Pat Wayne: I just had sacroiliac pain for years and years. And, like I said, I worked for fifteen to 20 years at Goodyear and I had problems with my legs when I worked there and I have never been so relieved since I got this Stimulator.
- Glen Matz: At first, I was a little skeptical. Who wasn't? Who wouldn't be? Something clicks and throws a spark, you know, but the darn-- it takes care of pain. Say what you want to. It alleviates pain.
- Ron Hartline: My truck driving and my football injuries and whiplash and all the things over years that I've accumulated. It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But this works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My warch actually slides now whereas it's always been tight. In the mornings I'd use it on my knees, like from carrying the concrete, carrying the bricks and standing on a concrete floor all day. It just -- it just seems like it relieves it. And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. You know, you start getting older and you do the work I'm doing and you get so sore. And pretty soon you're just kind of thinking, "God, how long am I going to be able to do this?" But this is my future. This is my job. This is my money, you know. So, for some silly little thing like this to work this well, I'm hanging on to it. And if it lasts for life I'm in good shape.

## Complaint

## EXHIBIT A

Lee Meriwether: It's obvious the Stimulator works for the people we've seen so far in this program. But I want you to stay tuned because we have a couple of special guests that I'm sure you're going to recognize who really know the meaning of the word pain.

*[Break to ordering spot.]*

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool. I fell off of a motorcycle on pavement going 100 miles per hour.

Bill Ramsell: I had excruciating pain in my knees. And it was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all.

*Super: "Sold nationally \$150.00" with a red "X" through it.*

Dr. Gandee: The Stimulator may sound to good to be true, but it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people rather than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.

Voice-over: Order now and receive an instructional video, instruction booklet, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four easy payments of \$19.95. Call 1-800-982-2600. Or send check or money order for \$79.80, plus \$8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.

*Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*

*Super: Visual of ordering telephone number and address.*

Ruth Minard: I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe - 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and it did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache.

*[End of ordering spot.]*

Lee Meriwether: Welcome back. If you just joined us, we've been talking about this amazing little device. It's called the Stimulator. And I'm here with Dr. Steven Gandee who's been using the Stimulator to treat his own patients. Now Doctor, has anyone used the Stimulator and not experienced relief from their pain?

## Complaint

123 F.T.C.

## EXHIBIT A

- Dr. Gandee: Nothing works 100% of the time on 100% of the people, unfortunately. But I'll tell you what. I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. Sinuses. The Stimulator works very well with sinuses. Allergies, the runny eyes, the runny nose. It really seems like it gives a lot of relief for that. Sore, stress areas, from the neck down into the shoulders, knees, elbows. All joint pains. It's amazing.
- James Larimore: I've been a teamster for almost 30 years. And I've been driving antiquated equipment for an awful long time. No power steering, no power brakes. Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. And when I go to bed, I hit the lower back and I sleep like a baby. It serves as a pain relief without [inaudible]. And to me that's a plus. If you're the type of person I am, if it works for you, you'll talk about it. I don't see how it works. I don't understand how it works. I don't care how it works -- as long as it works. And if I could have had one of these 20 years ago, I'd have been in a lot less pain for a long time.
- Lee Meriwether: I hadn't really no idea that electricity could be useful in pain prevention.
- Dr. Gandee: Well, it's true. Even the ancient Greeks. Picture this in your mind. The ancient Greeks realized that the body is an electrical system. You know what they did?
- Lee Meriwether: No.
- Dr. Gandee: They put a person in a tub of water and they put eels in the tub of water with them, so they could send electrical current and help the body. That's what they did.
- Glen Matz: I had gone through knee surgery and went through the therapy -- the physical therapy -- and they use elec-- I don't know what words I want to use. What is it, is it electrolysis? Or whatever. But they hooked the wires up to me and I got the same shocking effect. So I really couldn't scoff at the idea because if they use it, why couldn't I use it?
- Linda Anthony: He started telling me about this, you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. Within minutes, I'm back to working and doing whatever I was doing before. And I don't even realize it. All at once I have to say, "Oh my God, that pain is gone."
- Lee Meriwether: Listening to all these people and their incredible, incredible stories, it seems to be that one would be hard pressed to get the Stimulator away from them.

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## Complaint

## EXHIBIT A

Dr. Gandee: When I first started working with the Stimulator, what I actually did is I tried to buy the Stimulator back from a patient.

Lee Meriwether: Really?

Dr. Gandee: And they said, "Well, where I can get another one?" And I said, "Well, you can't. I have to have it back." And they said, "Well, you're not getting it back." Once you have this, and you can use it on yourself, you can take control of your own health to some degree. You can't get it back.

Lee Meriwether: Well, there's at least one man I know that will never give up his Stimulator and he's someone that needs no introduction. A death-defying daredevil who's put millions of us on the edge of our seats. Evel Knievel.

*Depiction: Evel Knievel jumping a motorcycle off a ramp.*

Evel, it scares me just watching you on tape in all your jumps. Now what has happened to your poor body?

*Depiction: Evel Knievel crashing, flying off a motorcycle.*

Evel Knievel: I've had fourteen major open reduction operations. That's where they open you up and put a plate in a bone and attach it to another bone so that you can heal. It's an inner cast.

Lee Meriwether: How many bones have you broken?

Evel Knievel: I've broken about 34 or 35. Everybody kids me about how I've broken every bone in my body, but I used to tell them that I've broken every one except my little finger. But the truth is I've only broken about 34 or 35. When you talk about an injury on the football field or when you talk about a person being hurt playing tennis, or baseball, or a rodeo rider falling off a horse into deep soft dirt or cow manure or whatever it is -- I'll tell you what pain really is. You get on the hood of a car and when your driver gets to 80 miles per hour, have him blow the horn, you bail off out here on the freeway, you're going to find out what pain is.

*Depiction: Evel Knievel crashing.*

Dr. Gandee: That's what you did.

Lee Meriwether: Oh, oh, oh.

Evel Knievel: And I have been there. When I wake up in the morning, my wrist tends to hurt me very badly. When I put it on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. I also use it on my knees. It does help me feel a lot better and I use it on my ankles. I've broken both of my ankles. It's such a simple thing to use. You don't have to rub it on you. If you have something bothering you and you're out playing golf or no matter what you're doing, if you got it in your pocket, you can pull it out and snap yourself with it three or four times. In fact, I like to use it on the guys when I hit a good shot on the golf course. I pull it out and go

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## EXHIBIT A

*Depiction: Evel Knievel using the Stimulator several times.*

and they say, "What's he got? What is that?" They know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. If you use this product, it will work for you. If you have nothing to lose by trying something and everything to gain if you're successful, then by all means, try it. I hope that people will try it and I hope that I will meet people years from now who say I saw you on TV and thank you for telling me about the Stimulator.

Lee Meriwether: Well, we thank you. Now coming up next, we'll visit with basketball great Bill Walton and more people just like you saying no to pain.

*[Break to ordering spot.]*

Kevin Culver: Well, being a police officer, I'm extremely skeptical. You can't just walk up to me and say, "Hey, this is going to work" without me having a little knowledge of it. It's gotta work. You've gotta show me it's going to work. And fortunately it did. It saved me a trip to the podiatrist, I know that. I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since.

*Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*

Voice-over: Write down this important number to take advantage of this revolutionary pain relief secret.

*Super: "1-800-982-2600"*

Order the Stimulator now and receive free Dr. Gandee's instruction booklet and exciting video "Pain Free Today." They give every technique you need to start saying no to pain immediately with the Stimulator. Also receive absolutely free a plush carrying pouch and plus your free issue of Dr. Gandee's exciting newsletter, "Secrets of Health," packed with dynamic ideas and techniques to help you get healthy and stay that way. The Stimulator is sold nationally for over \$150.00. But everyone with pain should be able to afford relief. So for a limited time, we're offering the Stimulator to you for just four easy payments of \$19.95. Take advantage of this special offer and call now.

To order the Stimulator for just four easy payments of \$19.95, have your credit card ready and call 1-800-982-2600. That's 1-800-982-2600. Or send check or money order for \$79.80 plus \$8.50 shipping and handling to The Stimulator, Box 36700, Canton, Ohio 44735. This exclusive TV offer comes with a 30-day money back guarantee. So call 1-800-982-2600. Call now.

*Super: Visual of ordering telephone number and address.*

*[End of ordering spot.]*

## Complaint

## EXHIBIT A

- Lee Meriwether: Hello again. During his basketball career, Bill Walton was a dominating center. He's one of the few players to ever win national championships both in college and the pros, and he's also a member of the pro basketball Hall of Fame. But in the world of sports, pain is common. And sometimes greatness comes at a great expense.
- Bill Walton: I was the type of player that by midway through my career, I realized that I was going to leave my game and my health on the basketball court. I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things that I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine.
- Lee Meriwether: Well, there's certainly no question about that. He's definitely a believer. And the Stimulator is making believers out of more people every day.
- Dr. Gandee: Because it's safe, effective, and it works.
- Lee Meriwether: I have to tell you something about the Stimulator that I really think is fantastic. Now I know that I have something that will help alleviate pain with the people that I love.
- Dr. Gandee: I know the feeling of helplessness because I have two children and many times they've awakened me in the middle of the night, crying with pain or hurting or sickness. Now I'm not saying that we should stay away from medical care, of course. But what I am saying is that this feeling of helplessness will no longer be there because you at least have an opportunity to try something yourself to help the family or friends or neighbors.
- Lee Meriwether: Dr. Gandee, I know we only have a few moments left, but is there anything that you'd like to say to our viewers?
- Dr. Gandee: No matter what we've done today, some people are still going to be skeptical. That's just the way human nature is. I can sit here and I can say, well, you should've watched Evel before he even came out here doing himself on his knuckles and his wrist. Remember? Or his knees. And we talked to Bill Walton. And Bill Walton was in pain. And because of [inaudible] surgery [inaudible] had done to his ankles, he couldn't even walk without limping. People can't see that though. All they can see is us up here talking. No matter how skeptical a person is, no matter what they think or what they feel, the only way they're truly going to find out if they can get help and if they can help their family or friends or loved ones to keep from suffering, no matter how much pain they're in, the only thing they can do is try it.
- Lee Meriwether: What we've seen here today is really nothing short of miraculous for those who have used this amazing little power house. People who have literally pushed pain away and started enjoying life once again. Now if you could experience results, powerful results, like you've seen here today, wouldn't it be worth almost anything? Do something now to say no to pain, for yourself or for someone you love.

## Complaint

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## EXHIBIT A

- Bill Walton: There is no way that I could talk about the positive benefits of this Stimulator if it didn't work for me. I'm into things that work. I'm into winning.
- Joe Anthony: It's a minimum investment with maximum results.
- Glen Matz: Try it and you'll find out. It's that simple. It does work. And if you don't believe me, do it yourself. Give it a try.
- Ruth Minard: Every home needs one.
- Unidentified Woman #7: Even that time of month when you get back cramps.
- Unidentified Man #1: I think everybody should have one.
- Evel Knievel: By all means, try it.
- Unidentified Man #2: It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly.
- Linda Anthony: No one could take it away from me.
- James Larimore: If I could have had one of these 20 years ago, I would've been in a lot less pain for a long time.
- Unidentified Man #3: It does work. There's no doubt in mind whatsoever.
- Unidentified Woman #7: It always -- every time I use it helps me. Every single time I've used it.
- Unidentified Woman #8: I've lived my whole life in pain and it's not worth it. If you have something that will help you, then I'd say go for it.
- Bill Walton: Thank God, thank God for the Stimulator.
- Dr. Gandee: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This is about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.
- Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*
- Super: Visual of ordering telephone number and address.*
- Voice-over: Order now and receive an instructional video, instruction book, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four

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## Complaint

## EXHIBIT A

easy payments of \$19.95. Call 1-800-982-2600. Or send check or money order for \$79.80, plus \$8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.

Ruth Minard: I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either.

Pat Wayne: If anyone is skeptical of my activator -- I [inaudible] to say Stimulator, but it's my activator -- you can call me.

Voice-over: The preceding program was a paid presentation from Natural Innovations.

*Super: "The preceding program was a paid presentation from Natural Innovations, Inc."*

## DECISION AND ORDER

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

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

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

1. Respondent World Media T.V., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, California.

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

## ORDER

## I.

*It is ordered,* That respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any device, as "device" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That use of the device will significantly reduce, relieve, or eliminate musculoskeletal pain, including but not limited to pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, or calves; carpal tunnel syndrome; muscle spasms or strains; or sciatica;

B. That use of the device will significantly reduce, relieve, or eliminate abdominal pain or pain or discomfort caused by allergies, sinus conditions, diverticulosis, cramps, or menstrual cramps;

C. That use of the device will eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, or stress headaches, or headaches caused by benign tumors;

D. That the pain relief or pain elimination provided by the device is immediate;

E. That use of the device provides long-term pain relief;

F. That, for the treatment of pain, the device is as effective as, or more effective than, prescription or over-the-counter medications, including but not limited to aspirin, acetaminophen, Darvon, Darvocet, or codeine;

G. That, for the treatment of pain, the device is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, or reflexology; or

H. About the efficacy or relative efficacy of the product in reducing, relieving, or eliminating pain from any source;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean adequate and

well-controlled clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

Provided that, for any representation that any device is effective for:

- (1) The temporary relief of minor aches and pains due to fatigue and overexertion, or
- (2) Easing and relaxing of tired muscles, or
- (3) The temporary increase of local blood circulation in the area where applied,

"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.

## II.

*It is further ordered,* That respondent, World Media T.V., Inc, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## III.

*It is further ordered*, That respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation, or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(1) What the generally expected results would be for users of such product, or

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

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

## IV.

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

## V.

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

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis for such representation, including but not limited to complaints from consumers and complaints or inquiries from governmental organizations.

## 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, the planned filing of a bankruptcy petition, or any other change in the corporation that may affect compliance obligations arising out of this order.

## VII.

*It is further ordered*, That respondent shall:

A. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

B. For a period of five (5) 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 it or any subsidiary, successor, or assign, within ten (10) days after the person assumes his or her position.

## VIII.

*It is further ordered,* That this order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

## IX.

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

Complaint

123 F.T.C.

IN THE MATTER OF

NATURAL INNOVATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3718. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997*

This consent order prohibits, among other things, the Ohio-based manufacturer and its president from making pain relief or pain elimination claims for their device without possessing competent and reliable scientific evidence to support such claims and prohibits them from representing that any endorsement or testimonial represents the typical experience with their product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

### *Appearances*

For the Commission: *Lesley Anne Fair.*

For the respondents: *Barry Cutler and Julia Oas, McCutchen, Doyle, Brown & Enersen, Washington, D.C.*

### COMPLAINT

The Federal Trade Commission, having reason to believe that Natural Innovations, Inc., a corporation, and William S. Gandee, individually and as an officer and director 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 Natural Innovations, Inc. is an Ohio corporation, with its principal office or place of business at 2717 South Arlington Road, Akron, Ohio.

Respondent William S. Gandee is an officer, director, and sole shareholder of Natural Innovations, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of Natural Innovations, Inc., 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 the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission

Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain;" the attached Exhibit B, an instruction booklet for the Stimulator; and the attached Exhibit C, an instruction video entitled "Pain Free Today." These advertisements and promotional materials contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that.

But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

K. DR. GANDEE: But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing. (Exhibit A, p. 3)

L. KEVIN CULVER (Consumer Endorser): I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since. (Exhibit A, p. 8)

M. RUTH MINARD (Consumer Endorser): I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either. (Exhibit A, p. 11)

N. BILL WALTON: I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine. (Exhibit A, p. 9)

O. JAMES LARIMORE (Consumer Endorser): Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. (Exhibit A, p. 6)

P. RON HARTLINE (Consumer Endorser): When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the

swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. (Exhibit A, p. 4)

Q. DR. GANDEE: Allergies, the runny eyes, the runny nose. [The Stimulator] really seems like it gives a lot of relief for that. (Exhibit A, p. 6)

R. BILL WALTON: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better. (Exhibit A, p. 4)

S. DR. GANDEE: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself. (Exhibit A, p. 4)

T. DR. GANDEE: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. (Exhibit A, p. 10)

U. UNIDENTIFIED WOMAN #6 (Consumer Endorser): Oh, I think it works much faster than any medication. (Exhibit A, p. 3)

V. LINDA ANTHONY (Consumer Endorser): He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. (Exhibit A, p. 6)

W. UNIDENTIFIED MAN #2 (Consumer Endorser): It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly. (Exhibit A, p. 10)

X. JOHN TRIPPE (Consumer Endorser): I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this I haven't used any of it. (Exhibit A, p. 3)

Y. UNIDENTIFIED WOMAN #4 (Consumer Endorser): Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have. (Exhibit A, p. 3)

Z. GLEN MATZ (Consumer Endorser): Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve that pain and I don't have to swallow anything. (Exhibit A, p. 3)

AA. INSTRUCTION BOOKLET: In most cases, The STIMULATOR provides almost instant relief from pain. In cases of chronic pain, it may require several treatments per day over a period of time to achieve results. It has been our experience that as your pain decreases, the frequency with which you use the STIMULATOR will decrease also, until it's only necessary to use it on an occasional basis. (Exhibit B, p. 2)

We all hurt at one time or another, and the STIMULATOR can provide relief for almost everyone. (Exhibit B, p. 3)

Painful conditions which the STIMULATOR may be helpful for: painful joints; Stiff joints; Swollen joints; Muscle spasms; Sciatica; Frontal headaches; Occipital headaches; Migraine headaches; Cluster headaches; Stress headaches; Shoulder

pain; Back pain; Menstrual cramps; Carpal tunnel syndrome; Numbness and tingling; Allergies; Neck pain; Muscle strain; Foot cramps; Abdominal pain. (Exhibit B, p. 3)

Although the STIMULATOR may not work 100% of the time on 100% of your problems, we are confident that you'll find it extremely effective for the vast majority of your aches and pains as well as enabling you to provide relief for family and friends. (Exhibit B, p. 4)

BB. DR. GANDEE: Who needs the Stimulator? Basically, anyone can use the Stimulator because it's safe and effective. My grandmother is 96 years old and she uses the Stimulator every day. She's got leg cramps and feet problems and she uses it just to help her get through the day. (Exhibit C, p. 1)

CC. DR. GANDEE: Yet I'm sure that as you use the Stimulator and as I show you today how to use the Stimulator more effectively, you're going to find that you're going to be able to get relief most of the time. (Exhibit C, p. 1-2)

DD. DR. GANDEE: At first I really didn't see improvement. It felt a little bit better for a short period of time but then it would go back to what it was before. It took about a week until one day just out of the blue I noticed I had no more pain. (Exhibit C, p. 2)

EE. DR. GANDEE: As I work with the Stimulator, it is very obvious to me that soon this product will be worldwide. I believe that every household in America very soon will own a Stimulator. It might even go to the point where each individual person in the household will own a Stimulator because they'll want to keep it with them all the time. I also sincerely believe that the Stimulator will help you lead a more active, productive, and pain-free life. And as you share the Stimulator with your family and friends, which I hope you do and soon, I know that your family and friends are going to be calling you "Doc" or they're going to be asking for you to use the Stimulator on them. (Exhibit C, p. 7-8)

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

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements and promotional materials for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

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 and promotional materials attached as Exhibits A through C, 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.

PAR. 8. 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.

## Complaint

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## EXHIBIT A

**Transcript of Stimulator Infomercial  
"Saying No To Pain"**

*Super: "The following program is a paid presentation from Natural Innovations, Inc."*

Voice-over: The following program is a paid presentation from Natural Innovations.

Voice-over: There are many stringent government regulations involved in selling a pain relief product on television, because some products sold in the past may have been ineffective, built false hope, and in some cases, could have been harmful. This product has not undergone the extensive testing that would allow us to satisfy all of the federal regulations. However, similar products have been in use for years with no record of ill effects; in fact, this concept has been used for centuries for pain relief. We make no medical claim that the Stimulator cures any disease, or does anything other than relieve pain for the people seen on this program. We simply believe that each of you has the right to try a product for yourself, and the opportunity to make your own decision to take active control of your own healthcare choices, including what gives you relief from your pain.

*Super: Simultaneous visual scrolling of voice-over.*

*Depiction: A man jogging with a red highlight pointing to his right ankle. A woman on a telephone in a kitchen rubbing her neck with her left hand.*

Bill Walton: Unfortunately I know far too much about pain.

*Depiction: A boy throwing a baseball and rubbing his right elbow.*

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool.

*Depiction: A man rubbing his hands.*

I fell off of a motorcycle on pavement going 100 miles per hour.

*Depiction: A woman grabbing her lower back in pain.*

Unidentified Woman #1: The pain is there.

*Depiction: A man playing tennis and grabbing his left elbow after hitting the ball.*

And it's going to scream at you. "Don't do that to me."

Lee Meriwether: Pain, pain go away. Stay tuned because you're about to meet a very special doctor who has brought us a key to unlock the grip of pain. And if you know someone who's living with pain, please, I'd like you to take a moment and call them right now. Ask them to join us as we hear some amazing stories from people who have been set free -- free to get on with the business of enjoying life and feeling good. Today, on "Say No to Pain."

## EXHIBIT A

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## Complaint

## EXHIBIT A

Joe Anthony: If they said that they were never going to be available again and somebody wanted to buy mine, and I couldn't replace it, I wouldn't sell it for \$5,000.

Evel Knievel: I think that this is a better product to use, and you can keep things that do not belong in your system out of your system.

Bill Walton: It's very effective in terms of enabling me to have a better life.

*Depiction: Still shots of the people depicted earlier.*

Voice-over: Back pains, headaches, joint pain, foot pain. Join Lee Meriwether as she talks with health practitioner Dr. Steven Gandee, NBA all-star player and announcer Bill Walton, special guest star Evel Knievel, and people just like you, whose only special quality is that they're living without pain. Today, on "Say No to Pain."

*Depiction: Still shots of Lee Meriwether, Dr. Gandee, Bill Walton, Evel Knievel, and consumer endorsers.*

*Super: The word "Pain" superimposed on the still shots, followed by the word "No" in large red letters.*

Lee Meriwether: Hi, I'm Lee Meriwether. And no matter who you are, what you do, you, me and the rest of world all have something in common. We hurt sometimes. Many of us ignore it, hope it goes away. Or we reach into the medicine cabinet for drugs. Generally, we do whatever we can to live around the pain. But what happens to your life in the meantime? You make sacrifices, don't you? Pain can literally take away our lives.

Unidentified Woman #2: Even like when I pick my child up, and she's ten months old now, when I first had her, it would sometimes cramp a lot. If I'd hold her for a long period of time, like in my elbow area.

Bill Walton: My goal was to get pain free. My goal was to have a life. I had no life.

Unidentified Woman #3: That wasn't me. I was very unhappy because I couldn't function the way I was used to functioning. I just couldn't do the things I was used to doing.

Lee Meriwether: I'd like to introduce a man who has been doing something about pain for almost 20 years.

*Depiction: Dr. Gandee examining a patient and presenting a speech.*

Dr. Steve Gandee has the largest single doctor practice in Ohio. Over 40,000 office visits a year. Now that puts him in the top one percent in the country. He's the Ohio state representative to the International Chiropractic Association. He's been featured in numerous medical publications as well as his own television series on chiropractic care. His mission has been to help people find a way to say no to pain. Now Dr. Gandee, I know most people seem to do one of two things when they're in pain. They either try to ignore it hoping it will go away. Or, well, unfortunately, they reach into the medicine cabinet.

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## EXHIBIT A

- Dr. Gandee: Lee, that's true and that's a shame. People nowadays search and reach for drugs first, instead of trying something different. But fortunately with the Stimulator people can take control of their life, of their pain, of their suffering themselves. People like that. I wish you could follow me around my office one day, just one day, and watch people's attitudes when they can start themselves, like you and I can take control of what we feel, what we want to do, and not go to the drug cabinet. It's great. It's a great feeling, great.
- John Trippe: I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this, I haven't used any of it.
- Unidentified Woman #4: Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have.
- Glen Matz: Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve the pain and I don't have to swallow anything.
- Lee Meriwether: What these people are talking about is this simple pain-relief device. It's called the Stimulator and it changes the lives of those who use it. You know, Doctor, when I first saw this product, well, and I heard the phenomenal effects it had on people, I thought, how in the world can something so small have such a phenomenal effect on the body?
- Dr. Gandee: I thought the same way. It is small, isn't it? But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing.
- Lee Meriwether: So you used it on yourself?
- Dr. Gandee: I certainly did. About three or four times a day over a period of a week, I have no more pain. And you know what I did? At that point in time, I made a conscious effort that I was going to get this product to society, to America. Not only America, the world.
- Unidentified Woman #5: That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out.
- James Larmore: It works for me in the area of the sinus problem. It works for me in the area of the muscle problem.
- Unidentified Woman #6: Oh, I think it works much faster than any medication.

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## Complaint

## EXHIBIT A

- Linda Anthony: The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication; no nothing can take that gives you that instant relief. I mean I'm talking instant.
- Bill Ramsell: My wife could tell you, I came home and I felt wonderful. I told her, "I just don't believe it. That little thing there could work a miracle [inaudible]. And it was.
- Bill Walton: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better.
- Lee Meriwether: Doctor, how does the Stimulator actually create such amazing results?
- Dr. Gandee: Very simple. You put the Stimulator up to wherever you hurt, wherever it is. You press in the plunger and a little spark comes out. Feel that?
- Lee Meriwether: Oh, yes.
- Dr. Gandee: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself.
- Pat Wayne: I just had sacroiliac pain for years and years. And, like I said, I worked for fifteen to 20 years at Goodyear and I had problems with my legs when I worked there and I have never been so relieved since I got this Stimulator.
- Glen Matz: At first, I was a little skeptical. Who wasn't? Who wouldn't be? Something clicks and throws a spark, you know, but the darn-- it takes care of pain. Say what you want to. It alleviates pain.
- Ron Hartline: My truck driving and my football injuries and whiplash and all the things over years that I've accumulated. It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But this works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. In the mornings I'd use it on my knees, like from carrying the concrete, carrying the bricks and standing on a concrete floor all day. It just -- it just seems like it relieves it. And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. You know, you start getting older and you do the work I'm doing and you get so sore. And pretty soon you're just kind of thinking, "God, how long am I going to be able to do this?" But this is my future. This is my job. This is my money, you know. So, for some silly little thing like this to work this well, I'm hanging on to it. And if it lasts for life I'm in good shape.

## Complaint

123 F.T.C.

## EXHIBIT A

Lee Meriwether: It's obvious the Stimulator works for the people we've seen so far in this program. But I want you to stay tuned because we have a couple of special guests that I'm sure you're going to recognize who really know the meaning of the word pain.

*[Break to ordering spot.]*

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool. I fell off of a motorcycle on pavement going 100 miles per hour.

Bill Ramsell: I had excruciating pain in my knees. And it was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all.

*Super: "Sold nationally \$150.00" with a red "X" through it.*

Dr. Gandee: The Stimulator may sound to good to be true, but it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people rather than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.

Voice-over: Order now and receive an instructional video, instruction booklet, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four easy payments of \$19.95. Call 1-800-982-2600. Or send check or money order for \$79.80, plus \$8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.

*Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*

*Super: Visual of ordering telephone number and address.*

Ruth Minard: I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and it did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache.

*[End of ordering spot.]*

Lee Meriwether: Welcome back. If you just joined us, we've been talking about this amazing little device. It's called the Stimulator. And I'm here with Dr. Steven Gandee who's been using the Stimulator to treat his own patients. Now Doctor, has anyone used the Stimulator and not experienced relief from their pain?

## Complaint

## EXHIBIT A

- Dr. Gandee: Nothing works 100% of the time on 100% of the people, unfortunately. But I'll tell you what. I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. Sinuses. The Stimulator works very well with sinuses. Allergies, the runny eyes, the runny nose. It really seems like it gives a lot of relief for that. Sore, stress areas, from the neck down into the shoulders, knees, elbows. All joint pains. It's amazing.
- James Larimore: I've been a teamster for almost 30 years. And I've been driving antiquated equipment for an awful long time. No power steering, no power brakes. Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. And when I go to bed, I hit the lower back and I sleep like a baby. It serves as a pain relief without [inaudible]. And to me that's a plus. If you're the type of person I am, if it works for you, you'll talk about it. I don't see how it works. I don't understand how it works. I don't care how it works -- as long as it works. And if I could have had one of these 20 years ago, I'd have been in a lot less pain for a long time.
- Lee Meriwether: I hadn't really no idea that electricity could be useful in pain prevention.
- Dr. Gandee: Well, it's true. Even the ancient Greeks. Picture this in your mind. The ancient Greeks realized that the body is an electrical system. You know what they did?
- Lee Meriwether: No.
- Dr. Gandee: They put a person in a tub of water and they put eels in the tub of water with them, so they could send electrical current and help the body. That's what they did.
- Glen Matz: I had gone through knee surgery and went through the therapy -- the physical therapy -- and they use elec-- I don't know what words I want to use. What is it, is it electrolysis? Or whatever. But they hooked the wires up to me and I got the same shocking effect. So I really couldn't scoff at the idea because if they use it, why couldn't I use it?
- Linda Anthony: He started telling me about this, you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. Within minutes, I'm back to working and doing whatever I was doing before. And I don't even realize it. All at once I have to say, "Oh my God, that pain is gone."
- Lee Meriwether: Listening to all these people and their incredible, incredible stories, it seems to be that one would be hard pressed to get the Stimulator away from them.

## Complaint

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## EXHIBIT A

Dr. Gandee: When I first started working with the Stimulator, what I actually did is I tried to buy the Stimulator back from a patient.

Lee Meriwether: Really?

Dr. Gandee: And they said, "Well, where I can get another one?" And I said, "Well, you can't. I have to have it back." And they said, "Well, you're not getting it back." Once you have this, and you can use it on yourself, you can take control of your own health to some degree. You can't get it back.

Lee Meriwether: Well, there's at least one man I know that will never give up his Stimulator and he's someone that needs no introduction. A death-defying daredevil who's put millions of us on the edge of our seats. Evel Knievel.

*Depiction: Evel Knievel jumping a motorcycle off a ramp.*

Evel, it scares me just watching you on tape in all your jumps. Now what has happened to your poor body?

*Depiction: Evel Knievel crashing, flying off a motorcycle.*

Evel Knievel: I've had fourteen major open reduction operations. That's where they open you up and put a plate in a bone and attach it to another bone so that you can heal. It's an inner cast.

Lee Meriwether: How many bones have you broken?

Evel Knievel: I've broken about 34 or 35. Everybody kids me about how I've broken every bone in my body, but I used to tell them that I've broken every one except my little finger. But the truth is I've only broken about 34 or 35. When you talk about an injury on the football field or when you talk about a person being hurt playing tennis, or baseball, or a rodeo rider falling off a horse into deep soft dirt or cow manure or whatever it is -- I'll tell you what pain really is. You get on the hood of a car and when your driver gets to 80 miles per hour, have him blow the horn, you bail off out here on the freeway, you're going to find out what pain is.

*Depiction: Evel Knievel crashing.*

Dr. Gandee: That's what you did.

Lee Meriwether: Oh, oh, oh.

Evel Knievel: And I have been there. When I wake up in the morning, my wrist tends to hurt me very badly. When I put it on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. I also use it on my knees. It does help me feel a lot better and I use it on my ankles. I've broken both of my ankles. It's such a simple thing to use. You don't have to rub it on you. If you have something bothering you and you're out playing golf or no matter what you're doing, if you got it in your pocket, you can pull it out and snap yourself with it three or four times. In fact, I like to use it on the guys when I hit a good shot on the golf course. I pull it out and go

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## Complaint

## EXHIBIT A

*Depiction: Evel Knievel using the Stimulator several times.*

and they say, "What's he got? What is that?" They know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. If you use this product, it will work for you. If you have nothing to lose by trying something and everything to gain if you're successful, then by all means, try it. I hope that people will try it and I hope that I will meet people years from now who say I saw you on TV and thank you for telling me about the Stimulator.

Lee Meriwether: Well, we thank you. Now coming up next, we'll visit with basketball great Bill Walton and more people just like you saying no to pain.

*[Break to ordering spot.]*

Kevin Culver: Well, being a police officer, I'm extremely skeptical. You can't just walk up to me and say, "Hey, this is going to work" without me having a little knowledge of it. It's gotta work. You've gotta show me it's going to work. And fortunately it did. It saved me a trip to the podiatrist, I know that. I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since.

*Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*

Voice-over: Write down this important number to take advantage of this revolutionary pain relief secret.

*Super: \*1-800-982-2600\**

Order the Stimulator now and receive free Dr. Gandee's instruction booklet and exciting video "Pain Free Today." They give every technique you need to start saying no to pain immediately with the Stimulator. Also receive absolutely free a plush carrying pouch and plus your free issue of Dr. Gandee's exciting newsletter, "Secrets of Health," packed with dynamic ideas and techniques to help you get healthy and stay that way. The Stimulator is sold nationally for over \$150.00. But everyone with pain should be able to afford relief. So for a limited time, we're offering the Stimulator to you for just four easy payments of \$19.95. Take advantage of this special offer and call now.

To order the Stimulator for just four easy payments of \$19.95, have your credit card ready and call 1-800-982-2600. That's 1-800-982-2600. Or send check or money order for \$79.80 plus \$8.50 shipping and handling to The Stimulator, Box 36700, Canton, Ohio 44735. This exclusive TV offer comes with a 30-day money back guarantee. So call 1-800-982-2600. Call now.

*Super: Visual of ordering telephone number and address.*

*[End of ordering spot.]*

## Complaint

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## EXHIBIT A

- Lee Meriwether: Hello again. During his basketball career, Bill Walton was a dominating center. He's one of the few players to ever win national championships both in college and the pros, and he's also a member of the pro basketball Hall of Fame. But in the world of sports, pain is common. And sometimes greatness comes at a great expense.
- Bill Walton: I was the type of player that by midway through my career, I realized that I was going to leave my game and my health on the basketball court. I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things that I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine.
- Lee Meriwether: Well, there's certainly no question about that. He's definitely a believer. And the Stimulator is making believers out of more people every day.
- Dr. Gandee: Because it's safe, effective, and it works.
- Lee Meriwether: I have to tell you something about the Stimulator that I really think is fantastic. Now I know that I have something that will help alleviate pain with the people that I love.
- Dr. Gandee: I know the feeling of helplessness because I have two children and many times they've awakened me in the middle of the night, crying with pain or hurting or sickness. Now I'm not saying that we should stay away from medical care, of course. But what I am saying is that this feeling of helplessness will no longer be there because you at least have an opportunity to try something yourself to help the family or friends or neighbors.
- Lee Meriwether: Dr. Gandee, I know we only have a few moments left, but is there anything that you'd like to say to our viewers?
- Dr. Gandee: No matter what we've done today, some people are still going to be skeptical. That's just the way human nature is. I can sit here and I can say, well, you should've watched Evel before he even came out here doing himself on his knuckles and his wrist. Remember? Or his knees. And we talked to Bill Walton. And Bill Walton was in pain. And because of [inaudible] surgery [inaudible] had done to his ankles, he couldn't even walk without limping. People can't see that though. All they can see is us up here talking. No matter how skeptical a person is, no matter what they think or what they feel, the only way they're truly going to find out if they can get help and if they can help their family or friends or loved ones to keep from suffering, no matter how much pain they're in, the only thing they can do is try it.
- Lee Meriwether: What we've seen here today is really nothing short of miraculous for those who have used this amazing little power house. People who have literally pushed pain away and started enjoying life once again. Now if you could experience results, powerful results, like you've seen here today, wouldn't it be worth almost anything? Do something now to say no to pain, for yourself or for someone you love.

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## Complaint

## EXHIBIT A

- Bill Walton: There is no way that I could talk about the positive benefits of this Stimulator if it didn't work for me. I'm into things that work. I'm into winning.
- Joe Anthony: It's a minimum investment with maximum results.
- Glen Matz: Try it and you'll find out. It's that simple. It does work. And if you don't believe me, do it yourself. Give it a try.
- Ruth Minard: Every home needs one.
- Unidentified Woman #7: Even that time of month when you get back cramps.
- Unidentified Man #1: I think everybody should have one.
- Evel Knievel: By all means, try it.
- Unidentified Man #2: It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly.
- Linda Anthony: No one could take it away from me.
- James Larimore: If I could have had one of these 20 years ago, I would've been in a lot less pain for a long time.
- Unidentified Man #3: It does work. There's no doubt in mind whatsoever.
- Unidentified Woman #7: It always -- every time I use it helps me. Every single time I've used it.
- Unidentified Woman #8: I've lived my whole life in pain and it's not worth it. If you have something that will help you, then I'd say go for it.
- Bill Walton: Thank God, thank God for the Stimulator.
- Dr. Gandee: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This is about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.

*Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.*

*Super: Visual of ordering telephone number and address.*

- Video offer: Order now and receive an instructional video, instruction book, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four

Complaint

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## EXHIBIT A

easy payments of \$19.95. Call 1-800-982-2600. Or send check or money order for \$79.80, plus \$8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.

Ruth Minard: I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either.

Pat Wayne: If anyone is skeptical of my activator -- I [inaudible] to say Stimulator, but it's my activator -- you can call me.

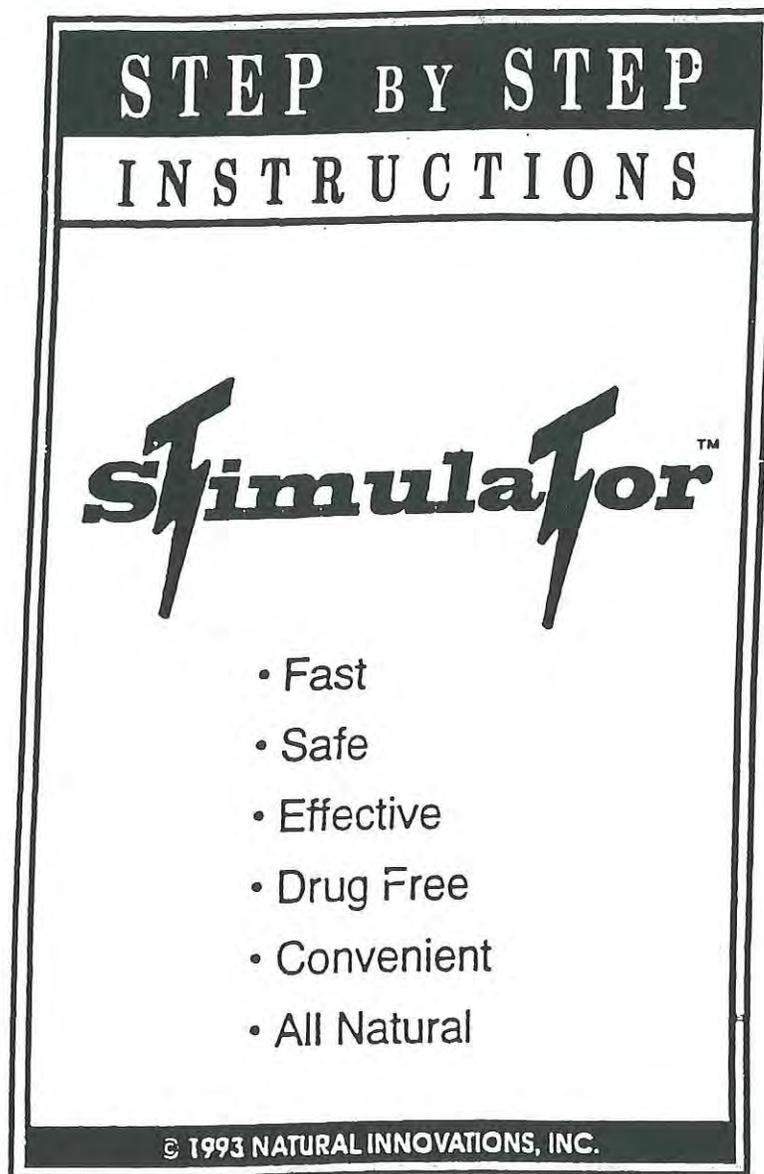
Voice-over: The preceding program was a paid presentation from Natural Innovations.

*Super: "The preceding program was a paid presentation from Natural Innovations, Inc."*

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Complaint

EXHIBIT B



The advertisement is enclosed in a double-line rectangular border. At the top, a black horizontal bar contains the words "STEP BY STEP" in white, bold, serif capital letters. Below this bar, the word "INSTRUCTIONS" is written in black, bold, serif capital letters. The central part of the advertisement features the brand name "Stimulafor" in a large, bold, black, stylized font with lightning bolt-like tails on the letters 'S' and 'r'. Below the brand name is a bulleted list of six features. At the bottom of the advertisement, a black horizontal bar contains the copyright notice "© 1993 NATURAL INNOVATIONS, INC." in white, bold, sans-serif capital letters.

**STEP BY STEP**  
**INSTRUCTIONS**

**Stimulafor™**

- Fast
- Safe
- Effective
- Drug Free
- Convenient
- All Natural

© 1993 NATURAL INNOVATIONS, INC.

EXHIBIT B

Complaint

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## EXHIBIT B

**WELCOME**

Congratulations on making a decision that will help you and your family or friends lead a more active, productive and pain-free life! And welcome to joining thousands of people just like you who have made a decision to take action and do something about the pain they are feeling.

Pain can be devastating. It can linger, get worse and control your life. Pain forces you to cut back activities, guard every move and constantly think about what you can do to get relief.

To help you break this vicious cycle of pain, we developed the STIMULATOR as a natural, safe and effective way to help you get relief from your pain, whether occasional, acute or chronic.

We believe the STIMULATOR is something people throughout the world need. We believe every household should have at least one. We believe the STIMULATOR will come to play a prominent role in helping you, as well as your family and friends maintain a more pain-free lifestyle and enjoy a higher quality of life.

The results brought about by the STIMULATOR are in harmony with nature, and with no side effects as with many medications, so you can use it often. Most people carry their STIMULATOR with them so they can use it immediately at the onset of any discomfort. We believe the STIMULATOR will become indispensable to you. As the beneficial results of the STIMULATOR become apparent to you, it will be worth many times the small investment you've made.

## EXHIBIT B

In most cases, The STIMULATOR provides almost instant relief from pain. In cases of chronic pain, it may require several treatments per day over a period of time to achieve results. It has been our experience that as your pain decreases, the frequency with which you use the STIMULATOR will decrease also, until it's only necessary to use it on an occasional basis.

Please remember that the STIMULATOR does not cure anything, it can only assist and work in harmony with nature. Nature herself is the real healer. The STIMULATOR method of controlling or eliminating pain is safe, simple and easy to use.

You cannot buy back health once it is gone, but you can, if you know how, help yourself while it is slipping. Your STIMULATOR will become one of your most treasured possessions.

***We at Natural Innovations, Inc. urge you to write and share your experiences with the STIMULATOR. We believe that special interest groups may attempt to stop us from making the STIMULATOR available to people like yourself. We believe that each of you has the right to buy a product that may help alleviate your pain particularly one that works in harmony with nature and your body. Your letter is of vital importance. So please take the time to let us hear from you, and tell us how the STIMULATOR has helped you.***

Address all correspondence to:

NATURAL INNOVATIONS, INC.  
CUSTOMER SERVICE CENTER  
2717 S. Arlington Rd., Suite E  
Akron, Ohio 44312

Complaint

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## EXHIBIT B

**Who Can Use The STIMULATOR?**

We at Natural Innovations have had numerous very beneficial personal experiences using the STIMULATOR on children as young as six years as well as seniors into their nineties. In fact, every nursing home should have several STIMULATORS. We all hurt at one time or another, and the STIMULATOR can provide relief for almost everyone.

We want you to be as active and healthy as you can be. But, we also want you to be smart about your health. The STIMULATOR is not intended as a substitute for medical care or as a replacement for medical treatment. We do not recommend that you discontinue any care or procedures prescribed by your Chiropractor or M.D.

**Painful conditions which the STIMULATOR may be helpful for:**

- |                                                         |                                                            |
|---------------------------------------------------------|------------------------------------------------------------|
| <input checked="" type="checkbox"/> Painful joints      | <input checked="" type="checkbox"/> Shoulder pain          |
| <input checked="" type="checkbox"/> Stiff joints        | <input checked="" type="checkbox"/> Back pain              |
| <input checked="" type="checkbox"/> Swollen joints      | <input checked="" type="checkbox"/> Menstrual cramps       |
| <input checked="" type="checkbox"/> Muscle spasms       | <input checked="" type="checkbox"/> Carpal tunnel syndrome |
| <input checked="" type="checkbox"/> Sciatica            | <input checked="" type="checkbox"/> Numbness and tingling  |
| <input checked="" type="checkbox"/> Frontal headaches   | <input checked="" type="checkbox"/> Allergies              |
| <input checked="" type="checkbox"/> Occipital headaches | <input checked="" type="checkbox"/> Neck pain              |
| <input checked="" type="checkbox"/> Migraine headaches  | <input checked="" type="checkbox"/> Muscle strain          |
| <input checked="" type="checkbox"/> Cluster headaches   | <input checked="" type="checkbox"/> Foot cramps            |
| <input checked="" type="checkbox"/> Stress headaches    | <input checked="" type="checkbox"/> Abdominal pain         |

## EXHIBIT B

**When To Use The STIMULATOR**

**"An ounce of prevention is worth a pound of cure."**

Well, the same rule applies to the care of your body! Always keep your STIMULATOR handy for immediate use at the first signs of a developing condition. Whenever and wherever you have aches and pains, think of using the STIMULATOR first to provide relief. At the onset of aches and pains the STIMULATOR is very effective; the important thing to remember is that in order to get maximum benefits from your STIMULATOR, you must always keep it in a convenient place; your pocket, purse, glove compartment, desk or next to your bed. Although the STIMULATOR may not work 100% of the time on 100% of your problems, we are confident that you'll find it extremely effective for the vast majority of your aches and pains as well as enabling you to provide relief for family and friends.

Your STIMULATOR can be your first line of defense against pain. Most people quickly find that they can't get along with just one STIMULATOR in the family and soon order more for family members

**When Not To Use The STIMULATOR**

While the STIMULATOR may be beneficial for temporary relief of minor aches and pains, Natural Innovations, Inc. makes no medical or health claims of any kind, nor is the STIMULATOR recommended as a substitute for medical care. If your problem persists, see your Chiropractor or M.D.

**The Stimulator is not recommended for:**

- Children under 6 years of age.
- Persons with a pacemaker or any type of electrical medical implants.
- Use over the abdominal area of a pregnant women.
- In the vicinity of malignant tumor.
- In the presence of pure oxygen or any flammable gas or liquid.
- Over any metal surgical implants.
- Directly on the eye.

## EXHIBIT B

**Tips for Getting the Most  
Out of Your STIMULATOR**

- Q. Do I have to use a lot of pressure when I am using my STIMULATOR?
- A. You don't need to use any pressure, just make contact with the skin and press the plunger.
- Q. Does the STIMULATOR have to be directly touching the skin or will it work through clothing?
- A. The STIMULATOR will work just as well through light clothing, although it may not penetrate several layers of clothing.
- Q. My STIMULATOR doesn't spark every single time I push the plunger - - is it broken?
- A. Occasionally after rapid, and repeated activations of your STIMULATOR, you may have to wait a few seconds until the internal mechanism has time to recharge. If this doesn't work, try turning the plunger slightly in one direction or the other. Your STIMULATOR should then continue to function properly.
- Q. If the fingers of the hand in which I am holding my STIMULATOR should happen to come in contact with the skin, will it still work?
- A. Yes, but the stimulation effect will be greatly reduced, maybe to the point of being ineffective. Always exercise care and deliberation when using the STIMULATOR. Do not allow the hand in which you are holding the STIMULATOR to touch the skin. This "short circuits" the STIMULATOR and directs the current to the wrong area. Always try to keep the STIMULATOR perpendicular to the body as in the photographs on the following pages.

## EXHIBIT B

**Tips for Getting the Most  
Out of Your STIMULATOR**

Q. I've been using my STIMULATOR for a while now, and I'm still getting good results, but it feels like the current is getting weaker ... Could it be?

A. The energy your STIMULATOR generates cannot diminish in strength. Your perception of the strength of this energy is diminishing because you have gotten used to the feeling.

Q. Can my STIMULATOR be used on acupuncture and acupressure points on my body?

A. Yes! Your STIMULATOR can be used to stimulate all the acupuncture and acupressure points throughout your body. In fact, many people refer to the STIMULATOR as acupuncture without needles. You can find very good books on acupuncture and acupressure at leading health food stores or the library.

Q. Is there any difference between using the STIMULATOR on myself as compared with using it with a partner?

A. Some people believe that the STIMULATOR is somewhat more effective when used with a partner because you can stimulate a larger area and the stimulation seems stronger. However, you can expect to receive excellent results when using the STIMULATOR alone. In fact, many people feel that the STIMULATOR works better when used alone because they are better able to pinpoint the area of pain. Of course, results vary from one person to another. So you must try different techniques to see what works best for you.

Q. Since there are no batteries in my STIMULATOR, how does it work?

A. There is a self-contained mechanism inside your STIMULATOR which has been designed using crystals to generate its own energy.

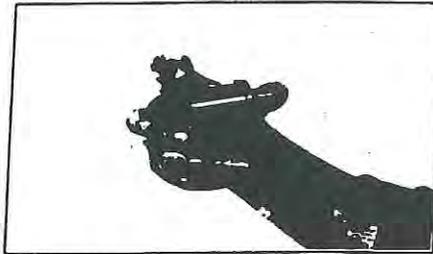
Complaint

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## EXHIBIT B

**How to Hold the STIMULATOR**

Grasp the STIMULATOR in one hand with your thumb on the plunger and your first and second finger on the metal grips as shown. Always remember that when using the STIMULATOR, don't allow any portion of the hand in which the STIMULATOR is being held to touch the skin of the person being treated. If the fingers, knuckles or wrist is touching the person, it will "short circuit" the STIMULATOR and direct the stimulation to the wrong area.



How to hold the STIMULATOR

**Using the STIMULATOR on Yourself**

The procedure for using STIMULATOR on yourself is very simple. Touch the tip of the STIMULATOR to the general area in which you feel pain. Activate the plunger 8 to 12 times as you move the STIMULATOR all around the area which is hurting. Remember, you don't need to use a lot of pressure. Just make contact with your skin. If you don't get the degree of relief needed, repeat the process. The STIMULATOR is all natural and you needn't worry about using it too often.

## EXHIBIT B

**Using the STIMULATOR with a Partner**

Some people believe the STIMULATOR is slightly more effective when using it with a partner. This is because when using the STIMULATOR on another person, you are able to take a finger on the hand which is not holding the STIMULATOR and place it on the person being treated to form a complete circuit. This will allow the current to travel from the point where the STIMULATOR is touching them to wherever your other finger is placed, thereby stimulating a much larger area. Each person reacts differently so use the STIMULATOR both ways and decide which is more effective for you.

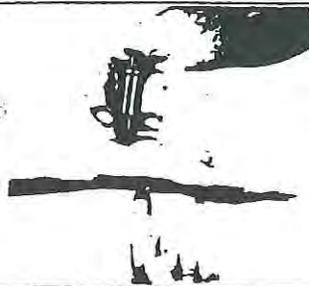
**The following series of photographs demonstrate how the STIMULATOR should be used with a partner for various painful conditions.**

**Abdominal Pain:**

Place the STIMULATOR on the abdominal area and your finger directly opposite the STIMULATOR on the back. Move the STIMULATOR around the vicinity of the pain as you activate it 8 to 12 times.

**Carpal Tunnel Syndrome:**

Stimulate the hand as shown in the photograph. Move the STIMULATOR and your finger slightly as you continue to activate the STIMULATOR to affect a larger area.



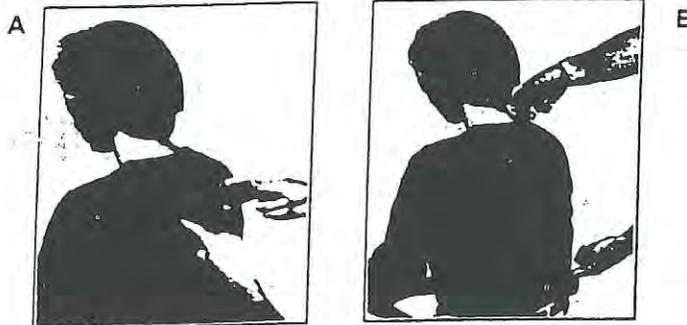
Complaint

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## EXHIBIT B

**Using the STIMULATOR with a Partner** *(continued)***For Back Pain:**

You can place the STIMULATOR on one side of the painful area and a finger on the opposite side, then activate the STIMULATOR 8 to 12 times, while moving both the STIMULATOR and the opposite finger in a circular motion around the painful area as in picture A. You can also help relax the entire spinal area by placing the STIMULATOR at the base of the neck and placing the finger of the opposite hand near the small of the back as in picture B, then activate the STIMULATOR 8 to 12 times. Repeat this process on both sides of the spine to stimulate and relax the spinal muscles.

**Sciatica Problems:**

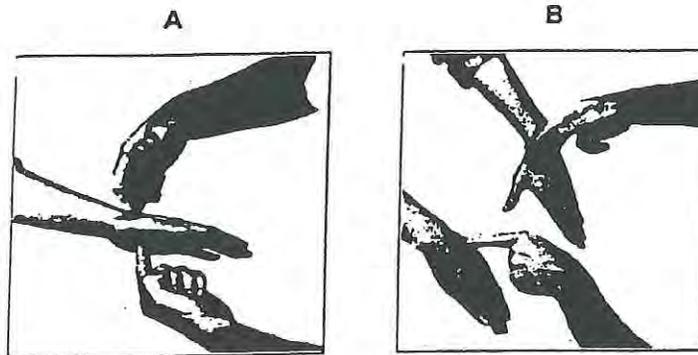
Place the STIMULATOR at the base of the spine as shown and a finger on the back of the achilles tendon, as shown, on the leg in which the problem occurs. Activate the STIMULATOR 8 to 12 times.



## EXHIBIT B

**Using the STIMULATOR with a Partner** *(continued)***Headaches and General Pain Relief:**

The webbing between the thumb and forefinger is one of the key areas to stimulate for all headaches as well as general pain relief. This area may be stimulated as in either photograph. Experiment and determine which technique brings the best results for you personally. When using method "A", you must naturally do it on each hand individually. When using method "B", activate the STIMULATOR 8 to 12 times as shown and then switch the STIMULATOR to the opposite hand for an additional 8 to 12 times to provide complete stimulation of this area.

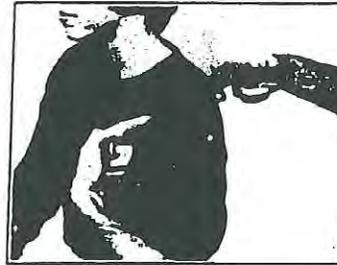


*Many people get excellent results using these techniques immediately after stimulating the general area of pain.*

## EXHIBIT B

**Using the STIMULATOR with a Partner** *(continued)***Painful, Stiff or Swollen Joints:**

When treating any joint problem, place the STIMULATOR on one side of the joint and a finger on the other side as shown. Activate the STIMULATOR 8 to 12 times as you move around the joint, always keeping the STIMULATOR opposite the other finger contact point as shown

**Joint Pain:**

For a painful condition in a joint, sometimes treatment is more effective if you stimulate the entire area to the next joint. The treatment shown could be used for painful elbow or wrist.

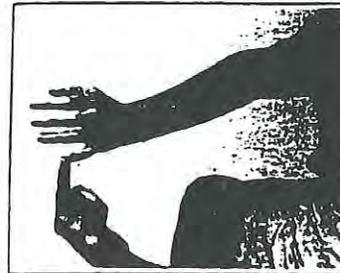
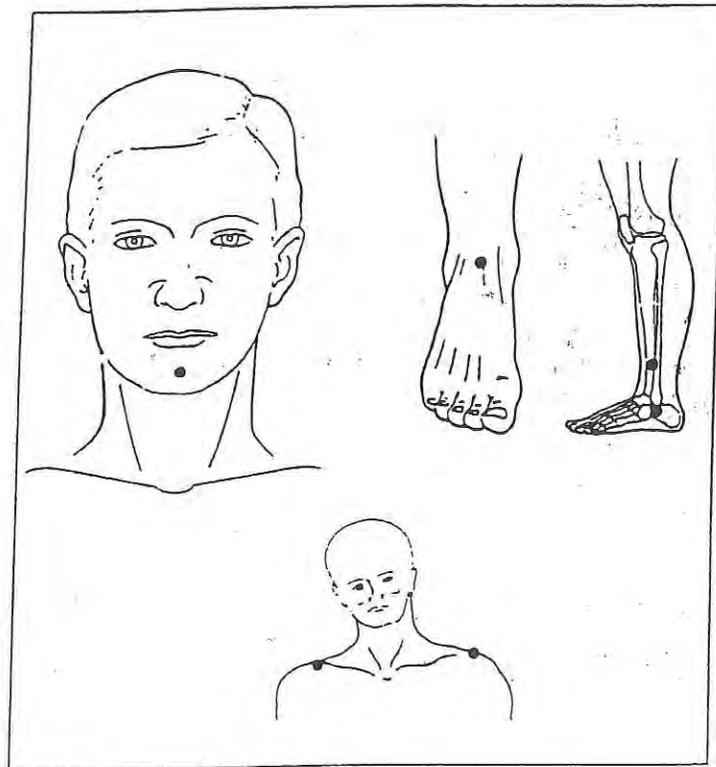


EXHIBIT B

The following pages contain a series of charts of acupuncture and acupressure points on the body which may be stimulated for specific problems in addition to stimulating the general area of pain.

Points of the Head and Face

• **MIGRAINE**



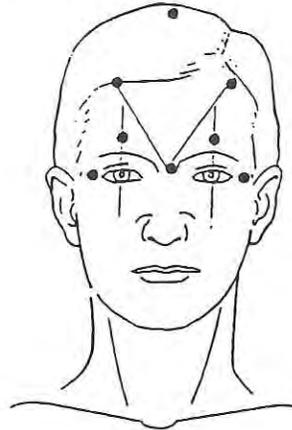
Complaint

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## EXHIBIT B

## Points of the Head and Face (continued)

- **HEADACHE**



- **STUFFY NOSE**
- **ALLERGIES**
- **SINUS**
- **SINUS HEADACHES**
- **HAY FEVER**

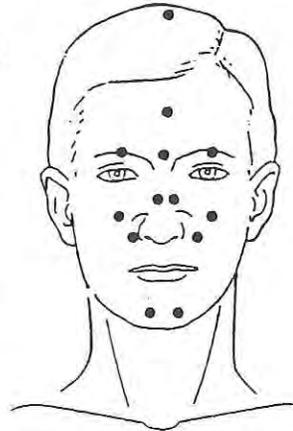
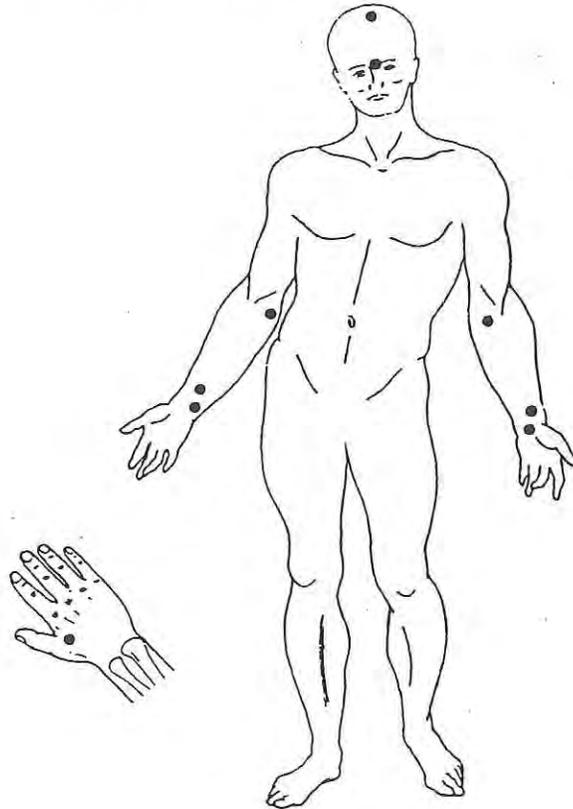


EXHIBIT B

• **STRESS, TENSION & ANXIETY**



If you have a problem which we have not addressed or wish more detailed information, a visit to your local health food store or library will yield a variety of reference books on acupuncture and acupressure.

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## EXHIBIT B

CLIP & MAIL

**GIVE TO A FRIEND**

Please send me \_\_\_\_\_ STIMULATORS.  
I enclose \$79.80  Check  Money Order  
Plus \$8.50 shipping and handling for each STIMULATOR

OR ... Bill My Credit Card

VISA  MasterCard  American Express  Discover  
Card # \_\_\_\_\_ Expires: \_\_\_\_\_

Signature \_\_\_\_\_

Bill my credit card in 4 equal installments of \$19.95 each, for each STIMULATOR ordered. (Shipping and Handling will be billed in the first installment)

Bill by credit card in just one installment of \$79.80 plus \$8.50 Shipping and Handling.

CHECK HERE FOR RUSH DELIVERY. For only \$10.00 you can receive your STIMULATOR within 7 days of receipt of your order. Simply add \$10.00 to your check amount for each STIMULATOR ordered, or we will bill your credit card.

**FOR FAST SERVICE ...**  
CREDIT CARD ORDERS MAY CALL  
(MON. - SAT. 9AM - 6PM EASTERN STANDARD TIME)  
**1-800-728-0815**

SHIP TO :

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY/STATE/ZIP \_\_\_\_\_

Allow 3-4 weeks for normal delivery. Enclose this order form in an envelope and MAIL TO:

NATURAL INNOVATIONS, INC.  
Box 36700  
DEPT. R  
Canton, Ohio 44735

Please complete for our survey:  
Age \_\_\_\_\_  
Is STIMULATOR for:  
 YOURSELF  
 GIFT

CLIP & MAIL

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**60 Day Money Back  
Guarantee**

At any time within the first 60 days after receiving your STIMULATOR you may return it for a full no questions asked refund, (*less shipping & handling of course*).

For Refund, complete this form in its entirety and send it along with ALL MATERIALS RECEIVED WITH THE STIMULATOR to:

**NATURAL INNOVATIONS, INC.**  
RETURNS DEPT.  
2717 South Arlington Rd., Suite E  
Akron, Ohio 44312

Date \_\_\_\_\_

Purchasers Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_

Method of Payment

- Credit Card     Check     Money Order
- Cash             Other

# of STIMULATORS Purchased \_\_\_\_\_

# of STIMULATORS Being returned for refund \_\_\_\_\_

Reason: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Signed \_\_\_\_\_



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## EXHIBIT B

**WARRANTY**

If at any time during the first 12 months after receiving your STIMULATOR it fails to function for any reason, Natural Innovations will replace it free of charge with only a small processing, shipping and handling fee of \$8.50.

**For replacement; send your STIMULATOR and a brief explanation to:**

**NATURAL INNOVATIONS, INC.**  
CUSTOMER SERVICE  
2717 South Arlington Rd., Suite E  
Akron, Ohio 44312

**FOR CUSTOMER SERVICE CALL:**  
1-800-728-0815 TOLL FREE  
Mon. - Sat. 9:00 a.m. - 6:00 p.m. Eastern Standard Time

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## EXHIBIT C

**Transcript of Stimulator Instructional Video  
"Pain Free Today"**

*Super : "Pain Free Today -- Using the Stimulator with Dr. William S. Gandee, D. C."*

Dr. Gandee:

Hi, I'm Dr. Gandee, a chiropractor. Today, I'm going to show you how to use the Stimulator. For you to be watching me means that you purchased the Stimulator and I want to congratulate you on making probably the purchase of your life because the Stimulator really helps many problems. Many people in pain with different symptoms have really discussed how well the Stimulator works with them. Today I'm going to show you how to use the Stimulator.

Who needs the Stimulator? Basically, anyone can use the Stimulator because it's safe and effective. My grandmother is 96 years old and she uses the Stimulator every day. She's got leg cramps and feet problems and she uses it just to help her get through the day. Also, I have an eight-year-old son that I use the Stimulator on myself at home for certain problems and a five-year-old daughter that I've used the Stimulator on also for certain problems. So there is no age limit to the Stimulator. Many times a person will come into my office and they'll say, "Dr. Gandee, I'm getting old," trying to relate their age with their health and pain problems. And my belief is that we're getting older not old. Just because we're aging does not mean we have to hurt. And today we're going to show you how you can get relief.

Now, who should stay away from using the Stimulator or under what circumstances should you maybe not use the Stimulator? I don't think you should use the Stimulator over a pacemaker because it's an electrical apparatus and the Stimulator shoots out an electrical spark. I think you should stay away from the abdomen of a pregnant woman. I think also if you're on oxygen you should unplug or turn the oxygen off before using the Stimulator. Don't use the Stimulator over a flammable liquid because again of the spark that it transmits. So there are certain things that you should stay away from using the Stimulator for, yet the Stimulator has proven very effective and safe for everyone.

When should you use the Stimulator? Basically when you feel the coming of pain or tension or excitability, any time you just don't feel right, you can use the Stimulator. Often times it's good to get a problem before it actually gets going or started. But there is no best time to use the Stimulator. You can use it whenever you want to. That's what so great about it.

Where can you use the Stimulator? Personally, I've used the Stimulator while in the theater. I've used it in a restaurant while dining. There is such a good marketability with the Stimulator that you can use it anywhere you want to and no one is going to look at you and [wonder] why you're using it or what it is because the Stimulator is very effective wherever you are at the time.

Is the Stimulator 100% effective on everything? No. What is? Nothing that I'm aware of is effective all the time. Yet I'm sure that as you use the Stimulator and as I show you today how to use the Stimulator more effectively, you're going to find that

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you're going to be able to get relief most of the time. And if you've bought the Stimulator for one specific need, and you don't get 100% use of the Stimulator, I know that for something else down the road, you're going to find the Stimulator good for that, or you're going to have a relative that can use the Stimulator or a friend or a neighbor. You're going to see that pretty soon this is going to be your best friend. You're going to carry it with you all the time and often times people will say or call you "Doc." They'll say, "Hey Doc, come here and use that Stimulator thing, that little popper thing, on my shoulder. Come on over here, Doc, and use it on me." And you're going to be very happy with this purchase.

What we're going to do right now is I'm going to show you how to effectively use the Stimulator on yourself and also on someone else.

Linda Anthony: The relief it gives me is worth more than any amount of money that somebody can give me for that.

Unidentified Woman: It always -- every time I use it, it helps me. Every single time I've used it.

Dr. Gandee: I'd like to share a story with you, a personal story, about the Stimulator and myself. Chiropractic is a very physical job. I use my hands continually all day long, and I see patients from eight in the morning until seven o'clock at night. So you can see that I'm constantly in motion and my hands receive a lot of physical abuse to the point I actually thought I was going to have to give up chiropractic because of severe pain I was having in the knuckle. A hundred percent of the time my knuckle hurt, all the time. And especially as the day progressed I had more and more pain. I started using the Stimulator on myself, as you can do with yourself. At first I really didn't see improvement. It felt a little bit better for a short period of time but then it would go back to what it was before. It took about a week until one day just out of the blue I noticed I had no more pain. It was like a gradual process. Now what I do is every once in a while, maybe every two weeks or three weeks, I need to use the Stimulator on myself about eight or ten repetitions just to keep the pain down.

*Depiction: Dr. Gandee using the Stimulator on his forefinger.*

This is what we're talking to you about. We're not saying that the Stimulator is going to completely eradicate all your aches and pains. Nothing does that. Yet what the Stimulator can do, and has done for me, is to help you to be able to live with what aches and pains that you have. It gives you a tremendous amount of relief. To the point for myself I no longer worry about if I can continue on in chiropractic because of this pain. I now can do anything I like to do.

With yourself, when you use the Stimulator on yourself, I want you to keep in mind that often times you'll see instantaneous relief. And that sometimes you need to use the Stimulator repetitiously over a period of time. For instance, let's say your shoulder started bothering you. Here's what you do. All you do is right around the area of pain you apply the Stimulator. Will it go through this sweater and shirt? Yes, it will. It will go right through it. You can feel it just as if it was on skin. So you don't have to take your clothes off or worry about that. You just apply the Stimulator right where the pain is and you just press the little knob and it shoots the spark of energy right into the shoulder area. And you just go right around that area about eight, ten, twelve times.

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*Depiction: Dr. Gandee using the Stimulator on his shoulder.*

And then you just leave it alone. Go about your business. You see how you feel. Five or ten minutes later, you want to do it again, go ahead and do it again. It won't hurt you. Go ahead. Again, you just apply it to the area of pain. You do it about eight or ten times.

*Depiction: Dr. Gandee using the Stimulator on his shoulder.*

And you see how you feel. It's so simple.

Now what happens if the pain doesn't go away? It means you have a little bit more of a problem. Is that unusual? No, that's the way life works, isn't it? So, for instance, let's take, for instance, an overweight person who goes on a diet. Are they going to be skinny tomorrow? Well, no, but over a period of time they're going to see changes, just like with the Stimulator. Just like with exercising. You can start exercising today, but will you be in shape tomorrow? No, but the more you use it, often times the better condition, the better shape you're going to be. So what happens with this shoulder? Sometimes with my patients, I'll say to them, "You need to use the Stimulator over a period of days. We're starting with Monday, say. Use the Stimulator every two or three hours, about eight or ten repetitions, maybe for five or six days in a row or whatever it takes for you to start seeing relief. You can't use the Stimulator too much." So that's how we work it. So on my fingers, I just did it right on the area of joint. I did it on top, on the sides, and on the bottom. That's all I did it about eight or ten times.

*Depiction: Dr. Gandee using the Stimulator on his hand.*

Whenever I thought about it again, I did it again. I only did about two or three times a day for three or four days and I started seeing changes. I was very happy with it, as you can imagine. So there is no limit to how often or what you need to do. You need to use the Stimulator on yourself because everyone's body is different. So let's say you have other symptoms going into your hand, maybe some tingling, use the Stimulator around your wrist. Very simple.

*Depiction: Dr. Gandee using the Stimulator on his wrist.*

Just go right around the areas of pain. This takes seconds. You can do it anywhere you want to do. It's very effective. It's very effective used correctly.

Glen Matz:

You can go to the counter and buy anything you want for pains and that. But some of us can't just take aspirin or some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomachs. This, I can relieve the pain and I don't have to swallow anything. I don't have to worry about it upsetting my stomach or ruining my dinner or whatever, because it's outside my body, I apply it when I want it and it works.

Dr. Gandee:

Craig has been nice enough to help me on this next segment because I have found that when you have another person help you use the Stimulator, sometimes it is even more effective. Sometimes it's even a stronger stimulation. So today, right now, I'm going to show you how to use the Stimulator with a partner.

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There are over 20 million confirmed headache sufferers just in the United States alone. So I'm going to start off showing how to use the Stimulator if you have a headache. If you have a headache or sinuses or allergies, we basically use the Stimulator in the same way. So what I usually do with the Stimulator is, let's say he has a frontal headache, and it hurts right across his temple, across his forehead, and even into the sinus areas. That's what we're going to show you. If you have an occipital headache or it hurts in the back of the head on the base of the neck line, I'll show that in a minute how to do it. So what I usually do is I put the Stimulator on the forehead and just press the Stimulator.

*Depiction: Dr. Gandee using the Stimulator on the subject's forehead, temple, and cheek.*

And you can hear the sound and then I go down right above on either side of the eye. There's a little knot right there you can feel with your finger, and then I go down to the temple area on both sides, right in the cheekbone to the chin and back up. How did that feel?

Subject: Fine.

Dr. Gandee: Did that hurt at all?

Subject: No.

Dr. Gandee: Most people when they use the Stimulator don't feel any pain. I've had people tell me that what it feels like is if you take a little rubber band and you let go of it. That's what the Stimulator feels like to some people. Now I have to say that some people don't like the feel of the Stimulator, but there are ways I'm going to show you how you can lessen the effects of that so everyone can use the Stimulator.

*(To subject)* Now, why don't you turn your head to your left. Now I'm going to show if you have an occipital headache. What I do is I put the Stimulator right back on the base line of the head, the back of the head and the neck muscles. With my finger, I put it on the exact opposite side and just press the Stimulator about eight or ten times.

*Depiction: Dr. Gandee using the Stimulator on the right side of the back of the subject's head while placing his forefinger on the other side of the subject's head.*

That's all that it takes. Now, what do you do then? You wait. Very simple. You wait to see how you start feeling. Give yourself five or ten minutes. See how much pain has lessened. How much relief you've gotten. If you want to then, you can do it again. If you haven't gotten much relief or you want more relief, do it again. You can do this often without any side effects. Let's say that you don't get results the first time. Does that mean that it doesn't work? No. That mean you want to send it back? No. What does it mean? It means that what you want to do is you want to use it more repetitiously over a period of time. Now, also with headaches what I always do is I always stimulate the web of the fingers between the thumb and the first finger on both hands. And what I do, as you can see, I start putting my one finger -- this completes the circuit. You can feel the Stimulator go from the contact point right

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through because this helps buffer the area of stimulation -- about eight or ten times again.

*Depiction: Dr. Gandee using the Stimulator on the back of the subject's hand while placing his forefinger on the subject's palm.*

Just like that. You feel how that goes through right there? This is for headaches. This is for sinuses or allergies. After I do that hand, I do this hand the same way. I put the Stimulator right between the thumb and the forefinger and my finger on the other side.

*Depiction: Dr. Gandee using the Stimulator on the back of the subject's hand while placing the tip of his forefinger on the subject's palm.*

Now, do you see how only the tip of my finger is touching and only the tip of the Stimulator is touching? See how that? I'm not touching like this and my hand is not laying all over it because if you do that, then you're reducing the effects of the stimulation. So, watch how this. Can you feel that?

Subject: It's less.

Dr. Gandee: Quite a bit less, isn't it? Now, with one finger, see how much stronger it is.

*Depiction: Dr. Gandee using the Stimulator on the subject's hand while placing the tip of his forefinger on the subject's palm.*

That's the way the Stimulator works. So when you're working on someone else, you want to be careful how you're actually doing this. You don't want to put and just lay all over the person that you're stimulating.

Now what I'm going to do is I'm going to show how to use the Stimulator on lower back pain or pain down the leg. *(To subject)* So I'm going to have Mark, if you would stand up with your back to the camera. Okay, good. Now with the Stimulator, the application will be right in this area because this is where usually the area is involved when it goes down the leg.

*Depiction: Dr. Gandee pointing to the subject's lower back.*

So I'm going to get down like this because it's a little bit easier for me to work this way and show you. So what I would do is I would put the Stimulator on this area. With my other hand, I would put it on his leg just like this.

*Depiction: Dr. Gandee using the Stimulator on the subject's lower back while placing his forefinger on the subject's calf.*

And again, just press the applicator eight or ten or twelve times. Now if I want to get a little fancy here, I can come up his leg while I'm doing it, following the course of the pain. Can you feel that?

Subject: Yes.

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Dr. Gandee: You can feel that all the way up and down. If it's the other leg, we can do the same thing, just with the other leg, just like this.

*Depiction: Dr. Gandee using the Stimulator on the same area while placing his left forefinger on the subject's right leg.*

You can feel the Stimulator working up and down the leg. It's very, very simple how to do this. *(To subject)* Now if you would, I'd like for you just to have a seat again please. There are many, many people that have feet problems. The Stimulator works very well with feet problems. And if you would, think of the feet and the hands equally because we have the digits. So as I'm talking about the feet, it works very similarly with the hands. Now if a person has a foot problem, what I would do is I would come down and I would stimulate each one of the toes with the Stimulator and with my other hand I would put it on the ankle because this is a joint and this is a joint. I would go to the next joint up. So I would-- here, can you feel that here with my other finger?

*Depiction: Dr. Gandee using the Stimulator on the subject's foot and ankle.*

Subject: [Inaudible]

Dr. Gandee: You can feel it. Now you just go around just like this and stimulate it. You're right at the foot and the ankle on either side. Very simple. Many people have feet problems. That's why there are specific doctors for feet problems. My grandmother is 96 years old and she uses the Stimulator on her feet and on her calves nightly because of the problems that she has with circulation. And you can see with cramping, I'm just putting the Stimulator right on the areas where the cramp would be and getting the general area.

*Depiction: Dr. Gandee using the Stimulator on the subject's calf and leg while placing his left forefinger on the opposite side of the subject's leg.*

And then what happens is the body handles it from there. It's very simple on how to use the Stimulator. How does that feel?

Subject: Fine.

Dr. Gandee: It felt pretty good, didn't it? It's very simple.

Bill Ramsell: Pain pills is what I've been taking for all these years and that's the only thing that's given me relief, you know. But it didn't give me total relief. Now that's why I tried the Stimulator. Well, it's amazing. It's almost hard to believe that it would do that, but it do it. It did the trick.

Dr. Gandee: Many people have abdominal problems, pain and aches. *(To subject)* Craig, why don't you stand up please, and we'll show how to use the Stimulator on that. Most of the time when a person has abdominal problems they've already been to the doctor because sometimes it can be very serious. Other times we don't know what the cause really is. But with the Stimulator, we can help give you a lot of relief. Now, where would you apply the Stimulator? Wherever you hurt -- the area of pain. So let's just say the pain is right here. I'd put the Stimulator right on the shirt, right on the area.

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It goes right through the skin. With my other hand, I would put it on the middle part of his back so it creates a circuit.

*Depiction: Dr. Gandee using the Stimulator on the subject's abdomen while placing his forefinger on the subject's back.*

Then I would just stimulate the body about eight or ten repetitions. How does that feel?

Subject: Fine.

Dr. Gandee: Then again what you do is you just see the kind of results you get. You might want to do it again in a few minutes, or maybe in an hour, or maybe it will go away totally.

Now, stress and tension. People have talked often about how this is very relaxing for them, using the Stimulator on the shoulders from the neck down through gives them a lot of relief and it takes away a lot of tension. And you know tension and stress sometimes comes and causes headaches. So what you would do is you just put the Stimulator on the shoulder and your other finger on the neck and you just zap it right on the trapezius muscle and you can feel it going up and down. Or you can do it the opposite way with the Stimulator on the neck and your finger on the muscle.

*Depiction: Dr. Gandee using the Stimulator on the subject's shoulder and neck while placing his forefinger on other parts of the subject's neck and shoulder.*

And this is a very soothing, relaxing effect on the body. Pretty good?

Subject: Um-hmm. It's great.

Dr. Gandee: I appreciate you helping me with that.

James Larimore: One fellow in particular I worked on or zapped him [inaudible], he said, "Try that on me." So I did. And he had stiffness in his shoulder, like the previous interviewee. And he went to a ball game that night and all he did was talk about the Stimulator. He didn't even pay any attention to the ball game. He felt better than he had in years. So the next time I came back to this particular customer, he said, "You got that thing with you?" I said, "Yeah, but I going to charge you to use it." So he bought me a coffee. It worked for him again. So he said, "Where'd you buy it?" and I told him. I said, "If you go down there and purchase one, tell them who sent you." So that's the way it works. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. And when I go to bed, I hit the lower back and I sleep like a baby.

Dr. Gandee: As I work with the Stimulator, it is very obvious to me that soon this product will be worldwide. I believe that every household in America very soon will own a Stimulator. It might even go to the point where each individual person in the household will own a Stimulator because they'll want to keep it with them all the time. I also sincerely believe that the Stimulator will help you lead a more active, productive, and pain-free life. And as you share the Stimulator with your family and friends, which I hope you do and soon, I know that your family and friends are going

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to be calling you "Doc" or they're going to be asking for you to use the Stimulator on them. I would like for you to share with me your testimonials of how the experience of using the Stimulator has helped you. I would like to know the kind of results that you've seen with the Stimulator. If you have any questions at all about how to use the Stimulator or different applications on using the Stimulator or different problems on using the Stimulator, don't hesitate to call me or don't hesitate to write to me. I would like and love to hear from you. In closing, I want to thank you for buying the Stimulator. I want to thank you for using the Stimulator and for sharing the Stimulator and I hope you have a wonderful, pain-free life.

Bill Walton:

Basketball is an incredibly physical game. You're smashing into people. You're falling on the ground. You're running on a hard wood surface. Everyone else is as big and as strong and has spent as much time in the weight room as you have. The collisions - I broke my nose thirteen times, eleven of them from people's elbows, two of them from people's knees. And they even called a foul on me one of those times. Can you believe that? I had my front teeth knocked out ten separate times. Broken both hands, both wrists. It is a very physical and very rough game. That's the way we like it. Until you get old like me and that pain just doesn't go away. Thank God, thank God for the Stimulator.

*Super: "Please address your letters to:*

*Natural Innovations, Inc.  
P.O. Box 36700  
Canton, OH 44735*

*Or call 1-800-728-0815"*

## DECISION AND ORDER

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

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

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

1. Respondent Natural Innovations, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business at 2717 South Arlington Road, Akron, Ohio.

Respondent William S. Gandee is an officer, director, and sole shareholder of Natural Innovations, Inc. He formulates, directs, and controls the policies, acts and practices of said corporation, and his office and principal place of business is located at the above stated address.

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

## ORDER

## I.

*It is ordered*, That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution for sale of any device, as "device" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That use of the device will significantly reduce, relieve, or eliminate musculoskeletal pain, including but not limited to pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, or calves; carpal tunnel syndrome; muscle spasms or strains; or sciatica;

B. That use of the device will significantly reduce, relieve, or eliminate abdominal pain or pain or discomfort caused by allergies, sinus conditions, diverticulosis, cramps, or menstrual cramps;

C. That use of the device will eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, or stress headaches, or headaches caused by benign tumors;

D. That the pain relief or pain elimination provided by the device is immediate;

E. That use of the device provides long-term pain relief;

F. That, for the treatment of pain, the device is as effective as, or more effective than, prescription or over-the-counter medications, including but not limited to aspirin, acetaminophen, Darvon, Darvocet, or codeine;

G. That, for the treatment of pain, the device is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, or reflexology; or

H. About the efficacy or relative efficacy of the product in reducing, relieving, or eliminating pain from any source;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean adequate and well-controlled clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

Provided that, for any representation that any device is effective for:

- (1) The temporary relief of minor aches and pains due to fatigue and overexertion, or
- (2) Easing and relaxing of tired muscles, or
- (3) The temporary increase of local blood circulation in the area where applied,

"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.

## II.

*It is further ordered,* That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution for sale of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an

objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### III.

*It is further ordered*, That respondents, Natural Innovations, Inc., its successors and assigns, and its officers; and William S. Gandee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation, or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(1) What the generally expected results would be for users of such product, or

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

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

### IV.

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

drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

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

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis for such representation, including but not limited to complaints from consumers and complaints or inquiries from governmental organizations.

VI.

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

VII.

*It is further ordered,* That respondent Natural Innovations, Inc. shall:

A. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

B. For a period of five (5) 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 it or any subsidiary, successor, or assign, within ten (10) days after the person assumes his or her position.

### VIII.

*It is furthered ordered,* That respondent William S. Gandee shall, for a period of seven (7) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business and his duties and responsibilities.

### IX.

*It is further ordered,* That this order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

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

IN THE MATTER OF  
COMTRAD INDUSTRIES, INC.

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

*Docket C-3719. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997*

This consent order prohibits, among other things, the Virginia-based company from misrepresenting the ability of food storage product to cool food items or maintain proper cold storage temperatures and to hold its cooling capacity after being unplugged, or misrepresenting the effect of operating such a product off a car battery when the car is not running, and requires the respondent to substantiate any claims regarding the safety or efficacy of food storage products.

*Appearances*

For the Commission: *John T. Dugan.*

For the respondent: *James E. Moore, Christian, Barton, Epps, Brent & Chappell, Richmond, VA.*

COMPLAINT

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

1. Respondent Comtrad Industries, Inc. is a Virginia corporation with its principal office or place of business at 2820 Waterford Lake Drive, Suite 106, Midlothian, Virginia.

2. Respondent has advertised, offered for sale, sold, and distributed products to the public through print advertisements and through the Internet's World Wide Web, including the Koolatron, a portable electronic food cooler and warmer also known as a thermo-electric cooler.

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

4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for the Koolatron, including but not necessarily limited to the attached Exhibits A and

B. These advertisements and promotional materials contain the following statements:

A. "500 miles from nowhere, it'll give you a cold drink or a warm burger . . . NASA space flights inspired this portable fridge that outperforms conventional fridges, replaces the ice chest and alternates as a food warmer.

Recognize the ice cooler in this picture? Surprisingly enough, there isn't one. What you see is a Koolatron, an invention that replaces the traditional ice cooler, and its many limitations, with a technology even more sophisticated than your home fridge. And far better suited to travel.

What's more, the innocent looking box before you is not only a refrigerator, it's also a food warmer.

NASA inspired portable refrigerator. Because of space travel demands, scientists had to find something more dependable and less bulky than traditional refrigeration coils and compressors. Their research led them to discover a miraculous solid-state component called the thermoelectric module."

"From satellites to station wagons. [T]hermoelectric temperature control has now been proven with more than 25 years of use in some of the most rigorous space and laboratory applications. And Koolatron is the first manufacturer to make this technology available to families, fishermen, boaters, campers and hunters -- in fact, anyone on the move.

Home refrigeration has come a long way since the days of the ice box and the block of ice. But when we travel, we go back to the sloppy ice cooler with its soggy and sometimes spoiled food. No more! Now . . . all the advantages of home cooling are available for you electronically and conveniently.

Think about your last trip. You just got away nicely on your long-awaited vacation. You're cruising comfortably in your car along a busy interstate with only a few rest stops or restaurants. You guessed it . . . the kids want to stop for a snack. But your Koolatron is stocked with fruit, sandwiches, cold drinks, fried chicken . . . fresh and cold."

.....  
"Hot or cold. With the switch of a plug, the Koolatron becomes a food warmer for a casserole, burger or baby's bottle. It can go up to 125 degrees."

.....  
"Just load it up and plug it in. On motor trips, plug your Koolatron into your cigarette lighter; it will use less power than a taillight. If you decide to carry it to a picnic place or a fishing hole, the Koolatron will hold its cooling capacity for 24 hours. If you leave it plugged into your battery with the engine off, it consumes only three amps of power."

.....  
(Exhibit A).

B. "Technology combines the dependable cooling power of a refrigerator with the convenience of a cooler . . . heats food too!

Remarkable new portable cooler/warmer reduces the outside temperature by up to 40 degrees and heat[s] up to 125 degrees!"

.....  
Imagine the versatility and convenience of a cooler that worked like a refrigerator. You could have ice-cold drinks at softball games, enjoy a picnic without soggy or spoiled food, even store insulin or other medicine that needs to be refrigerated. You

could take it along when traveling and avoid the long lines and high prices of rest areas and interstate restaurants.

Now, imagine that this cooler that worked like a refrigerator could also heat food. You could warm baby formula or enjoy warm drinks at football games, camping, hunting or anywhere else. Sound like a dream? It's not -- the Koolatron cooler/warmer does it all."

"Hot or cold. One of the most innovative things about Koolatron is that it works as well to heat food as to cool it. In the cool mode, Koolatron can reduce the outside temperature by as much as 40 degrees F. With the switch of a plug, Koolatron goes from a refrigerator to a food warmer, going up to 125 degrees.

Just plug it in. Koolatron plugs directly into your vehicle's cigarette lighter and uses less power than a taillight. If you leave it plugged in while the vehicle is off, it will consume only three amps of power. Unplugged, Koolatron will hold its cooling capacity for up to 24 hours."

"Modern solution. Home refrigeration has come a long way from the "ice box" of the 1920s. But when we travel, we revert to similar methods and sloppy or spoiled food. Now, . . . the advantages of home refrigeration are available to you electronically."

....

(Exhibit B).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. The Koolatron is as effective at cooling food items and medicines as a home refrigerator.

B. The Koolatron will effectively cool down warm items and heat up cold items.

C. Once unplugged from a power source, the Koolatron will hold its cooling capacity for 24 hours.

D. Operating the Koolatron off a car battery when the car is not running will result in only a minimal power drain off the car's battery.

6. In truth and in fact:

A. The Koolatron is not as effective at cooling food items and medicines as a home refrigerator. Among other reasons, the Koolatron's internal cold storage temperature is highly dependent on outside air or room temperatures, and in many circumstances it will not maintain internal cold storage temperatures comparable to a home refrigerator.

B. The Koolatron will not effectively cool down warm items or heat up cold items. The Koolatron is primarily designed to maintain the cool or warm temperatures of items that were already cool or warm before being placed in the Koolatron. It may take up to twelve

hours or more for the Koolatron to cool down a warm item or heat up a cold item.

C. In most instances, once unplugged from a power source, the Koolatron will not hold its cooling capacity for 24 hours.

D. Operating the Koolatron off a car battery when the car is not running does not result in a minimal power drain off the car's battery. Use of the Koolatron in this manner may drain the car battery of all power in as little as three hours.

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

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

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. In its advertising and sale of the Koolatron, respondent has represented that the Koolatron is effective, useful, or appropriate for refrigerating or cooling food items, or for holding food items at a cool temperature, including in a wide variety of outdoor settings. Respondent has failed to disclose that the Koolatron may not keep perishable food items, such as meat, poultry, and fish, sufficiently cold to prevent the growth of bacteria when the surrounding outside temperature is greater than 80 degrees Fahrenheit, including when the Koolatron is used in hot weather, in direct sunlight, or in a hot car. Use of the Koolatron in such circumstances poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

10. In its advertising and sale of the Koolatron, respondent has represented that the Koolatron is effective, useful, or appropriate for heating or warming food items, or for holding food items at a warm temperature. Respondent has failed to disclose that, because the Koolatron's maximum internal heating temperature of 125 degrees Fahrenheit is not high enough to kill or prevent the growth of certain bacteria in perishable food items such as meat, poultry, and fish,

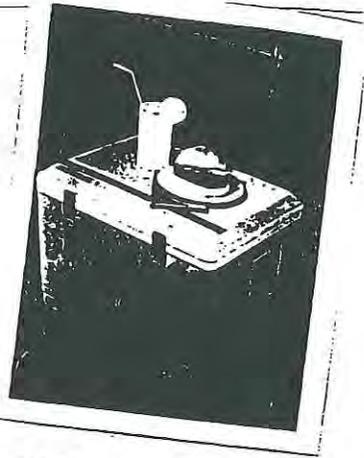
holding perishable food in the Koolatron in its warming mode poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness. These facts would be material to consumers in their purchase or use of the product. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

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

EXHIBIT A

# 500 miles from nowhere, it'll give you a cold drink or a warm burger...

NASA space flights inspired this portable fridge that outperforms conventional fridges, replaces the ice chest and alternates as a food warmer.



**R**ecognize the ice cooler in this picture? Surprisingly enough, there isn't one. What you see instead is a Koolatron, an invention that replaces the traditional ice cooler, and its many limitations, with a technology even more sophisticated than your home fridge. And far better suited to travel. What's more, the innocent looking box before you is not only a refrigerator, it's also a food warmer.

spoiled food. No more! Now for the price of a good cooler and one or two seasons of buying ice (or about five family restaurant meals), all the advantages of home cooling are available for you electronically and conveniently. Think about your last trip. You just got away nicely on your long-awaited vacation.

**NASA inspired portable refrigerator.** Because of space traveler's tough demands, scientists had to find something more dependable and less bulky than traditional refrigeration coils and compressors. Their research led them to discover a miraculous solid-state component called the thermoelectric module.

Aside from a small fan, this electronic fridge has no moving parts to wear out or break down. It's not affected by tilting, jarring or vibration (situations that cause home fridges to fail). The governing module, no bigger than a matchbook, actually delivers the cooling power of a 10-pound block of ice.

From satellites to station wagons, thermoelectric temperature control has now been proven with more than 25 years of use in some of the most rigorous space and laboratory applications. And Koolatron is the first manufacturer to make this technology available to families, fishermen, boaters, campers and hunters—in fact, anyone on the move.

Home refrigeration has come a long way since the days of the ice box and the block of ice. But when we travel, we go back to the stoppy ice cooler with its soggy and sometimes

### The refrigerator from outer space.

The secret of the Koolatron Cycle is...  
When you turn on the Koolatron, it...  
...keeps your food...  
...cold...  
...or...  
...warm...  
...up to 125 degrees.



you're cruising comfortably in your car along a busy interstate with only a few rest stops or restaurants. You guessed it...the kids want to stop for a snack. But your Koolatron is stocked with fruit, sandwiches, cold drinks, fried chicken... fresh and cold. Everybody helps themselves and you have saved valuable vacation time and another expensive restaurant bill.

**Hot or cold.** With the switch of a plug, the Koolatron becomes a food warmer for a casserole, burger or baby's bottle. It can go up to 125 degrees.

And because there are no temperamental compressors or gasses, the Koolatron works perfectly under all circumstances, even

upside down. Empty, the large model weighs only 12 pounds and the smaller one weighs just seven. Full, the large model holds up to 40 12-ounce cans and the smaller one holds six.

**Just load it up and plug it in.** On motor trips, plug your Koolatron into your cigarette lighter; it will use less power than a taillight. If you decide to carry it to a picnic place or a fishing hole, the Koolatron will hold its cooling capacity for 24 hours. If you leave it plugged into your battery with the engine off, it consumes only three amps of power.

**Limited-time offer.** Because Comrad is bringing this offer to you directly, you save the cost of middlemen and retail mark-ups. For a limited time only, you can get this advanced, portable Koolatron refrigerator at the introductory price of \$99. Call today to take advantage of this special promotional pricing. Most orders are processed within 72 hours and shipped UPS in 10 to 15 days.

**Try it risk-free.** We guarantee your satisfaction with any product from Comrad Industries. With the Koolatron you get our complete "No Questions Asked" 90-day money-back guarantee. Plus you get a full one-year manufacturer's limited warranty. If you are not satisfied for any reason, just return the product for a complete refund.

Koolatron (P24) holds 30 quarts	\$99	\$32 S&H
Koolatron (P9) holds 7 quarts	\$79	\$16 S&H
Optional AC Adapter (AC 10)	\$49	\$12 S&H

All amounts in U.S. dollars

Please mention promotional code 725-TM7107. For fastest service call toll-free 24 hours a day

## 800-704-1210

To order by mail send check or money order for the total amount including S&H. VA residents add 13% sales tax. Or charge to your credit card by enclosing your account number and expiration date.

### COMRAD INDUSTRIES

2820 Waterford Lake Dr., Suite 106  
Midlothian, Virginia 22113

4c  
will  
Pg

EXHIBIT B



TECHNOLOGY UPDATE

**Technology combines the dependable cooling power of a refrigerator with the convenience of a cooler... heats food too!**

*Remarkable new portable cooler/warmer reduces the outside temperature by up to 40 degrees and heat up to 125 degrees!*

by Ellen C. Burns

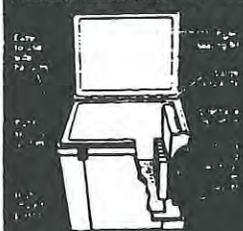
Imagine the versatility and convenience of a cooler that worked like a refrigerator. You could have ice-cold drinks at softball games, enjoy a picnic without soggy or spoiled food, even store insulin or other medicine that needs to be refrigerated. You could take it along when traveling and avoid the long lines and high prices at rest areas and interstate restaurants.

Now, imagine that this cooler that worked like a refrigerator could also heat food. You could warm baby formula or enjoy warm drinks at football games, camping, hunting, or anywhere else. Sound like a dream? It's not—the Koolatron cooler/warmer does it all.

MASA-inspired portable refrigerator. When man first attempted to explore the "final frontier," scientists were forced to develop many new ways to deal with the demanding new environment. Standard refrigeration technology and equipment were not suited for use in space. Scientists had to develop equipment that was more dependable and less bulky than traditional refrigeration coils and compressors. Their research led to the discovery of a miraculous solid-state component called the thermoelectric module.

With more than 25 years of use in the most rigorous space and laboratory applications, thermoelectric temperature control has proven itself. Now, this technology is available to you in this amazing new product.

**Space-age technology goes anywhere.**



Koolatron's secret is a mini-thermoelectric module which effectively replaces the bulky piping coils, loud motors and temperamental compressors used in conventional refrigeration. In the cool mode, the Koolatron reduces the outside temperature by 40° F. With the switch of a plug, it becomes a food warmer, going up to 125°.

**Hot or cold.** One of the most innovative things about Koolatron is that it works as well to heat 200¢ as it does to cool. In the cool mode, Koolatron can reduce the outside temperature by as much as 40 degrees F. With the switch of a plug, Koolatron goes from a refrigerator to a food warmer, going up to 125 degrees.

**Just plug it in.** Koolatron plugs directly into your vehicle's cigarette lighter and uses less power than a taillight. If you leave it plugged in while the vehicle is off, it will consume only three amps of power. Unplugged, Koolatron will hold its cooling capacity for up to 24 hours.

Koolatron is also extremely lightweight, so picnickers can carry it to the picnic site. The large model weighs only 12 pounds and the smaller one weighs only seven. Since there's no ice to weigh it down or take up room, the large model holds up to 40 12-ounce cans. The smaller one will hold six.

**Modern solution.**

Home refrigeration has come a long way from the "ice box" of the 1920s. But when we travel, we revert to similar methods and sloppy or spoiled food. Now, for the price of a good cooler and a season or two of buying ice or the price of about five family restaurant meals, the advantages of home refrigeration are available to you electronically.

Aside from a small built-in fan, Koolatron has no moving parts to wear out or break. It isn't affected by tilting, jarring or vibration. Koolatron works perfectly under all circumstances...even upside down! No bigger than a matchbook, the module has the cooling power of a 10-pound block of ice.

**Not just for travel.** With the optional adapter, you can plug Koolatron into any electrical outlet. Enjoy cold or warm meals in your hotel room without room service! Use it in your home as an extra fridge. Koolatron is even compact enough for college dorm rooms and makes a great gift for any college student. **Try it risk-free.** Koolatron is backed by Comtrad's exclusive risk-free home trial. Try it and if you are not totally satisfied, return it within 30 days for a full refund. "No Questions Asked." It is also backed by a one-year manufacturer's limited warranty. Most orders are processed within 72 hours and shipped UPS.



Koolatron is compact enough to take to your campsite, on a picnic or on the road in your car.

**Factory-direct offer.** If you were to find this product in stores, you might expect to pay as much as \$149. But for a limited time only, you can get Koolatron directly through Comtrad Industries for the introductory price of just \$99. Call now to take advantage of this special promotional pricing!

Koolatron has two convenient sizes: one holds seven quarts and the other holds 38 quarts.

- 38-quart Koolatron \$99 \$149 S&H
- 7-quart Koolatron \$79 \$99 S&H
- Optional AC Adapter \$49 \$6 S&H



Please mention promotional code 732-225001.

For fastest service, call toll-free 24 hours a day

**800-704-1211**



To place my order, send check or money order for the total amount including S&H. VISA residents add 4.5% sales tax. Do charge to your credit card by enclosing your account number and expiration date.

**COMTRAD INDUSTRIES**

2820 Waterford Lake Drive, Suite 106  
Midlothian, Virginia 23113

## DECISION AND ORDER

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

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

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

1. Respondent Comtrad Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its offices and principal place of business located at 2820 Waterford Lake Drive, Suite 106, Midlothian, Virginia.

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

## ORDER

## DEFINITIONS

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

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

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

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

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

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.

D. In an advertisement on any electronic media received by consumers via computer, such as the Internet's World Wide Web or commercial on-line computer services, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-screen documents, the disclosure shall appear on the first screen and on any screen containing ordering information.

E. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

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

3. Unless otherwise specified, "*respondent*" shall mean Comtrad Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

4. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Substantially similar product*" shall mean any portable device that operates off a thermo-electric unit and is intended to store or hold food at cool or warm temperatures.

## I.

*It is ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the storage of food in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The comparative or absolute ability of such product to refrigerate or cool food items or medicines or to maintain proper cold storage temperatures;

B. The comparative or absolute ability of such product to heat or warm food items;

C. The comparative or absolute ability of such product to hold its cooling capacity after being unplugged from a power source; or

D. The effect of operating such product off a car battery when the car is not running, including the amount of power used by the product in such circumstances or the potential for such use to drain the car battery of power.

## II.

*It is further ordered*, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the storage of food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy, or safety of such product, unless, at the time the representation is made, respondent possesses and relies upon

competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

### III.

*It is further ordered,* That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Koolatron or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the cooling capacity of such product, or about the effectiveness, usefulness, or appropriateness of such product for refrigerating or cooling food items, or for holding food items at a cool temperature, unless it discloses, clearly and prominently, and in close proximity to the representation, that such product may not keep perishable food items, such as meat, poultry, and fish, sufficiently cold to prevent the growth of bacteria when the surrounding outside temperature is greater than 80 degrees Fahrenheit, including when such product is used in hot weather, in direct sunlight, or in a hot car, and that use of such product in these circumstances poses a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness.

### IV.

*It is further ordered,* That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Koolatron or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the effectiveness, usefulness, or appropriateness of such product for heating or warming food items, or for holding food items at a warm temperature, unless it discloses, clearly and prominently, and in close proximity to the representation, that heating, warming, or holding perishable food items such as meat, poultry, and fish in such product in its warming mode may pose a risk of buildup of harmful or unsafe bacteria and could lead to food-borne illness.

## V.

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

A. All advertisements and promotional materials containing the representation;

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

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

## VI.

*It is further ordered,* That respondent Comtrad Industries, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## VII.

*It is further ordered,* That respondent Comtrad Industries, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a

bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

### VIII.

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

### IX.

This order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

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IN THE MATTER OF

## PREMIER PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3720. Complaint, Feb. 26, 1997--Decision, Feb. 26, 1997*

This consent order prohibits, among other things, the New Jersey-based corporations, that advertise "Miracle Thaw" food thawing trays, and their officers from misrepresenting, with respect to any product involving the storage or preparation of food, the risk of buildup of harmful or unsafe levels of bacteria on food items defrosted, thawed, prepared, or stored using the product; the amount of time it may take to defrost, thaw, or prepare food items using the product; the process by which the product achieves any claimed defrosting, thawing, or preparation times; or the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

*Appearances*

For the Commission: *John T. Dugan.*

For the respondents: *Jeffrey Edelstein, Hall, Dickler, Kent, Friedman & Wood, New York, N.Y.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, corporations, and Michael Sander and Issie Kroll, individually and as officers of the corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Premier Products, Inc. is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

2. Respondent T.V. Products, Inc. is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

3. Respondent T.V.P. Corporation is a New Jersey corporation with its principal office or place of business at 23 Vreeland Road, Florham Park, New Jersey.

4. Respondent Michael Sander is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations,

including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

5. Respondent Issie Kroll is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

6. Respondents have advertised, labeled, offered for sale, sold, and distributed products to the public, including Miracle Thaw, a food defrosting or thawing tray.

7. 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.

8. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Miracle Thaw, including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements and depictions:

A. "After a hard day at work, it's time for a nice juicy steak. Oh, no! You forgot to defrost.

You need MIRACLE THAW, the incredible new defrosting tray that perfectly thaws any frozen food like magic in just minutes.

No chemicals. No batteries. No wires. No microwave rays. Just a space-age metal from Mother Nature that thaws frozen food faster and better than anything in the world.

Look! This thick frozen steak could take all day to defrost! But watch! Simply place it on Miracle Thaw and incredibly, in just 30 minutes, it's butcher block fresh. [Super: Thaws Food in Minutes.]

These rock hard chicken breasts are perfectly tender in only 13 minutes!

That's frozen fish. 12 minutes later, it's the catch of the day.

Frozen pork chops are thawed, cool and juicy in just 14 minutes.

The secret is in the superconductive metal tray. It absorbs the natural heat energy in the air and then releases it directly into the frozen food.

[Super: Natural Heat Conductor. Absorbs Heat From Air.]

Now, you can defrost any frozen food, just minutes before cooking. Just watch this ice cube demonstration. The tray is cool to the touch, but the ice cube melts away like it was on a hot griddle. The Miracle Thaw defrosting tray simply speeds up the natural thawing process. Incredibly, the ice cube has melted down in just seconds. Amazing!

All day thawing could cause bacteria burgers. But with Miracle Thaw, burgers are safely defrosted in just 10 minutes.

[Visual: Six spoiled thawed hamburger patties on a plate; Six unspoiled thawed hamburger patties on Miracle Thaw.]

[Super: No Dangerous Bacteria.]

Most important, it's lab tested for product and food safety.

[Super: Miracle Thaw . . . Laboratory Tested . . . 100% Safe.]  
Microwave defrosting could ruin your food. You get dry cooked edges, causing poor stale flavor. But Miracle Thaw defrosts perfectly every time. Food retains the natural juices for the best flavor.

[Super: Thaws evenly and safely.]  
Miracle Thaw. Instant defrosting."

.....

(Exhibit A, television commercial transcript).

B. "Amazing Tray Thaws Food In Minutes!"

.....  
"Laboratory SAFETY Tested."

.....  
"Space-age metal thaws frozen foods safely, evenly, perfectly . . . EVERY TIME!"

.....  
"Before . . . Rock-hard frozen chicken breasts [depiction of two frozen boneless chicken breasts being placed on tray]. . . . After . . . Perfectly thawed . . . moist and tender in as little as 7 MINUTES! [depiction of two fully thawed boneless chicken breasts being removed from tray]."

.....  
"Up until now you really only had two choices for defrosting or thawing foods. Either in the microwave or on the counter top. . . . So what about defrosting food by leaving it on the counter top all day? This option is not highly recommended or very safe due to bacterias found in most foods which is why safe handling guidelines recommend that you keep raw meat, poultry and fish refrigerated or frozen until you're ready to cook it. The safest, most convenient choice is Miracle Thaw . . ."

.....  
(Exhibit B, product package).

9. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that laboratory testing proves that food items defrosted or thawed on Miracle Thaw will not develop harmful or unsafe levels of bacteria.

10. In truth and in fact, laboratory testing does not prove that food items defrosted or thawed on Miracle Thaw will not develop harmful or unsafe levels of bacteria. At the time respondents made the representations set forth in paragraph nine, no tests relating to bacteria buildup on food had been conducted on Miracle Thaw. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that:

A. There is no risk of buildup of harmful or unsafe levels of bacteria on perishable frozen food items defrosted or thawed on Miracle Thaw.

B. Miracle Thaw will defrost or thaw frozen food items in the following times: steak in 30 minutes; chicken breasts in 7 to 13 minutes; fish fillets in 12 minutes; pork chops in 14 minutes; and hamburgers in 10 minutes.

C. Miracle Thaw achieves the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight because it is a superconductive metal tray that transfers heat energy from the air into frozen food items, thereby speeding up the natural defrosting or thawing process.

12 In truth and in fact:

A. There is a potential risk of buildup of harmful or unsafe levels of bacteria on perishable frozen food items defrosted or thawed on Miracle Thaw. Miracle Thaw operates at room temperature, and defrosting or thawing perishable food at room temperature, even for relatively short periods of time, increases the risk of harmful or unsafe bacteria buildup.

B. In many cases, Miracle Thaw will not defrost or thaw frozen food items in the claimed time periods. Defrosting or thawing times will vary depending on several factors, including the size, shape, and thickness of the food item, the number of items placed on the tray at one time, the number of times the tray is reheated during defrosting or thawing, and room temperature. In some cases actual defrosting or thawing times may be three or more times longer than the claimed defrosting or thawing times.

C. Miracle Thaw does not achieve the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight by superconducting or transferring heat energy from the air into frozen food items. Miracle Thaw is a Teflon-coated aluminum tray that can only achieve the accelerated defrosting or thawing depicted in the advertisements referred to in paragraph eight if it is preheated before use and reheated during use. Similar results could be achieved with any aluminum pan.

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

13. Through the means described in paragraph eight, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations

set forth in paragraph eleven, at the time the representations were made.

14. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made. Therefore, the representation set forth in paragraph thirteen was, and is, false or misleading.

15. In their advertising and sale of Miracle Thaw, respondents have represented that Miracle Thaw is effective, useful, or appropriate for defrosting or thawing frozen food items. Respondents have failed to disclose that defrosting or thawing perishable food on Miracle Thaw may pose a risk of buildup of harmful or unsafe bacteria on the food. These facts would be material to consumers in their purchase or use of the product. Respondents' failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

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

#### EXHIBIT A

##### Miracle Thaw TV Commercial, 120 Second, Original Version

Super: [Copyright] 1994. T.V.P. Corp. All Rights Reserved [small print].

Audio: After a hard day at work, it's time for a nice juicy steak. Oh, no! You forgot to defrost.

Super: Miracle Thaw.

Audio: You need MIRACLE THAW, the incredible new defrosting tray that perfectly thaws any frozen food like magic in just minutes.

Visual: 1 steak on tray, before and after.

Audio: No chemicals. No batteries. No wires. No microwave rays. Just a space-age metal from Mother Nature that thaws frozen food faster and better than anything in the world.

Visual: 1 whole chicken on tray, before and after.

Super: No breakable Parts. Natural Thawing Method.

Audio: Look! This thick frozen steak could take all day to defrost! But watch! Simply place it on Miracle Thaw and incredibly, in just 30 minutes, its butcher block fresh.

Visual: 1 steak on tray, before and after.

Super: Thaws Food in Minutes.

Audio: These rock hard chicken breasts are perfectly tender in only 13 minutes!

Visual: 3 breasts on tray at once, before and after.

Audio: That's frozen fish. 12 minutes later, it's the catch of the day.

Visual: 1 fish fillet on tray, before and after.

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- Audio: Frozen pork chops are thawed, cool and juicy in just 14 minutes.
- Visual: 6 chops on tray at once, before and after.
- Audio: The secret is in the superconductive metal tray. It absorbs the natural heat energy in the air and then releases it directly into the frozen food.
- Super: Natural Heat Conductor. Absorbs Heat From Air.
- Audio: Now, you can defrost any frozen food, just minutes before cooking. Just watch this ice cube demonstration. The tray is cool to the touch, but the ice cube melts away like it was on a hot griddle. The Miracle Thaw Defrosting Tray simply speeds up the natural thawing process. Incredibly, the cube has melted down in just seconds. Amazing!
- Super: Ice Cube Demonstration.
- Audio: All day thawing could cause bacteria burgers. But with Miracle Thaw, burgers are safely defrosted in just 10 minutes.
- Visual: 6 spoiled thawed hamburger patties on a plate; 6 unspoiled hamburger patties on tray at once, before and after.
- Super: No Dangerous Bacteria.
- Audio: Most important, it's lab tested for product and food safety.
- Super: Miracle Thaw . . . Laboratory Tested . . . 100% Safe.
- Audio: Microwave defrosting could ruin your food. You get dry cooked edges, causing poor stale flavor. But Miracle Thaw defrosts perfectly every time. Food retains the natural juices for the best flavor.
- Visual: 5 assorted cuts on tray at once, before and after.
- Super: Thaws evenly and safely.
- Audio: Miracle Thaw. Instant defrosting. Quick clean-up. Easy storage. Now, only \$19.95.
- Visual: 6 hamburger patties on tray at once, before and after.
- Audio: Designed to last a lifetime, it's the incredible kitchen miracle you'll use every day.
- Visual: 1 whole chicken on tray, before and after.
- Super: Miracle Thaw. Only \$19.95. Risk-Free Money Back Guarantee.
- Audio and Super: [ordering information].

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EXHIBIT B

**THE JAW**  
DEFROSTING TRAYS

AS SEEN ON TV  
TV DEMO!

**Before**  
Rock-hard frozen chicken.

**After**  
Thawed perfectly...  
fresh in minutes!

- NO ELECTRICITY
- NO CHEMICALS!
- NO BATTERIES!
- NO MICROWAVES!

EXHIBIT B



## DECISION AND ORDER

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

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

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

1. Respondent Premier Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent T.V. Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent T.V.P. Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 23 Vreeland Road, Florham Park, New Jersey.

Respondent Michael Sander is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his office or principal place of business is located at the above stated address.

Respondent Issie Kroll is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his office or principal place of business is located at the above stated address.

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

## ORDER

### DEFINITIONS

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

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

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

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

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

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

E. On a product insert, the disclosure shall be in a type size that is sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears, and it shall appear before all written text, other than the name of the product or product slogans.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any product label or insert.

3. Unless otherwise specified, "*respondents*" shall mean Premier Products, Inc., T.V. Products, Inc., T.V.P. Corporation, corporations, their successors and assigns and their officers; Michael Sander and Issie Kroll, individually and as officers of the corporations; and each of the above's agents, representatives and employees.

4. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

#### I.

*It is ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product involving the preparation or storage of food in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

A. The existence, contents, validity, results, conclusions or interpretations of any test, study, or research;

B. The risk of buildup of harmful or unsafe levels of bacteria on food items defrosted, thawed, prepared, or stored using such product;

C. The amount of time it may take to defrost, thaw, or prepare food items using such product; or

D. The process by which such product achieves any claimed defrosting, thawing, or preparation times.

## II.

*It is further ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in the preparation or storage of food in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, efficacy or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

## III.

*It is further ordered,* That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Miracle Thaw or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the effectiveness, usefulness, or appropriateness of such product for defrosting or thawing frozen food items, unless it discloses, clearly and prominently:

A. In any advertisement, promotional material, and product label for Miracle Thaw or any substantially similar product:

"SEE INSTRUCTIONS FOR IMPORTANT INFORMATION ABOUT POTENTIAL FOOD SAFETY RISKS ASSOCIATED WITH THAWING FOOD AT ROOM TEMPERATURE"; and

B. In a product insert enclosed in each product package for Miracle Thaw or any substantially similar product:

"CAUTION: THERE IS A POTENTIAL RISK OF HARMFUL OR UNSAFE BACTERIA BUILDUP ON PERISHABLE FOOD THAWED AT ROOM TEMPERATURE. For more information about thawing food safely, please contact the U.S. Dept. of Agriculture's Meat and Poultry Hotline at 1-800-535-4555, or the FDA's Seafood Hotline at 1-800-332-4010."

## IV.

*It is further ordered*, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

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

## V.

*It is further ordered*, That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall:

A. Send a copy of this order by first class mail, return receipt requested to:

1. Each purchaser for resale of Miracle Thaw or any substantially similar product who purchased from respondents since January 1, 1992, and each licensee who sells Miracle Thaw or any substantially similar product under any licensing agreement with respondents entered into prior to the date of service of this order. Such copy shall be sent within thirty (30) days after the date of service of this order; and

2. For a period of three (3) years following service of this order, each purchaser for resale of Miracle Thaw or any substantially similar product who purchases from respondents after the date of service of this order and who has not already received a copy of this order, and each licensee who sells Miracle Thaw or any substantially similar product under any licensing agreement with respondents entered into

after the date of service of this order and who has not already received a copy of this order. Such copy shall be sent within thirty (30) days of the initiation of any business transaction with the purchaser for resale or licensee;

B. In the event respondents receive any evidence that subsequent to its receipt of a copy of this order any purchaser for resale or licensee is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order or that fails to disclose any information required by this order, respondents shall immediately notify the purchaser for resale or licensee that respondents will terminate their business arrangement with said purchaser for resale or licensee if it continues to use such advertisements or promotional materials; and

C. Terminate their business arrangement with any purchaser for resale or licensee if respondents receive any evidence that such purchaser for resale or licensee has continued to use advertisements or promotional materials that contain any representation prohibited by this order or that fail to disclose any information required by this order after receipt of the notice required by subparagraph B of this part.

## VI.

*It is further ordered,* That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## VII.

*It is further ordered,* That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation and their successors and assigns shall notify the Commission at least thirty (30) days prior to

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

#### VIII.

*It is further ordered,* That respondents Michael Sander and Issie Kroll, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

#### IX.

*It is further ordered,* That respondents Premier Products, Inc., T.V. Products, Inc., and T.V.P. Corporation, and their successors and assigns, and respondents Michael Sander and Issie Kroll shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## X.

This order will terminate on February 26, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

J.C. PENNEY COMPANY, INC., ET AL.

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

*Docket C-3721. Complaint, Feb. 28, 1997--Decision, Feb. 28, 1997*

This consent order requires, among other things, J.C. Penney and Thrift Drugs, its wholly-owned subsidiary, to divest by March 21, 1997, to a Commission-approved acquirer, a total of 161 drug stores in North and South Carolina. The consent order settles allegations that J.C. Penney's proposed acquisition of Eckerd Corporation, and 190 Rite Aid drug stores in these two states, violated antitrust laws by substantially reducing drug store competition.

### *Appearances*

For the Commission: *George S. Cary, Michael Moiseyev, Ann Malester and William Baer.*

For the respondents: *Peter Standish, Weil, Gotshal & Manges, New York, N.Y.*

### COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that J.C. Penney Company, Inc., through two wholly-owned subsidiaries, Omega Acquisition Corporation and Thrift Drug, Inc., all subject to the jurisdiction of the Commission, has agreed to acquire Eckerd Corporation and certain assets of Rite Aid Corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

#### I. DEFINITION

1. For the purposes of this complaint, "MSA" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

## II. RESPONDENTS

2. Respondent J.C. Penney Company, Inc. ("J.C. Penney") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

3. Respondent Thrift Drug, Inc. ("Thrift Drug") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## III. THE ACQUIRED COMPANIES

5. Eckerd Corporation ("Eckerd") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

6. Rite Aid Corporation ("Rite Aid") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

7. For purposes of this proceeding, Eckerd and Rite Aid are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## IV. THE ACQUISITIONS

8. On October 11, 1996, J.C. Penney's wholly-owned subsidiary, Thrift Drug, entered into an Asset Purchase Agreement to acquire certain assets of Rite Aid, and on November 2, 1996, J.C. Penney's wholly-owned subsidiary, Omega Acquisition Corporation, entered

into an Amended and Restated Agreement and Plan of Merger to acquire Eckerd (collectively "the Acquisitions").

#### V. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisitions is the retail sale of pharmacy services to third-party payors.

10. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisitions are:

- a. The state of North Carolina;
- b. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina MSA;
- c. The Greensboro-Winston Salem-High Point, North Carolina MSA;
- d. The Raleigh-Durham-Chapel Hill, North Carolina MSA; and
- e. The Charleston-North Charleston, South Carolina MSA.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisitions described in paragraph fourteen.

13. Thrift Drug, Eckerd and Rite Aid are actual competitors in the relevant markets.

#### VI. EFFECT OF THE ACQUISITIONS

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

- a. By eliminating direct actual competition between Thrift Drug, Eckerd and Rite Aid;
- b. By increasing the likelihood that Thrift Drug will unilaterally exercise market power; and
- c. By increasing the likelihood of collusion in the relevant markets.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

#### VII. VIOLATIONS CHARGED

16. The acquisition agreements described in paragraph eight constitute violations of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

17. The Acquisitions described in paragraph eight, if consummated, would constitute violations 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 ("Commission"), having initiated an investigation of the proposed acquisition of Eckerd Corporation ("Eckerd") and of certain assets of Rite Aid Corporation ("Rite Aid") by J.C. Penney Company, Inc. ("J.C. Penney") and Thrift Drug, Inc. ("Thrift Drug"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said 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 J.C. Penney Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

2. Respondent Thrift Drug, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

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

## ORDER

### I.

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

A. "*J.C. Penney*" means J.C. Penney Company, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by J.C. Penney Company, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Thrift Drug*" means Thrift Drug, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries (including Kerr Drug, Inc.), divisions, groups, and affiliates controlled, directly or indirectly, by Thrift Drug, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. "*Rite Aid*" means Rite Aid Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Rite Aid Corporation and the

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

D. "*Respondents*" means J.C. Penney and Thrift Drug.

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

F. "*Acquisitions*" means the acquisitions of Eckerd by Omega Acquisition Corporation, a wholly-owned subsidiary of J.C. Penney, and of certain assets of Rite Aid by Thrift Drug, an indirect, wholly-owned subsidiary of J.C. Penney, pursuant to an agreement dated November 2, 1996 and an agreement dated October 11, 1996, respectively.

G. "*Retail drug store*" means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

H. "*MSA*" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

I. "*Rite Aid Retail Business*" means Rite Aid's retail drug store business located in the states of North Carolina and South Carolina.

J. "*Rite Aid Retail Assets*" means all assets constituting the Rite Aid Retail Business, excluding those assets pertaining to the Rite Aid trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, reports, dockets and lists relating to the Rite Aid Retail Business;
4. Retail drug store inventory and storage capacity;
5. Lists of stock keeping units ("SKUs"), e.g., all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;
6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Rite Aid Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Rite Aid;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

Provided, however, that Rite Aid Retail Assets shall include only such assets as are being acquired in the Acquisitions.

K. "*Rite Aid North Carolina/Charleston Retail Assets*" means Rite Aid's Retail Assets located in the state of North Carolina and in the Charleston-North Charleston, South Carolina MSA.

L. "*Thrift Retail Business*" means Thrift Drug's retail drug store business located in the Charlotte-Gastonia-Rock Hill, North Carolina MSA, and Thrift Drug's retail drug store business identified in Schedule A of this Agreement.

M. "*Thrift Retail Assets*" means all assets constituting the Thrift Retail Business, excluding those assets pertaining to the Thrift Drug or Kerr trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, reports, dockets and lists relating to the Thrift Retail Business;
4. Retail drug store inventory and storage capacity;
5. Lists of stock keeping units ("SKUs"), e.g., all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;
6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Thrift Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Thrift Drug;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

## II.

*It is further ordered, That:*

A. Respondents shall divest, absolutely and in good faith, the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within four (4) months of the date the Agreement Containing Consent Order in this matter was signed by respondents; provided, however, that respondents shall not acquire any of the Rite Aid North Carolina/Charleston Retail Assets until respondents have entered into an agreement that has received the prior approval of the Commission to divest the Rite Aid North Carolina/Charleston Retail Assets.

B. If respondents do not divest the Thrift Retail Assets pursuant to paragraph II.A, respondents shall divest the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within five (5) months of the date the Agreement Containing Consent Order in this matter was signed by the respondents.

C. The purpose of the divestiture of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets is to ensure the continuation of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets as ongoing viable enterprises engaged in the retail drug store business providing retail pharmacy services to third-party payors and to remedy any lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint.

## III.

*It is further ordered, That:*

A. If respondents have not divested absolutely and in good faith the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Rite Aid Retail Assets and the Thrift Retail Assets; or if the respondents have not divested absolutely and in good faith the Thrift Retail Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the Thrift Retail Assets. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest the Rite Aid Retail Assets and the Thrift Retail Assets.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (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 for up to twelve (12) months each time.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity for the Rite Aid Retail Assets and the Thrift Retail Assets, the trustee shall divest to the

acquiring entity selected by respondents from among those approved by the Commission.

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

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

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

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Rite Aid Retail Assets and the Thrift Retail Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Rite Aid Retail Assets and the Thrift Retail Assets.

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

#### IV.

*It is further ordered, That:*

A. Pending divestiture of the Rite Aid Retail Assets and the Thrift Retail Assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Rite Aid Retail Assets and the Thrift Retail Assets consistent with paragraphs II and III of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the Rite Aid Retail Assets and the Thrift Retail Assets except in the ordinary course of business and except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have complied with the divestiture requirements of the order.

#### V.

*It is further ordered, That* within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of proposals for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties concerning divestiture.

## VI.

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

## VII.

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

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

B. Upon five days' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

## SCHEDULE A

Kerr Store Number 8549  
Lakewood Shopping Center  
2000 Chapel Hill Road  
Durham, NC 27704

Kerr Store Number 8556  
Erwin Square  
737 Ninth Street  
Durham, NC 27705

Kerr Store Number 8566  
University Mall  
201-10 Estes Drive  
Chapel Hill, NC 27514

Kerr Store Number 8550  
North Duke Mall  
3600 North Duke Street  
Durham, NC 27704

Kerr Store Number 8935  
Cary Village Mall  
1105 Walnut Street  
Cary, NC 27511

Kerr Store Number 8933  
South Square Shopping Center  
4001 Chapel Hill Boulevard  
Durham, NC 27707

Kerr Store Number 8531  
Northridge Shopping Center  
8140 Falls of the Neuse Road  
Raleigh, NC 27689

Kerr Store Number 8943  
Harvest Plaza  
9650 Strickland Road  
Raleigh, NC 27615

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Kerr Store Number 8541  
Longview Shopping Center  
2116 East New Bern Avenue  
Raleigh, NC 27610

Kerr Store Number 8537  
Eastgate Shopping Center  
4025 Old Wake Forest Road  
Raleigh, NC 27609

Kerr Store Number 8553  
Loehman's Plaza  
1821 Hilandale Road  
Durham, NC 27705

Kerr Store Number 8929  
Crabtree Valley Mall  
4325 Glenwood Avenue  
Raleigh, NC 27612

Kerr Store Number 8538  
South Hills Mall  
1255 Buck Jones Road  
Raleigh, NC 27606

Kerr Store Number 8595  
North Hills Mall  
Six Forks Road  
Raleigh, NC 27609

Kerr Store Number 8539  
Mission Valley Shopping Center  
2233-113 Avant Ferry Road  
Raleigh, NC 27605

Kerr Store Number 8534  
Tower Shopping Center  
Newbern Avenue  
Raleigh, NC 27610

Kerr Store Number 8602  
Triangle East Centre  
134 Wakelon Street  
Zebulon, NC 27597

Kerr Store Number 8530  
Towne North Plaza  
8385 Creedmoor Road  
Raleigh, NC 27612

Kerr Store Number 8904  
Preston Corners Shopping Center  
920 High House Road  
Cary, NC 27513

Kerr Store Number 8547  
The Village Shopping Center  
613 Wellons Village  
Durham, NC 27703

## APPENDIX I

### ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between J.C. Penney Company, Inc. ("J.C. Penney"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas; Thrift Drug, Inc. ("Thrift Drug"), a corporation organized, existing, and doing

business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

#### PREMISES

*Whereas*, J.C. Penney (through a wholly-owned subsidiary, Omega Acquisition Corporation) agreed to acquire Eckerd Corporation ("the Eckerd Acquisition"), pursuant to an agreement dated November 2, 1996, and J.C. Penney (through a wholly-owned subsidiary, Thrift Drug, Inc.) agreed to acquire certain assets of the Rite Aid Corporation ("the Rite Aid Acquisition"), pursuant to an agreement dated October 11, 1996, respectively (collectively "the Acquisitions"); and

*Whereas*, the Commission is now investigating the Acquisitions to determine if they would violate any of the statutes enforced by the Commission; and

*Whereas*, if the Commission accepts the Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Rite Aid Retail Assets and the Thrift Retail Assets as described in the Agreement Containing Consent Order ("Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisitions might not be possible, or might produce a less than effective remedy; and

*Whereas*, if the Commission accepts the consent order or a modified consent order, and J.C. Penney and Thrift Drug have not divested the Assets or such other assets as are specified in the consent order or in a modified consent order, in accordance with the consent order or modified order respectively, the Commission may appoint a trustee to divest the Assets and such additional assets as are identified in the consent order or in a modified consent order; and

*Whereas*, the Commission is concerned that prior to divestiture to an acquirer approved by the Commission, it may be necessary to

preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to an acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisitions; and

*Whereas*, J.C. Penney and Thrift Drug entering into this Agreement shall in no way be construed as an admission by J.C. Penney or Thrift Drug that the Acquisitions are illegal; and

*Whereas*, J.C. Penney and Thrift Drug understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

*Now, therefore*, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting periods, the Parties agree as follows:

#### TERMS OF AGREEMENT

1. J.C. Penney and Thrift Drug agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition, J.C. Penney and Thrift Drug will be free to close the Rite Aid Acquisition after December 8, 1996, subject to the terms of the order, and the Eckerd Acquisition after December 6, 1996.

3. J.C. Penney and Thrift Drug agree that from the date this Agreement is signed until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

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

b. On the day the divestitures set out in the consent order have been completed.

4. J.C. Penney and Thrift Drug shall maintain the competitiveness of the Assets. This includes, but is not limited to, the maintaining of promotions and discount policies as well as the continuation of specific store services (*i.e.*, hours of operation and operation of specific departments).

5. Until J.C. Penney and Thrift Drug have divested the Assets or other assets pursuant to paragraphs II and III of the consent order or such assets as are specified pursuant to a modified consent order, J.C. Penney and Thrift Drug shall continue to offer those Thrift Drug customers who receive third-party pharmacy services at Thrift Drug the same type of pharmacy service at any retail drug store that constitutes a part of the Thrift Retail Assets.

6. Should the Commission seek in any proceeding to compel J.C. Penney and Thrift Drug to divest themselves of the Assets or such other assets as specified in the consent order or in a modified consent order or to seek any other injunctive or equitable relief, J.C. Penney and Thrift Drug shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisitions. J.C. Penney and Thrift Drug also waive all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to J.C. Penney or Thrift Drug and to their principal offices, J.C. Penney and Thrift Drug shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of J.C. Penney or Thrift Drug, 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 J.C. Penney or Thrift Drug relating to compliance with this Agreement; and

b. To interview officers or employees of J.C. Penney or Thrift Drug, who may have counsel present, regarding any such matters.

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

## IN THE MATTER OF

J.C. PENNEY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-3722. Complaint, Feb. 28, 1997--Decision, Feb. 28, 1997*

This consent order requires, among other things, J.C. Penney and Thrift Drugs, its wholly-owned subsidiary, to divest by March 21, 1997, to a Commission-approved acquirer, a total of 161 drug stores in North and South Carolina. The consent order settles allegations that J.C. Penney's proposed acquisition of 190 Rite Aid drug stores in these two states and Eckerd Corporation, violated antitrust laws by substantially reducing drug store competition.

*Appearances*

For the Commission: *George S. Cary, Michael Moiseyev, Ann Malester and William Baer.*

For the respondents: *Peter Standish, Weil, Gotshal & Manges, New York, N.Y.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that J.C. Penney Company, Inc., through two wholly-owned subsidiaries, Omega Acquisition Corporation and Thrift Drug, Inc., all subject to the jurisdiction of the Commission, has agreed to acquire Eckerd Corporation and certain assets of Rite Aid Corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. DEFINITION

1. For the purposes of this complaint, "MSA" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

## II. RESPONDENTS

2. Respondent J.C. Penney Company, Inc. ("J.C. Penney") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

3. Respondent Thrift Drug, Inc. ("Thrift Drug") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## III. THE ACQUIRED COMPANIES

5. Eckerd Corporation ("Eckerd") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

6. Rite Aid Corporation ("Rite Aid") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

7. For purposes of this proceeding, Eckerd and Rite Aid are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## IV. THE ACQUISITIONS

8. On October 11, 1996, J.C. Penney's wholly-owned subsidiary, Thrift Drug, entered into an Asset Purchase Agreement to acquire certain assets of Rite Aid, and on November 2, 1996, J.C. Penney's wholly-owned subsidiary, Omega Acquisition Corporation, entered

into an Amended and Restated Agreement and Plan of Merger to acquire Eckerd (collectively "the Acquisitions").

#### V. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisitions is the retail sale of pharmacy services to third-party payors.

10. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisitions are:

- a. The state of North Carolina;
- b. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina MSA;
- c. The Greensboro-Winston Salem-High Point, North Carolina MSA;
- d. The Raleigh-Durham-Chapel Hill, North Carolina MSA; and
- e. The Charleston-North Charleston, South Carolina MSA.

11. The relevant markets set forth in paragraphs nine and ten are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

12. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisitions described in paragraph fourteen..

13. Thrift Drug, Eckerd and Rite Aid are actual competitors in the relevant markets.

#### VI. EFFECT OF THE ACQUISITIONS

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

- a. By eliminating direct actual competition between Thrift Drug, Eckerd and Rite Aid;
- b. By increasing the likelihood that Thrift Drug will unilaterally exercise market power; and
- c. By increasing the likelihood of collusion in the relevant markets.

15. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

#### VII. VIOLATIONS CHARGED

16. The acquisition agreements described in paragraph eight constitute violations of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

17. The Acquisitions described in paragraph eight, if consummated, would constitute violations 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 ("Commission"), having initiated an investigation of the proposed acquisition of Eckerd Corporation ("Eckerd") and of certain assets of Rite Aid Corporation ("Rite Aid") by J.C. Penney Company, Inc. ("J.C. Penney") and Thrift Drug, Inc. ("Thrift Drug"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said 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 J.C. Penney Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas.

2. Respondent Thrift Drug, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania.

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

## ORDER

### I.

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

A. "*J.C. Penney*" means J.C. Penney Company, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by J.C. Penney Company, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Thrift Drug*" means Thrift Drug, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries (including Kerr Drug, Inc.), divisions, groups, and affiliates controlled, directly or indirectly, by Thrift Drug, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. "*Rite Aid*" means Rite Aid Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Rite Aid Corporation and the

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

D. "*Respondents*" means J.C. Penney and Thrift Drug.

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

F. "*Acquisitions*" means the acquisitions of Eckerd by Omega Acquisition Corporation, a wholly-owned subsidiary of J.C. Penney, and of certain assets of Rite Aid by Thrift Drug, an indirect, wholly-owned subsidiary of J.C. Penney, pursuant to an agreement dated November 2, 1996 and an agreement dated October 11, 1996, respectively.

G. "*Retail drug store*" means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

H. "*MSA*" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

I. "*Rite Aid Retail Business*" means Rite Aid's retail drug store business located in the states of North Carolina and South Carolina.

J. "*Rite Aid Retail Assets*" means all assets constituting the Rite Aid Retail Business, excluding those assets pertaining to the Rite Aid trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, reports, dockets and lists relating to the Rite Aid Retail Business;
4. Retail drug store inventory and storage capacity;
5. Lists of stock keeping units ("SKUs"), e.g., all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;
6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Rite Aid Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Rite Aid;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

Provided, however, that Rite Aid Retail Assets shall include only such assets as are being acquired in the Acquisitions.

K. "*Rite Aid North Carolina/Charleston Retail Assets*" means Rite Aid's Retail Assets located in the state of North Carolina and in the Charleston-North Charleston, South Carolina MSA.

L. "*Thrift Retail Business*" means Thrift Drug's retail drug store business located in the Charlotte-Gastonia-Rock Hill, North Carolina MSA, and Thrift Drug's retail drug store business identified in Schedule A of this Agreement.

M. "*Thrift Retail Assets*" means all assets constituting the Thrift Retail Business, excluding those assets pertaining to the Thrift Drug or Kerr trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, reports, dockets and lists relating to the Thrift Retail Business;
4. Retail drug store inventory and storage capacity;
5. Lists of stock keeping units ("SKUs"), e.g., all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;
6. Lists of all customers, including, but not limited to, third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
7. All pharmacy files, documents, instruments, papers, books, computer files and records and all other records in any media relating to the Thrift Retail Business;

8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Thrift Drug;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and

10. Goodwill, tangible and intangible, utilized in retail drug stores.

## II.

*It is further ordered, That:*

A. Respondents shall divest, absolutely and in good faith, the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within four (4) months of the date the Agreement Containing Consent Order in this matter was signed by respondents; provided, however, that respondents shall not acquire any of the Rite Aid North Carolina/Charleston Retail Assets until respondents have entered into an agreement that has received the prior approval of the Commission to divest the Rite Aid North Carolina/Charleston Retail Assets.

B. If respondents do not divest the Thrift Retail Assets pursuant to paragraph II.A, respondents shall divest the Thrift Retail Assets to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission, within five (5) months of the date the Agreement Containing Consent Order in this matter was signed by the respondents.

C. The purpose of the divestiture of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets is to ensure the continuation of the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets as ongoing viable enterprises engaged in the retail drug store business providing retail pharmacy services to third-party payors and to remedy any lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint.

## III.

*It is further ordered, That:*

A. If respondents have not divested absolutely and in good faith the Rite Aid North Carolina/Charleston Retail Assets and the Thrift Retail Assets pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Rite Aid Retail Assets and the Thrift Retail Assets; or if the respondents have not divested absolutely and in good faith the Thrift Retail Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the Thrift Retail Assets. In the event that the Commission brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest the Rite Aid Retail Assets and the Thrift Retail Assets.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (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 for up to twelve (12) months each time.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity for the Rite Aid Retail Assets and the Thrift Retail Assets, the trustee shall divest to the

acquiring entity selected by respondents from among those approved by the Commission.

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

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

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

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Rite Aid Retail Assets and the Thrift Retail Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Rite Aid Retail Assets and the Thrift Retail Assets.

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

#### IV.

*It is further ordered, That:*

A. Pending divestiture of the Rite Aid Retail Assets and the Thrift Retail Assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Rite Aid Retail Assets and the Thrift Retail Assets consistent with paragraphs II and III of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the Rite Aid Retail Assets and the Thrift Retail Assets except in the ordinary course of business and except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondents have complied with the divestiture requirements of the order.

#### V.

*It is further ordered, That* within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of proposals for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties concerning divestiture.

## VI.

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

## VII.

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

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

B. Upon five days' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

## SCHEDULE A

Kerr Store Number 8549  
Lakewood Shopping Center  
2000 Chapel Hill Road  
Durham, NC 27704

Kerr Store Number 8556  
Erwin Square  
737 Ninth Street  
Durham, NC 27705

Kerr Store Number 8566  
University Mall  
201-10 Estes Drive  
Chapel Hill, NC 27514

Kerr Store Number 8550  
North Duke Mall  
3600 North Duke Street  
Durham, NC 27704

Kerr Store Number 8935  
Cary Village Mall  
1105 Walnut Street  
Cary, NC 27511

Kerr Store Number 8933  
South Square Shopping Center  
4001 Chapel Hill Boulevard  
Durham, NC 27707

Kerr Store Number 8531  
Northridge Shopping Center  
8140 Falls of the Neuse Road  
Raleigh, NC 27689

Kerr Store Number 8943  
Harvest Plaza  
9650 Strickland Road  
Raleigh, NC 27615

Kerr Store Number 8541  
Longview Shopping Center  
2116 East New Bern Avenue  
Raleigh, NC 27610

Kerr Store Number 8537  
Eastgate Shopping Center  
4025 Old Wake Forest Road  
Raleigh, NC 27609

Kerr Store Number 8553  
Loehman's Plaza  
1821 Hilandale Road  
Durham, NC 27705

Kerr Store Number 8929  
Crabtree Valley Mall  
4325 Glenwood Avenue  
Raleigh, NC 27612

Kerr Store Number 8538  
South Hills Mall  
1255 Buck Jones Road  
Raleigh, NC 27606

Kerr Store Number 8595  
North Hills Mall  
Six Forks Road  
Raleigh, NC 27609

Kerr Store Number 8539  
Mission Valley Shopping Center  
2233-113 Avant Ferry Road  
Raleigh, NC 27605

Kerr Store Number 8534  
Tower Shopping Center  
Newbern Avenue  
Raleigh, NC 27610

Kerr Store Number 8602  
Triangle East Centre  
134 Wakelon Street  
Zebulon, NC 27597

Kerr Store Number 8530  
Towne North Plaza  
8385 Creedmoor Road  
Raleigh, NC 27612

Kerr Store Number 8904  
Preston Corners Shopping Center  
920 High House Road  
Cary, NC 27513

Kerr Store Number 8547  
The Village Shopping Center  
613 Wellons Village  
Durham, NC 27703

#### APPENDIX I

#### ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between J.C. Penney Company, Inc. ("J.C. Penney"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6501 Legacy Drive, Plano, Texas; Thrift Drug, Inc. ("Thrift Drug"), a corporation organized, existing, and doing

business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 615 Alpha Drive, Pittsburgh, Pennsylvania; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

#### PREMISES

*Whereas*, J.C. Penney (through a wholly-owned subsidiary, Omega Acquisition Corporation) agreed to acquire Eckerd Corporation ("the Eckerd Acquisition"), pursuant to an agreement dated November 2, 1996, and J.C. Penney (through a wholly-owned subsidiary, Thrift Drug, Inc.) agreed to acquire certain assets of the Rite Aid Corporation ("the Rite Aid Acquisition"), pursuant to an agreement dated October 11, 1996, respectively (collectively "the Acquisitions"); and

*Whereas*, the Commission is now investigating the Acquisitions to determine if they would violate any of the statutes enforced by the Commission; and

*Whereas*, if the Commission accepts the Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Rite Aid Retail Assets and the Thrift Retail Assets as described in the Agreement Containing Consent Order ("Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisitions might not be possible, or might produce a less than effective remedy; and

*Whereas*, if the Commission accepts the consent order or a modified consent order, and J.C. Penney and Thrift Drug have not divested the Assets or such other assets as are specified in the consent order or in a modified consent order, in accordance with the consent order or modified order respectively, the Commission may appoint a trustee to divest the Assets and such additional assets as are identified in the consent order or in a modified consent order; and

*Whereas*, the Commission is concerned that prior to divestiture to an acquirer approved by the Commission, it may be necessary to

preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to an acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisitions; and

*Whereas*, J.C. Penney and Thrift Drug entering into this Agreement shall in no way be construed as an admission by J.C. Penney or Thrift Drug that the Acquisitions are illegal; and

*Whereas*, J.C. Penney and Thrift Drug understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

*Now, therefore*, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting periods, the Parties agree as follows:

#### TERMS OF AGREEMENT

1. J.C. Penney and Thrift Drug agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Rite Aid Acquisition or the proposed Eckerd Acquisition, J.C. Penney and Thrift Drug will be free to close the Rite Aid Acquisition after December 8, 1996, subject to the terms of the order, and the Eckerd Acquisition after December 6, 1996.

3. J.C. Penney and Thrift Drug agree that from the date this Agreement is signed until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

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

b. On the day the divestitures set out in the consent order have been completed.

4. J.C. Penney and Thrift Drug shall maintain the competitiveness of the Assets. This includes, but is not limited to, the maintaining of promotions and discount policies as well as the continuation of specific store services (*i.e.*, hours of operation and operation of specific departments).

5. Until J.C. Penney and Thrift Drug have divested the Assets or other assets pursuant to paragraphs II and III of the consent order or such assets as are specified pursuant to a modified consent order, J.C. Penney and Thrift Drug shall continue to offer those Thrift Drug customers who receive third-party pharmacy services at Thrift Drug the same type of pharmacy service at any retail drug store that constitutes a part of the Thrift Retail Assets.

6. Should the Commission seek in any proceeding to compel J.C. Penney and Thrift Drug to divest themselves of the Assets or such other assets as specified in the consent order or in a modified consent order or to seek any other injunctive or equitable relief, J.C. Penney and Thrift Drug shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisitions. J.C. Penney and Thrift Drug also waive all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to J.C. Penney or Thrift Drug and to their principal offices, J.C. Penney and Thrift Drug shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of J.C. Penney or Thrift Drug, 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 J.C. Penney or Thrift Drug relating to compliance with this Agreement; and

b. To interview officers or employees of J.C. Penney or Thrift Drug, who may have counsel present, regarding any such matters.

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

Complaint

123 F.T.C.

IN THE MATTER OF

## THE BOEING COMPANY

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-3723. Complaint, March 5, 1997--Decision, March 5, 1997*

This consent order involves the Boeing Company's acquisition of Rockwell International Corporation's aerospace and defense business and the competition in the markets for high altitude endurance unmanned air vehicles ("UAVs") and space launch vehicles. The consent order, among other things, gives Teledyne Ryan, the prime contractor of one team, the opportunity to replace Boeing on that team, thereby protecting competition in the UAVs market. The consent order also establishes a "firewall" to prevent the flow of competitively sensitive information between Boeing's team and a division of Rockwell International Corporation's aerospace and defense business that is currently providing wings to the other teams, establishes a firewall that prevents Boeing from making any space launch vehicle manufacturer's non-public information available to its launch vehicle division, and allows Boeing to use such information only in its capacity as a propulsion system provider.

*Appearances*

For the Commission: *George S. Cary, Ann Malester and Steven Bernstein.*

For the respondent: *Benjamin S. Sharp and Susan E. Foster,* Washington, D.C.

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, The Boeing Company ("Boeing"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the Aerospace and Defense Business of Rockwell International Corporation ("Rockwell"), 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. "*High Altitude Endurance Unmanned Air Vehicle*" means any unmanned aircraft designed to perform high-altitude, broad-area reconnaissance missions and manufactured for sale to the United States Department of Defense.

2. "*Tier II Plus*" or "*Global Hawk*" means the Tier II Plus High Altitude Endurance Unmanned Air Vehicle currently being developed for the Department of Defense's Advanced Research Projects Agency.

3. "*Tier III Minus*" or "*DarkStar*" means the Tier III Minus High Altitude Endurance Unmanned Air Vehicle currently being developed for the Department of Defense's Advanced Research Projects Agency.

4. "*Tier II Plus Team*" means Teledyne Ryan Aeronautical and the group of subcontractors, including Rockwell Aerospace and Defense, which are currently developing Tier II Plus.

5. "*Tier III Minus Team*" means the team comprised of Boeing and Lockheed Martin Corporation which is currently developing Tier III Minus.

6. "*Space Launch Vehicle*" means any vehicle designed to launch satellites or persons into space.

7. "*Space Launch Vehicle Propulsion System*" means any device that is used to provide propulsion to a Space Launch Vehicle.

8. "*Respondent*" means Boeing.

## II. RESPONDENT

9. Respondent is a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 7755 East Marginal Way South, Seattle, Washington.

10. Respondent is engaged in, among other things, the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles and Space Launch Vehicles.

11. 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

12. Rockwell Aerospace and Defense Business ("Rockwell Aerospace and Defense") is a division of Rockwell, a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its principal office and place of business located at 2201 Seal Beach Boulevard, Seal Beach, California.

13. Rockwell Aerospace and Defense is engaged in, among other things, the research, development, manufacture and sale of wings for High Altitude Endurance Unmanned Air Vehicles, and Space Launch Vehicle Propulsion Systems.

14. Rockwell Aerospace and Defense 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

15. On or about July 31, 1996, Boeing entered into an Agreement and Plan of Merger, whereby Boeing would acquire Rockwell Aerospace and Defense for approximately \$3.025 billion ("Acquisition").

## V. THE RELEVANT MARKETS

16. 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 High Altitude Endurance Unmanned Air Vehicles;
- b. The research, development, manufacture and sale of Space Launch Vehicles; and
- c. The research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems.

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

## VI. STRUCTURE OF THE MARKETS

18. The market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent and Rockwell are members of the only two teams which produce High Altitude Endurance Unmanned Air Vehicles.

19. Respondent, through the Acquisition, would be a member of both the Tier II Plus Team and the Tier III Minus Team.

20. The market for Space Launch Vehicle Propulsion Systems is highly concentrated as measured by the HHI or concentration ratios.

21. Respondent, through the proposed Acquisition, would be engaged in the research, development, manufacture and sale of a wide range of Space Launch Vehicles and Space Launch Vehicle Propulsion Systems.

## VII. BARRIERS TO ENTRY

22. Entry into the market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the difficulty involved in developing the technology and expertise necessary to produce High Altitude Endurance Unmanned Air Vehicles.

23. Entry into the market for the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles is not likely to occur to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the expense required to develop the technology and expertise necessary to produce High Altitude Endurance Unmanned Air Vehicles.

24. Entry into the market for the research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the difficulty involved in developing the technology and expertise necessary to produce Space Launch Vehicle Propulsion Systems.

25. Entry into the market for the research, development, manufacture and sale of Space Launch Vehicle Propulsion Systems is not likely to occur to deter or counteract the adverse competitive effects described in paragraph twenty-six because of, among other things, the expense required to develop the technology and expertise necessary to produce Space Launch Vehicle Propulsion Systems.

#### VIII. EFFECTS OF THE ACQUISITION

26. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the United States markets for High Altitude Endurance Unmanned Air Vehicles and Space Launch Vehicles in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By reducing actual, direct and substantial competition between the Tier II Plus Team and the Tier III Minus Team in the research, development, manufacture and sale of High Altitude Endurance Unmanned Air Vehicles;

b. By increasing the likelihood that the Department of Defense would be forced to pay higher prices for High Altitude Endurance Unmanned Air Vehicles;

c. By increasing the likelihood that quality and technological innovation in the High Altitude Endurance Unmanned Air Vehicle market would be reduced;

d. By allowing respondent to gain access to competitively sensitive non-public information concerning the Tier II Plus team, whereby:

(1) Actual, direct and substantial competition between the Tier II Plus Team and the Tier III Minus Team in the High Altitude Endurance Unmanned Air Vehicle market would be reduced;

(2) The likelihood that the Department of Defense would be forced to pay higher prices for High Altitude Endurance Unmanned Air Vehicles would be increased; and

(3) Quality and technical innovation in the High Altitude Endurance Unmanned Air Vehicle market would be reduced; and

e. By allowing respondent to gain access to competitively sensitive non-public information concerning other Space Launch Vehicle manufacturers, whereby:

(1) Actual competition between respondent and other Space Launch Vehicle manufacturers would be reduced; and

(2) Quality and technical innovation in the Space Launch Vehicle market would be reduced.

#### IX. VIOLATIONS CHARGED

27. The Acquisition described in paragraph fifteen constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

28. The Acquisition described in paragraph fifteen, 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 Rockwell International Corporation's Aerospace and Defense business, 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, and having duly considered the comment filed thereafter by the respondent pursuant to Section 2.34 of its Rules, and having modified the Decision and Order in certain respects, 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 The Boeing Company ("Boeing") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 7755 East Marginal Way South, Seattle, Washington.

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 "*Boeing*" means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by The Boeing Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Boeing also includes Rockwell Aerospace and Defense.

B. "*Rockwell*" means Rockwell International Corporation, a corporation organized, existing and doing business under the laws of the state of Delaware, with its office and principal place of business located at 2201 Seal Beach Boulevard, Seal Beach, California, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell International

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

C. "*Rockwell Aerospace and Defense*" means Rockwell's Aerospace and Defense businesses, including the Autonetics and Missiles Systems Division, North American Aircraft Division, North American Aircraft Modification Division, Rocketdyne Division, Space Systems Division and Rockwell's interest in United Space Alliance, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell Aerospace and Defense, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Rockwell Aerospace and Defense does not include any of the assets that are not included in the Acquisition and that will remain part of Rockwell after the Acquisition.

D. "*Acquisition*" means the acquisition of Rockwell Aerospace and Defense by Boeing.

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

F. "*Allegheny Teledyne*" means Allegheny Teledyne Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the state of Massachusetts, with its office and principal place of business located at 1000 Six PPG Place, Pittsburgh, Pennsylvania, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Allegheny Teledyne Incorporated, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

G. "*Teledyne Ryan*" means Teledyne Ryan Aeronautical, a division of Allegheny Teledyne, with its office and principal place of business located at 2701 Harbor Drive, San Diego, California, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Teledyne Ryan Aeronautical, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

H. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

I. *"Tier II Plus"* or *"Global Hawk"* means the Tier II Plus high altitude endurance unmanned air vehicle currently being developed for the United States Advanced Research Projects Agency.

J. *"Tier II Plus Wings"* means the completed and integrated wing assemblies used for Tier II Plus.

K. *"Tier II Plus Wings Special Tooling and Special Test Equipment"* means all of the special tooling and special test equipment, as the terms special tooling and special test equipment are defined in Federal Acquisition Regulations, 48 CFR ("FAR") 45.101, used in the design, development and manufacture of Tier II Plus Wings.

L. *"Tier II Plus Wings Engineering and Design Data"* means all of the engineering and design data, in both electronic and hard copy, used in the design, development and manufacture of Tier II Plus Wings.

M. *"Tier II Plus Prime Agreement"* means Agreement No. MDA972-95-3-0013 between Teledyne Ryan and the Defense Advanced Research Projects Agency and any amendments to such agreement.

N. *"Phase II Flight & System Performance Test"* means all of the flights and tests of Tier II Plus associated with Phase II of the United States Advanced Research Projects Agency's Tier II Plus program.

O. *"Tier III Minus"* or *"DarkStar"* means the Tier III Minus high altitude endurance unmanned air vehicle currently being developed for the United States Advanced Research Projects Agency.

P. *"Space Launch Vehicle"* means any vehicle designed to launch satellites or persons into space.

Q. *"Space Launch Vehicle Propulsion System"* means any device designed, developed, manufactured or sold by Rocketdyne that is used to provide propulsion to a Space Launch Vehicle.

R. *"Rockwell NAAD"* means Rockwell International Corporation's North American Aircraft Division, an entity included within Rockwell Aerospace and Defense and as part of the Acquisition, with its principal place of business at 2201 Seal Beach Boulevard, Seal Beach, California, or any other entity within or controlled by Boeing engaged in, among other things, the research, development, manufacture or sale of Tier II Plus Wings, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell NAAD, and the respective

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

S. "*Rockwell NAAD Tulsa*" means Rockwell North American Aircraft Division, Tulsa, a Rockwell NAAD facility located at 2000 North Memorial Drive, P.O. Box 582808, Tulsa, Oklahoma, or any other facility within or controlled by Boeing engaged in, among other things, the research, development, manufacture or sale of Tier II Plus Wings, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rockwell NAAD Tulsa, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

T. "*Rocketdyne*" means Rockwell International Corporation's Rocketdyne Division, an entity included within Rockwell Aerospace and Defense and as part of the Acquisition, with its principal place of business at 6633 Canoga Avenue, Canoga Park, California, or any other entity within or controlled by Boeing engaged in, among other things, the research, development, manufacture or sale of Space Launch Vehicle Propulsion Systems, and its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Rocketdyne, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

U. "*Boeing Tier III Minus Business*" means any entity within or controlled by Boeing that is engaged in, among other things, the research, development, manufacture or sale of Tier III Minus, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing Tier III Minus Business, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

V. "*Boeing Space Launch Vehicle Business*" means any entity within or controlled by Boeing that is engaged in, among other things, the research, development, manufacture or sale of Space Launch Vehicles, and its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing Space Launch Vehicle Business, and the respective

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

W. "*Non-Public Tier II Plus Information*" means any information not in the public domain received or developed by Rockwell in its capacity as a provider of Tier II Plus Wings. Non-Public Tier II Plus Information shall not include: (1) information known or disclosed to respondent, excluding Rockwell Aerospace and Defense, at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Rockwell 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 Tier II Plus Information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

X. "*Non-Public Tier III Minus Information*" means any information not in the public domain received by Boeing in its capacity as a designer, developer or manufacturer of Tier III Minus. Non-Public Tier III Minus Information shall not include: (1) information known or disclosed to Rockwell NAAD at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to Rockwell NAAD from a third party not in breach of a confidential disclosure agreement, or (4) information after six (6) years from the date of disclosure of such Non-Public Tier III Minus Information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Y. "*Boeing Non-Public Tier III Minus Information*" means any information not in the public domain developed by Boeing in its capacity as a designer, developer or manufacturer of Tier III Minus.

Boeing Non-Public Tier III Minus information shall not include: (1) information known or disclosed to Rockwell NAAD Tulsa at the time respondent signs the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to Rockwell NAAD Tulsa from a third party not in breach of a confidential disclosure agreement, or (4) information after six (6) years from the date of development of such Boeing Non-Public Tier III Minus Information by respondent.

Z. "*Non-Public Space Launch Vehicle Information*" means (1) any information not in the public domain disclosed by any Space Launch Vehicle manufacturer, other than Boeing, to Rocketdyne in its capacity as a provider of Space Launch Vehicle Propulsion Systems and (a) if written information, designated in writing by the Space Launch 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 Space Launch 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 Space Launch Vehicle manufacturer to Rocketdyne in its capacity as a provider of Space Launch Vehicle Propulsion Systems prior to the Acquisition. Non-Public Space Launch Vehicle Information shall not include: (1) information known or disclosed to respondent, excluding Rockwell Aerospace and Defense, at the time respondent signed the agreement containing consent order in this matter, (2) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, falls within the public domain through no violation of this order by respondent, (3) information that, subsequent to the time respondent signs the agreement containing consent order in this matter, becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Rockwell 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 Space Launch Vehicle Information to respondent, or such

other period as agreed to in writing by respondent and the provider of the information.

II.

*It is further ordered,* That respondent shall not hold Teledyne Ryan liable for any damages or costs resulting from the replacement of respondent as the supplier of Tier II Plus Wings.

III.

*It is further ordered,* That:

A. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall, upon request from Teledyne Ryan, deliver to business locations in the United States designated by Teledyne Ryan, and assemble, the Tier II Plus Wings Special Tooling and Special Test Equipment. Respondent shall perform its obligations under this paragraph III.A as soon as practicable after receiving such request from Teledyne Ryan, but in a timeframe not to exceed ninety (90) days from the receipt of such request, or such other time period as agreed to in writing by Teledyne Ryan. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph III.A that would not be considered allowable, as the term allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement. Nothing in this paragraph shall alter respondent's or Teledyne Ryan's rights and obligations pursuant to FAR Section 52.249-6, as incorporated in any current or future Tier II Plus Wings contract between respondent and Teledyne Ryan.

B. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall, upon request from Teledyne Ryan, deliver to business locations in the United States designated by Teledyne Ryan the Tier II Plus Wings Engineering and Design Data. Respondent shall perform its obligations under this paragraph III.B as soon as practicable after receiving such request from Teledyne Ryan, but in a timeframe not to exceed fifteen (15)

days from the receipt of such request, or such other time period as agreed to in writing by Teledyne Ryan. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph III.B that would not be considered allowable, as the term allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement.

#### IV.

*It is further ordered,* That respondent shall not assert or enforce any proprietary rights in any Tier II Plus Wings Special Tooling and Special Test Equipment or Tier II Plus Wings Engineering and Design Data delivered pursuant to paragraph III of this order.

#### V.

*It is further ordered,* That:

A. At any time prior to six (6) months of the date this order becomes final, and if respondent and Teledyne Ryan have not reached an agreement on a new contract for respondent to provide Tier II Plus Wings to Teledyne Ryan, respondent shall provide, upon request from Teledyne Ryan, such assistance to personnel designated by Teledyne Ryan as is reasonably necessary to such personnel to design and manufacture Tier II Plus Wings. Such assistance shall include, but not be limited to, consultation with employees of respondent knowledgeable in the design and manufacture of Tier II Plus Wings, and training at facilities designated by Teledyne Ryan for a period of time and in a manner sufficient to satisfy Teledyne Ryan's management that the designated personnel are appropriately trained in the design and manufacture of Tier II Plus Wings. Respondent shall convey to personnel designated by Teledyne Ryan all know-how necessary to design and manufacture Tier II Plus Wings. However, respondent shall not be required to continue providing such assistance for more than one (1) year from the date respondent begins providing such assistance, and shall not be required to provide personnel for more than the equivalent of four (4) man-years during this one (1) year period. Respondent shall not charge Teledyne Ryan for any costs associated with carrying out respondent's obligations under this paragraph V.A that would not be considered allowable, as the term

allowable is defined in FAR Section 52.216-7, under the Tier II Plus Prime Agreement.

B. Upon reasonable request from Teledyne Ryan, respondent shall provide such additional technical assistance relating to the Tier II Plus Wings to personnel designated by Teledyne Ryan as is reasonably necessary to enable personnel designated by Teledyne Ryan to complete the Phase II Flight & System Performance Test. Such assistance shall include, but not be limited to, consultation with employees of respondent knowledgeable in the design and manufacture of Tier II Plus Wings, and training at facilities designated by Teledyne Ryan for a period of time and in a manner sufficient to satisfy Teledyne Ryan's management that the designated personnel have sufficient knowledge relating to Tier II Plus Wings to be able to support fully Teledyne Ryan's efforts to complete the Phase II Flight & System Performance Test requirements. However, respondent shall not be required to continue providing such assistance after the completion of the Phase II Flight & System Performance Test. Respondent shall charge Teledyne Ryan at a rate of no more than \$90 per hour for providing such technical assistance.

## VI.

*It is further ordered, That:*

A. Respondent shall not provide, disclose or otherwise make available to the Boeing Tier III Minus Business any Non-Public Tier II Plus Information.

B. Respondent shall use any Non-Public Tier II Plus Information only in respondent's capacity as a provider of Tier II Plus Wings or technical assistance, pursuant to paragraph V of this order.

## VII.

*It is further ordered, That:*

A. Respondent shall not provide, disclose or otherwise make available to Rockwell NAAD any Non-Public Tier III Minus Information.

B. Respondent shall use any Non-Public Tier III Minus Information only in its capacity as a designer, developer or manufacturer of Tier III Minus.

## VIII.

*It is further ordered,* That respondent shall not provide, disclose or otherwise make available to Rockwell NAAD Tulsa any Boeing Non-Public Tier III Minus Information.

## IX.

*It is further ordered,* That:

A. Rocketdyne shall not, absent the prior written consent of the proprietor of Non-Public Space Launch Vehicle Information, provide, disclose or otherwise make available to Boeing Space Launch Vehicle Business any Non-Public Space Launch Vehicle Information.

B. Rocketdyne shall use any Non-Public Space Launch Vehicle Information only in its capacity as a provider of Space Launch Vehicle Propulsion Systems, absent the prior written consent of the proprietor of the Non-Public Space Launch Vehicle Information.

## X.

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

## XI.

*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.

## XII.

*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

II through X of this order. Respondent shall include in its reports information sufficient to identify all Space Launch Vehicle Manufacturers with whom respondent has entered into an agreement for the research, development, manufacture or sale of Space Launch Vehicle Propulsion Systems.

### XIII.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment, 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 respondent that may affect compliance obligations arising out of the order.

### XIV.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, 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 representative of the Commission:

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

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

### XV.

*It is further ordered,* That this order shall terminate on March 5, 2017, except as otherwise provided in this order.

## APPENDIX I

## INTERIM AGREEMENT

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

## PREMISES

*Whereas*, Boeing has proposed to acquire Rockwell International Corporation's Aerospace and Defense business; 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*, Boeing entering into this Interim Agreement shall in no way be construed as an admission by Boeing that the proposed Acquisition constitutes a violation of any statute; and

*Whereas*, Boeing 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*, Boeing 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. Boeing 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 Boeing signs the Consent Agreement.

2. Boeing 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, Teledyne Ryan Aeronautical, McDonnell Douglas Corporation and Lockheed Martin Corporation.

3. Boeing agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Boeing, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Boeing setting forth in detail the manner in which Boeing will comply with paragraphs II through X of the Consent Agreement. Boeing agrees to include in such report a detailed description and explanation of the procedures it has implemented or will implement to comply with paragraphs II through X of the order.

4. Boeing agrees that, from the date Boeing 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. Boeing 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, upon written request, and on reasonable notice, to Boeing made to its principal office, Boeing shall permit any duly authorized representative or 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 Boeing relating to compliance with this Interim Agreement; and

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

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

Complaint

123 F.T.C.

IN THE MATTER OF

PROGRESSIVE MORTGAGE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE TRUTH IN LENDING ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-3724. Complaint, March 10, 1997--Decision, March 10, 1997*

This consent order prohibits, among other things, the Ohio-based mortgage corporation and its president from misrepresenting any terms or conditions of financing, such as, the annual percentage rate and finance charges of consumer loans; the number, amount and timing of mortgage payments; and the total number of payments to repay consumer loans.

*Appearances*For the Commission: *John Mendenhall* and *Brenda Doubrava*.For the respondents: *Leonard Wolkov*, Russell, OH.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Progressive Mortgage Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, and that Sanford Cramer, individually and as an officer of Progressive Mortgage Corporation, has violated the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, issues this complaint and alleges as follows:

PARAGRAPH 1. Respondent Progressive Mortgage Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business at 5400 Transportation Boulevard, Cleveland, Ohio.

Respondent Sanford Cramer is the President of Progressive Mortgage Corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondent Progressive Mortgage Corporation has been and is now engaged in the business of offering "consumer credit" to the public and is a "creditor," as those terms are defined in the TILA and Regulation Z.

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

PAR. 4. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to include the premiums for mortgage insurance, for so long as such insurance is required, in determining the finance charge and annual percentage rate for consumer credit transactions, and, thus, has understated the annual percentage rate and finance charge in its TILA disclosures.

PAR. 5. The aforesaid practice of respondent Progressive Mortgage Corporation violates Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606 and 1638, respectively, and Sections 226.4(b)(5); 226.22; and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(b)(5); 226.22; and 226.18(d) and (e), respectively, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 6. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to disclose accurately the number, amount, and timing of payments scheduled to repay the obligation in its TILA disclosures.

PAR. 7. The aforesaid practice of respondent Progressive Mortgage Corporation violates Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 226.18(g), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 8. Respondent Progressive Mortgage Corporation, in the course and conduct of its business, on certain occasions, has failed to disclose accurately the total of payments scheduled to repay the obligation in its TILA disclosures.

PAR. 9. The aforesaid practice of respondent Progressive Mortgage Corporation violates Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 10. Respondent Sanford Cramer, in the course and conduct of his business, has provided written disclosures to customers and potential customers of Progressive Mortgage Corporation relating to the TILA that state, for mortgage loans, the annual percentage rate, the finance charge, the monthly payment amount, and the total of payments scheduled to repay the obligation.

PAR. 11. Through the use of these written disclosures, respondent Sanford Cramer has represented, directly or by implication, that the figures and amounts stated therein truthfully represent the annual percentage rate, the finance charge, the monthly payment amount, and the total of payments scheduled to repay the obligation.

PAR. 12. In truth and fact, on certain occasions, the figures and amounts contained in these written disclosures were less than the actual annual percentage rate, finance charge, monthly payment amount, and total of payments scheduled to repay the obligation. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. The aforesaid acts and practices of respondent Sanford Cramer constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents, Progressive Mortgage Corporation and Sanford Cramer, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act ("TILA") and its implementing Regulation Z, and Section 5 of The Federal Trade Commission Act ("FTC Act"); and

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

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

1. Respondent Progressive Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 5400 Transportation Boulevard, Cleveland, Ohio.

Respondent Sanford Cramer is president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above address.

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

## ORDER

### I.

*It is ordered,* That respondent, Progressive Mortgage Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, division, subsidiary or any other device, in connection with any extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to include premiums for mortgage insurance, for so long as such insurance is required, in determining the finance charge and annual percentage rate as required by Sections 106 and 107 of the TILA, 15 U.S.C. 1605 and 1606, and Sections 226.4(b)(5) and 226.22 of Regulation Z, 12 CFR 226.4(b)(5) and 226.22.

B. Failing to disclose accurately, where mortgage insurance is required, the finance charge and the annual percentage rate as

required by Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, and Section 226.4, 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22, and 226.18(d) and (e).

C. Failing to disclose accurately, where mortgage insurance is required, the number, amount, and timing of payments scheduled to repay the obligation, as required by Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 226.18(g).

D. Failing to disclose accurately, where mortgage insurance is required, the total of payments scheduled to repay the obligation, as required by Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

E. Failing to make all disclosures determined in accordance with Sections 106 and 107 of the TILA, 15 U.S.C. 1605 and 1606, and Sections 226.4 and 226.22 of Regulation Z, 12 CFR 226.4 and 226.22, in the manner, form and amount required by Sections 226.17, 226.18, 226.19, and 226.20 of Regulation Z, 12 CFR 226.17, 226.18, 226.19, and 226.20.

F. Misrepresenting any term or condition of financing for any consumer credit transaction.

## II.

*It is further ordered,* That respondent Sanford Cramer, individually and as an officer of respondent Progressive Mortgage Corporation, and his agents, representatives and employees, directly or through any corporation, division, subsidiary or any other device in connection with any extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting the annual percentage rate and the finance charge in written disclosures provided to consumers relating to the TILA.

B. Misrepresenting the number, amount, and timing of payments scheduled to repay the obligation in written disclosures provided to consumers relating to the TILA.

C. Misrepresenting the total of payments scheduled to repay the obligation in written disclosures provided to consumers relating to the TILA.

D. Misrepresenting any term or condition of financing for any consumer credit transaction.

### III.

*It is further ordered*, That for six (6) years after the date of service of this order, respondent Progressive Mortgage Corporation, its successors or assigns, and respondent Sanford Cramer, individually and as an officer of Progressive Mortgage Corporation, shall maintain and upon request make available to the Commission and its employees all records that will demonstrate compliance with the requirements of this order.

### IV.

*It is further ordered*, That respondent Progressive Mortgage Corporation, and its successors and assigns, and respondent Sanford Cramer, shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

### V.

*It is further ordered*, That respondent Progressive Mortgage Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take

place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

#### VI.

*It is further ordered,* That respondent Sanford Cramer shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, he shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include his business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of his duties and responsibilities in connection with the business or employment.

#### VII.

*It is further ordered,* That respondent Progressive Mortgage Corporation, its successors and assigns, and respondent Sanford Cramer shall, within sixty (60) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. The report shall be forwarded to the Federal Trade Commission, Enforcement Division, Washington, D.C.

#### VIII.

*It is further ordered,* That this order shall terminate on March 10, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

Interlocutory Order

123 F.T.C.

IN THE MATTER

## TRANS UNION CORPORATION

*Docket 9255. Interlocutory Order, March 12, 1997*ORDER DIRECTING GENERAL COUNSEL TO  
ENFORCE THIRD-PARTY SUBPOENA

In early November 1996, respondent Trans Union Corporation ("Trans Union") served a non-party, Experian Information Solutions Inc. ("Experian"), with a *subpoena duces tecum*. On January 24, 1997, Experian, which competes with Trans Union in providing services at issue in this case, filed a motion to quash this subpoena, which the Administrative Law Judge denied by order of February 19, 1997. On March 5, 1997, Trans Union filed a Motion for Enforcement of a Subpoena Duces Tecum Issued to Experian Information Solutions, Inc. On March 6, 1997, the Administrative Law Judge certified Trans Union's motion for enforcement of the subpoena to the Commission with a recommendation that the Commission seek enforcement.

The subpoena to Experian seeks documents falling into two categories: those relating to the source and makeup of Experian's target-marketing lists, and those relating to consent orders entered in 1991 and 1993 against Experian's predecessor, TRW. Trans Union and Experian have agreed, in a document signed on December 13, 1996, to limit the scope of the subpoena. The limitations agreed to reflect the objections and concerns later raised in Experian's Motion To Quash. After this agreement was reached, Experian produced certain documents in response to the subpoena.

The current dispute does not concern documents. The issue is whether, in further response to the subpoena, Experian will produce a representative for an oral deposition who can "authenticate any documents Experian produced in response to the Subpoena and . . . explain general background information that [is] either not contained in the documents or [is] not self-evident from the documents." Trans Union's Response to Motion To Quash at 7. Experian acknowledges that "negotiations ha[ve] broken down due to an impasse on [the] single issue . . . whether Experian voluntarily would produce a witness to testify regarding the documents requested in the Subpoena." Motion To Quash at 2.

The motion to quash takes the position that "an unrestrained oral deposition would endanger Experian's confidential business strategies and proprietary trade secrets. . . ." Motion To Quash at 2-3. For the most part, however, Experian's motion appears to be an effort to argue to the Administrative Law Judge issues that were largely resolved in negotiations with Trans Union over the scope of the subpoena. Although Trans Union has offered to meet with the deponent and Experian's counsel before conducting the deposition to discuss the scope of questioning, Experian has declined, arguing that unless Trans Union is willing to accept alternative discovery in the form of a sworn declaration or an oral deposition on written questions, it will not produce the requested representative in response to the subpoena.

The Administrative Law Judge refused to quash the subpoena, ruling that "Trans Union's refusal to accept the alternative discovery offered by Experian is not unreasonable, and its offer of a meeting before a deposition is conducted is acceptable." Order at 3. He also observed that "[s]ince Experian and Trans Union have agreed on the information which will be produced pursuant to the subpoena, there is no need to consider any arguments raised by Experian except that involving the proposed deposition." *Id.*

The Commission agrees with the ruling of the Administrative Law Judge on the motion to quash. In addition, the Commission has a strong interest in ensuring the integrity of its adjudicative process. In his certification, the Administrative Law Judge concludes that "[t]he information sought by Trans Union is relevant and Experian's refusal to comply with my order justifies Trans Union's request for court enforcement of the subpoena." *Id.* at 1. The Commission agrees that enforcement of the subpoena is warranted. The Commission notes, however, that by producing its representative in response to the subpoena, Experian, of course, would not waive its right to limit the information provided in response to questions proffered on grounds of privilege, or to request the Administrative Law Judge to issue an appropriate protective order limiting access to the information provided. Accordingly,

*It is ordered,* That the General Counsel be, and he hereby is directed promptly to take appropriate action to enforce Trans Union's subpoena to Experian.