

FEDERAL TRADE COMMISSION
DECISIONS

FINDINGS, OPINIONS AND ORDERS
JANUARY 1, 1998 TO JUNE 30, 1998

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 1998 TO JUNE 30, 1998

ROBERT PITOFSKY, *Chairman*
Took oath of office April 12, 1995.

MARY L. AZCUENAGA, *Commissioner**
Took oath of office November 27, 1984.

SHEILA F. ANTHONY, *Commissioner*
Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

* Resigned, effective June 5, 1998.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

FRANK BOMMARITO OLDSMOBILE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3774. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, the St. Louis Missouri-area automobile dealership and its officer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondents to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Lauren Steinfeld* and *David Medine*.

For the respondents: *Brian E. McGovern, McCarthy, Leonard, Kaemmerer, Owen, Lamkrin & McGovern*, Chesterfield, MO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Frank Bommarito Oldsmobile, Inc., a corporation, and Frank J. Bommarito, individually and as an officer of the corporation ("respondents"), have 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 Frank Bommarito Oldsmobile, Inc. is a Delaware corporation with its principal office or place of business at 15736 Manchester Road, Ballwin, Missouri. Respondent offers automobiles for sale or lease to consumers.

2. Respondent Frank J. Bommarito 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 Frank Bommarito Oldsmobile, Inc.

3. Respondents have 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.

4. Respondents have 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.

5. 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, 15 U.S.C. 44.

LEASE ADVERTISING

6. Respondents have disseminated or have caused to be disseminated consumer lease advertisements ("lease advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibits A through F. These advertisements contain the following statements:

A. "BRAND NEW 1995 SAFARI CONVERSION VANS. . . BOMMARITO'S PREFERRED LEASING PRICE \$399 MO. 36 MONTHS NO MONEY DOWN" [A fine print statement at the bottom of the ad states "Prices include all factory rebates."] (Exhibit A)

B. "BOMMARITO INFINITI NO MONEY DOWN SALE. . . 1995 INFINITI J-30 NO DOWN PAYMENT! \$399 PER MONTH* NO MONEY DOWN 36 MONTH LEASE 1995 INFINITI Q-45 NO DOWN PAYMENT! \$599 PER MONTH* NO MONEY DOWN 24 MONTH LEASE" (Exhibit B)

C. "OLDSMOBILE '95 CUTLASS SUPREME FOR ONLY \$269* 36 MOS. LEASE NO MONEY DOWN . . . '95 EIGHTY EIGHT FOR ONLY \$339* 36 MOS. LEASE NO MONEY DOWN"

. . . INFINITI NEW 1995 J30 NO MONEY DOWN \$449 PER MONTH 36 MONTH LEASE

[A fine print statement at the bottom of the ad states "**12,000 miles per year, acq. fee and taxes extra."] (Exhibit C)

D. "BOMMARITO MAZDA'S PRESIDENTS WEEK SALE 1995 PROTÉGÉ NO MONEY DOWN \$199 PER MONTH FOR ONLY 36 MONTHS"

1

Complaint

[A fine print statement at the bottom of the advertisement states "Protégé 36 month close end lease, includes gap insurance, excludes taxes. 1st payment and security deposit due. Activation fee required. Approved credit." (Exhibit D)

E. "1995 Q45 2 Year Lease \$599 per mo.* . . . 1995 J30 3 Year Lease \$399 per mo.*"

[A fine print statement at the bottom of the ad states "*Q45, \$2500 cap reduction, 15,000 miles per year, J30, \$2000 cap reduction, 12,xxx miles per year, personal property and luxury tax included, sales tax and acquisition fee extra." (Exhibit E)

F. Full Size \$310^{00*} Mini \$18,995^{00**} 36 Month . . ST. LOUIS' EXCLUSIVE STARCRAFT DEALER Was \$34,678, \$399^{00*} 36 Month"

[A fine print statement at the bottom of the ad states "***After rebate = \$599 Trim. Pkg. *36 Month Lease, \$2,000 Down, Cash or Trade, Includes Rebate and Acquisition Fee, 15,000 Miles Per Year." (Exhibit F)

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION OF INCEPTION FEES

7. In lease advertisements, including but not necessarily limited to Exhibits A through D, respondents have represented, expressly or by implication, that the amount stated as "down" is the total amount consumers must pay at lease inception to lease the advertised vehicles.

8. In truth and in fact, the amount stated as "down" in respondents' lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers are required to pay significant amounts at lease inception, including but not limited to one or more of the following: a downpayment, a first month's payment, security deposit, acquisition fee, and bank fee. Therefore, respondents' representation as alleged in paragraph seven was, and is, false or misleading.

9. Respondents' 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 INCEPTION FEES

10. In lease advertisements, including but not necessarily limited to Exhibits A through F, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisement, including but not limited to the monthly payment amount and/or amount stated as "down."

11. These lease advertisements do not adequately disclose additional terms pertaining to obligations at lease inception, including

but not necessarily limited to one or more of the following charges: a required downpayment, first month's payment, security deposit, acquisition fee, and bank fee. This information either does not appear at all, appears in very fine print, and/or is referenced by multiple and inconsistent asterisks making it unclear which statements are relevant to which offer.

12. These additional terms would be material to consumers in deciding whether to visit respondents' dealership and/or whether to lease an automobile from respondents. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

13. Respondents' 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).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS
COUNT III: FAILURE TO DISCLOSE REQUIRED INFORMATION
CLEARLY AND CONSPICUOUSLY

14. In lease advertisements, including but not necessarily limited to Exhibits A through F, respondents have stated a monthly payment amount, the number of required payments, and/or an amount "down."

15. These lease advertisements have failed to disclose clearly and conspicuously the following items of information required by Regulation M: 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 scheduled payments 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, in lieu of disclosure of the price, 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.

16. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

CREDIT ADVERTISING

17. Respondents have disseminated or have caused to be disseminated credit sale advertisements ("credit advertisements") for automobiles in the print media, including but not necessarily limited

1

Complaint

to the attached Exhibit F. These advertisements contain the following statements:

"BOMMARITO SMART BUY '95 Cutlass Supreme THIS IS NOT A LEASE 5.8% A.P.R. WITH APPROVED CREDIT FOR ONLY \$275* 36 MOS. NO MONEY DOWN . . . BOMMARITO SMART BUY '95 EIGHTY EIGHT THIS IS NOT A LEASE 4.8% A.P.R. WITH APPROVED CREDIT FOR ONLY \$315* 36 MOS. NO MONEY DOWN [A fine print statement at the bottom of the ad states "***After rebate = \$599 Trim Pkg. *36 Month Lease, \$2,000 Down, Cash or Trade, Includes Rebate and Acquisition Fee, 15,000 Miles Per Year."] (Exhibit F)

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT IV: MISREPRESENTATION OF BALLOON PAYMENTS

18. In credit advertisements, including but not necessarily limited to Exhibit F, respondents have represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated, including but not necessarily limited to the monthly payment amount, APR, and amount stated as "down."

19. In truth and in fact, consumers cannot buy the advertised vehicles at the terms prominently stated in the advertisements. Consumers must also satisfy a final balloon payment obligation of several thousand dollars to purchase the advertised vehicles. Therefore, respondents' representation as alleged in paragraph eighteen was, and is, false or misleading.

20. Respondents' 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).

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS
COUNT V: FAILURE TO DISCLOSE REQUIRED INFORMATION

21. In credit advertisements, including but not necessarily limited to Exhibit F, respondents have stated a monthly payment amount and/or an amount "down" as terms for financing the purchase of the advertised vehicles.

22. These advertisements have failed to disclose, as required by Regulation Z, the terms of repayment, including but not limited to the existence and amount of the balloon payment.

23. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

Commissioner Thompson and Commissioner Swindle not participating.

EXHIBIT A

Bommarito Exhibit A

**BRAND NEW
1995 SAFARI CONVERSION VANS
ALL NEW STYLING**



- XT LENGTH
- POWER WINDOWS & LOCKS
- TILT
- CRUISE
- DUTCH DOORS
- AIR CONDITIONING
- STEREO
- CUSTOM
- 2-TONE PAINT
- FIBERGLASS
BOARDS
- SPECIAL-BUTTON
TUFTED SEATS
- ALL NEW FRONT END STYLING
- OVERHEAD LIGHTING & MOOD LIGHTING
AND MUCH, MUCH MORE!

**OVER 50
TO CHOOSE FROM**

BOMMARITO'S PREFERRED LEASING PRICE

\$399 **36 MONTHS** **MO.**

NO MONEY DOWN

FRANK BOMMARITO
GMC TRUCKS & VANS

Manchester at Clarkson
Seven Miles West of I-270
391-7200

Complaint

EXHIBIT B

Bommarito Exhibit B

BOMMARITO INFINITI NO MONEY DOWN SALE

 <p>1994 INFINITI G-20</p> <p>ORIGINAL LIST PRICE \$25,000</p> <p>\$18,495</p> <p>10 TO CHOOSE FROM</p> <p><small>AUTOMATIC, LEATHER, SUNROOF, DUAL AIR BAGS, ANTILOCK BRAKES, V-6, POWER, BALANCE OF 4 YEAR, 80,000 MILE WARRANTY.</small></p>	 <p>1995 INFINITI J-30</p> <p>NO DOWN PAYMENT!</p> <p>\$399</p> <p>36 MONTH LEASE</p> <p><small>AUTOMATIC, TRANSMISSION, AIR CONDITIONING, DUAL AIR BAGS, SUNROOF, LEATHER, REMOTE ENTRY SECURITY SYSTEM, ANTILOCK BRAKES, CD DISC PLAYER, & HEATED SEATS</small></p>	 <p>1995 INFINITI Q-45</p> <p>NO DOWN PAYMENT!</p> <p>\$599</p> <p>24 MONTH LEASE</p> <p><small>DUAL AIR BAGS, AUTOMATIC TRANSMISSION, AIR CONDITIONING, LEATHER, SUNROOF, REMOTE ENTRY SECURITY SYSTEM, ANTILOCK BRAKES, PLUS MUCH MORE!</small></p>
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FREE LOANER CARS

NO MONEY DOWN PLAN

Frank Bommarito Infiniti 391-9400

MANCHESTER AT CLARKSON (7 miles west of I-270) CLARKSON ROAD NOW OPEN!

EXHIBIT C

July is hot at St. Louis' largest automotive center. Over 500 cars and trucks in stock!

SIZZLIN' SUMMER SAVINGS!

OLDSMOBILE

'95 CUTLASS SUPREME



FOR ONLY \$269*

36 MOS. LEASE

NO MONEY DOWN

WITH ALL THESE FEATURES

- 3100 - V6
- AIR COND.
- PWR. WINDOWS
- PWR. LOCKS
- TILT WHEEL
- CRUISE CONTROL
- ABS BRAKES
- AIR BAG
- STEREO CASSETTE
- REAR DEFOGGER
- BUCKET SEATS
- CONSOLE

'95 EIGHTY EIGHT



FOR ONLY \$339*

36 MOS. LEASE

NO MONEY DOWN

WITH ALL THESE FEATURES

- PWR. LOCKS
- PWR. TRUNK
- PWR. WINDOWS
- PWR. ANTENNA
- 2800 - V6
- STEREO CASSETTE
- ALUMINUM WHEELS
- ABS BRAKES
- CRUISE CONTROL
- DUAL AIR BAGS
- PWR. DRIVERS SEAT

2 LOCATIONS TO SERVE YOU

ELLISVILLE 391-7200 ST. PETERS 928-2300

GMC TRUCK & VAN OUTLET

MINI CONVERSION VANS YOUR CHOICE SALE FULL SIZE CONVERSION VANS



\$18,995*

WE HAVE 16 1995 JIMMY'S IN STOCK. READY TO DELIVER!

COBRA



\$24,995

DELIVERED - NO ADDED COSTS

ELLISVILLE 391-7200

1996 I30



\$26,599

Delivered

INFINITI

1995 J30



\$449

36 MONTH LEASE

1995 G20's



\$17,795

Delivered

PRE-OWNED CENTER ELLISVILLE 391-9400

'88 MAZDA PROTEGE LE \$11,995	'88 TOYOTA TERCEL \$13,995	'88 JEEP CRUISER LIMITED \$16,995	'88 HONDA ACCORD \$18,995	'91 CHEVY COVALETS \$15,995	'91 OLDS INTRIGUE \$12,995	'87 CADILLAC \$14,995	'88 OLDS CHEVY \$16,495	'88 OLDS CHEVY \$15,995	'88 OLDS CHEVY \$10,995	'88 OLDS CHEVY \$15,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995
'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995	'88 OLDS CHEVY \$11,995

OVER 150 USED CARS, TRUCKS & VANS

BOMMARITO

AUTOMOTIVE GROUP

ELLISVILLE USED CARS
15735 MANCHESTER RD.
ELLISVILLE
391-7200

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Complaint

EXHIBIT D

Bommarito Exhibit D

BOMMARITO MAZDA'S
Auto Show
Savings Jamboree!

1995 PROTEGE

DX CONV. GROUP
 AIR CONDITIONING
 AM/FM CASSETTE
 FLOOR MATS
 DUAL AIR BAGS
 REAR DEFROSTER
 TILT WHEEL
 RECLINING
 BUCKET SEATS



\$199 PER MONTH FOR ONLY 36 MONTHS

NO MONEY DOWN

1995 MIATA

1000 REBATE



AIR CONDITIONING, AM/FM CASSETTE, FLOOR MATS, STARTING AT

\$199 PER MONTH FOR ONLY 26 MONTHS

1994 B-3000 SE CAB PLUS

IN STOCK



AIR COND., FLOOR MATS, JUMP SEATS, CASSETTE, P-STEERING, BUCKET SEATS, REBATE, STARTING AT

\$12,795

BOMMARITO MAZDA

ELLISVILLE Manchester at Clarkson
391-0073

ST. PETERS I-70 & Cave Springs
928-2300

EXHIBIT E

Bommarito Exhibit E

Bommarito Infiniti's
NEW YEAR SALES EXTRAVAGANZA!
 Highest Customer Satisfaction Index
 In St. Louis For 1994.
 Come In And Experience The
**BEST LEASE DEALS
 IN THE WORLD!**

MSRP \$52,850 **1995 Q45**

 2 Year Lease **\$599** per mo.

MSRP \$39,000 **1995 J30**

 3 Year Lease **\$399** per mo.
 INCREDIBLE SAVINGS ON
 REMAINING 1994 J30'S AVAILABLE

MSRP \$23,325 **1995 G20**

 Purchase For As Low As **\$18,565**

*Q45, \$2500 cap reduction, 15,000 miles per year. J30, \$2000 cap reduction, 12,000 miles per year. Personal property and luxury tax included, sales tax and acquisition fee extra.

 *Frank Bommarito Infiniti*
 Manchester at Clarkson, 7 miles west of I-270 **391-9400** CLARKSON ROAD NOW OPEN

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 the respondents with violation of the Federal Trade Commission Act, the Consumer Leasing Act and its implementing Regulation M, and the Truth in Lending Act and its implementing Regulation Z; 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 the 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 Regulations, 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 Frank Bommarito Oldsmobile, Inc. is a Delaware corporation with its principal office or place of business at 15736 Manchester Road, Ballwin, Missouri.

2. Respondent Frank J. Bommarito is an officer of the corporate respondent. His principal office or place of business is the same as that of Frank Bommarito Oldsmobile, Inc.

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.

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Decision and Order

ORDER

DEFINITIONS

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

1. "*Clearly and conspicuously*" shall mean as follows:

a. In a television or video 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 print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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.

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

2. "*Equal prominence*" shall mean as follows:

a. In a television or video advertisement, the video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. The audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

b. In a print advertisement, the disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

c. In a radio advertisement, the disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

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

3. "*Total amount due at lease inception*" 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.

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

5. Unless otherwise specified, "*respondents*" shall mean Frank Bommarito Oldsmobile, Inc., a corporation, its successors and assigns and its officers; Frank J. Bommarito, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the costs of leasing a vehicle, including but not necessarily limited to the total amount due at lease inception.

B. State any amount due at lease inception (or that no such amount is required), except for the statement of a periodic payment, unless the advertisement also states with equal prominence the total amount due at lease inception.

C. State the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease unless all of the following items are disclosed, clearly and conspicuously, as required by Regulation M, as amended:

- (1) That the transaction advertised is a lease;
- (2) 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;
- (3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;
- (4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method

of determining the price may be substituted for disclosure of the price); and

(5) 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 and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondents may comply with the requirements of this subparagraph by utilizing Section 184(a) of the Consumer Leasing Act ("CLA"), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a))("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (October 7, 1996) and 62 Fed. Reg. 15364, 15368 (Apr. 1, 1997) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), 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, 3009-473 (Sept. 30, 1996)(to be codified at 15 U.S.C. 1667c(c))("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

D. Fail to comply in any other respect with Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended. Respondents may comply with the requirements of this subparagraph regarding Regulation M by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) and 62 Fed. Reg. 15364 (Apr. 1, 1997) (to be codified at 12 CFR 213), as amended.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, 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 terms of financing a vehicle, including but not necessarily limited to the amount of any balloon payment.

B. State the amount of any payment or the amount or percentage of any downpayment or amount "down" in any advertisement unless respondents state the amount of any final balloon payment 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 payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c), as amended, as follows:

1. The amount or percentage of the downpayment;
2. The terms of repayment, including but not necessarily limited to the amount of any balloon payment; and
3. The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

D. Fail to comply in any other respect with Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended.

III.

It is further ordered, That respondent Bommarito Oldsmobile, Inc., and its successors and assigns, and respondent Frank J. Bommarito 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 all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondent Bommarito Oldsmobile, Inc., and its successors and assigns, and respondent Frank J. Bommarito 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 such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Frank Bommarito Oldsmobile, 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 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.

VI.

It is further ordered, That respondent Frank J. Bommarito, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. 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.

VII.

It is further ordered, That respondent Bommarito Oldsmobile, Inc., and its successors and assigns, and respondent Frank J. Bommarito 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.

VIII.

This order will terminate on January 5, 2018, 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:

1

Decision and Order

- 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

ASHLAND, INC.

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

Docket C-3775. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, the Kentucky-based manufacturer and advertiser of the Valvoline Engine Treatment product from making unsubstantiated claims about the performance or attributes of any engine treatment in the future and from misrepresenting tests or studies used to support its claims.

Appearances

For the Commission: *Jonathan Cowen, Robert Frisby, Mary Engle and Elaine Kolish.*

For the respondent: *Alan J. Hruska, Cravath, Swaine & Moore, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Ashland, Inc., 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 Ashland, Inc., is a Kentucky corporation, with its office and principal place of business located at 1000 Ashland Drive, Russell, KY.

PAR. 2. Respondent has manufactured, advertised, promoted, offered for sale, sold and distributed Valvoline TM8 Engine Treatment ("TM8"), an aftermarket motor oil additive or engine treatment containing various chemicals, including Teflon brand polytetrafluoroethylene ("Teflon"), blended in a fully formulated motor oil.

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 TM8, including, but not necessarily

limited to, the attached Exhibits A-F. These advertisements contain the following statements and visual depictions:

A. A television advertisement for TM8:

Video: Visual depiction of TM8 coating internal engine parts.

Announcer: TM8 coats moving parts with eight friction-fighting ingredients including teflon. (Exhibit A)

B. A radio advertisement for TM8:

Over time, stop and go driving creates deposits that rob your engine of performance, and shorten its life. That's why there is TM8 with teflon, a new engine treatment from Valvoline. TM8 reduces engine wear by coating moving parts with eight friction fighting ingredients. (Exhibit B)

C. A magazine advertisement for TM8:

Engines don't die from old age. They wear out. And in terms of wear, the most grueling kind of driving is stop-and-go driving.... That's why there's TM8, a new engine treatment with Teflon from Valvoline. TM8's 8 friction-fighting ingredients chemically bond to moving parts, protecting your engine even at start-up. In fact, under high operating temperatures, motor oil treated with TM8 offers twice the protection. (Exhibit C)

D. A TM8 coupon leaflet:

[T]here is something you can do to reduce wear and tear on your engine: Add a quart of TM8 Engine Treatment during your next oil change.

CAMSHAFT BEARING WEAR

[Chart]

REDUCE WEAR BY UP TO 75%. TM8 helps protect your car's vital engine parts from the demands of "Stop and Go" driving, reducing camshaft bearing wear by as much as 75 percent compared to conventional oil.

MAIN BEARING WEAR WEIGHT LOSS (AVERAGE)

[Chart]

REDUCE WEAR BY UP TO 75%. TM8 protects engines during "Stop and Go" driving, reducing main bearing wear by as much as 75 percent compared to conventional oil. (Exhibit D)

E. Valvoline Web page on the Internet:

TM8 is a blend of eight scientifically formulated components - including DuPont's TEFLON fluoroadditive - that chemically bond to engine surfaces, reducing engine friction and wear....

"We've found scientific evidence in laboratory experiments and in a variety of engines that TM8 provides significant additional protection."

Main Bearing Wear Weight Loss (Average)

[Chart]

REDUCE WEAR BY UP TO 75%.

Camshaft Bearing Wear

[Chart]

REDUCE WEAR BY UP TO 75%....

We spent a great deal of time testing the existing products and experimenting with our own formulations to determine what worked and what didn't. Through extensive testing, we developed TM8. Our research shows that TM8:

* protects the engine during "Stop and Go" driving

* gives engine oil up to twice the protection in high temperature conditions

- * improves fuel economy
 - * protects engine at start-up, especially at low temperatures
- TM8 is designed to be used at least once every 50,000 miles. For optimum results, an engine may be re-treated with TM-8 once a year. (Exhibit E)

F. TM8 product packaging:

TM8 ENGINE TREATMENT WITH TEFLON® Fluoroadditive
TREATS THE ENGINE, NOT THE OIL

- * Protects engine during "Stop and Go" driving
- * Gives engine oil up to twice the protection in high temperature conditions
- * Improves fuel economy
- * Protects engine at start-up, especially at low temperatures
- * Compatible with all motor oils

A blend of eight scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear.

4. Treat your engine with TM-8 Engine Treatment at least every 50,000 miles. For optimal results, re-treat your engine with TM-8 Engine Treatment once a year. (Exhibit F)

PAR. 5. Through the use of the statements and visual 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-F, respondent has represented, directly or by implication, that:

- A. TM8 bonds Teflon to engine parts.
- B. Compared to motor oil alone, TM8:

1. Reduces engine wear
2. Reduces camshaft bearing wear by up to 75%.
3. Reduces main bearing wear by up to 75%.
4. Under high temperature conditions experienced by engines, provides twice as much wear protection.
5. Extends the duration of engine life.
6. Improves fuel economy.

- C. One treatment of TM8 lasts for 50,000 miles.

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-F, 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 paragraphs 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 visual depictions contained in the advertisements and promotional materials referred to in paragraph four, including, but not necessarily limited to, the advertisement attached as Exhibit E, respondent has represented, directly or by implication, that tests prove that, compared to motor oil alone, TM8:

- A. Reduces camshaft bearing wear by up to 75%.
- B. Reduces main bearing wear by up to 75%.
- C. Under high temperature conditions experienced by engines, provides twice as much wear protection.
- D. Improves fuel economy.

PAR. 9. In truth and in fact, tests do not prove that, compared to motor oil alone, TM8:

- A. Reduces camshaft bearing wear by up to 75%.
- B. Reduces main bearing wear by up to 75%.
- C. Under high temperature conditions experienced by engines, provides twice as much wear protection.
- D. Improves fuel economy.

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

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

EXHIBIT B

Radio Copy

Bozell Worldwide, Inc.
Advertising
40 West 23rd Street
New York, New York 10010-5201
212-727-5000

Date **September 7, 1995** Client **Valvoline** Job number _____
 Title & length **TM8 "Traffic Report" :50/:10** Product _____
 Commercial number _____ As produced date _____

Its, Its, moving like molasses out there...

Rubbernecking is heavy around the parkway...

There's an accident right where 295 meets the tunnel...

There's a good reason so many cars today have cellular phones, stereos that can play 12 CD's and even fax machines. People are spending more and more time stuck in traffic, and while stop and go driving is hard on you, it's even harder on your engine. Over time, stop and go driving creates deposits that rob your engine of performance, and shorten its life. That's why there is TM8 with teflon, a new engine treatment from Valvoline. TM8 reduces engine wear by coating moving parts with eight friction fighting ingredients. Eventually you'll be able to put moments like this behind you. With TM8, your engine can too.

TM8 from Valvoline. Because driving is more stop than go.

EXHIBIT C



They can drive your engine
to an early grave.



Engines don't die from old age. They wear out. And in terms of wear, the most grueling kind of driving is stop-and-go driving. • It's so severe it creates deposits inside your engine that can cause wear and friction, robbing your engine of performance and shortening its life. • That's why there's TMB, a new engine treatment with Teflon from Valvoline. TMB's 8 friction-fighting ingredients chemically bond to moving parts, protecting your engine even at start-up. In fact, under high operating temperatures, motor oil treated with TMB offers twice the protection. • And that's about as far as you can get from an early grave.



Because driving is more stop than go.

Another high-performance product from The Valvoline Company
A Division of Ashland Inc. © 1995



Ex C

TMS Insert / Coupon 2/27/96 4:04 PM Page 1

PROTECTING ENGINES

To Our Business

ON YOUR NEXT
PURCHASE OF
TMS[®] ENGINE
TREATMENT
SAVE
\$3.00



\$3.00 OFF

SAVE \$3.00 ON YOUR
NEXT PURCHASE OF
TMS[®] ENGINE
TREATMENT



THIS COUPON IS GOOD FOR \$3.00 OFF
NOT VALID ON PURCHASES BEFORE
JUNE 1, 1996 OR AFTER AUGUST 31, 1996

Complaint

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EXHIBIT D

TM8 Insert / Coupon 2/27/96 4:04 PM Page 2

Protecting Engines Is Our Business

"Stop and Go" driving takes a toll on more than your patience; it can rob your car's engine of performance and shorten its life. Although you can't do much about the kind of driving you do every day, there is something you can do to reduce wear and tear on your engine: Add a quart of TM8™ Engine Treatment during your next oil change.

TM8 Engine Treatment from Valvoline is a blend of eight high-tech, scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear. Using TM8 Engine Treatment can help reduce the engine wear associated with "Stop and Go" driving.

While it's protecting your engine, TM8 can also improve your vehicle's fuel economy. Laboratory tests show that TM8 in conventional motor oil offered improved fuel economy, exceeding the American Petroleum Institute's ECI (Energy Conserving II) standards.

CAMSHAFT BEARING WEAR



CONVENTIONAL OIL
CONVENTIONAL OIL AND TM8

TM8 helps protect your car's vital engine parts from the demands of "Stop and Go" driving, reducing camshaft bearing wear by as much as 75 percent compared to conventional oil.

MAIN BEARING WEAR

WEAR LOSS (AVERAGE)



CONVENTIONAL OIL
CONVENTIONAL OIL AND TM8

TM8 protects engines during "Stop and Go" driving, reducing main bearing wear by as much as 75 percent compared to conventional oil.

This offer expires August 31, 1996

To receive your \$3.00 rebate by mail:

1. Buy 1 quart of TM8™ Engine Treatment.
2. Mail this required original certificate, UPC code from TM8 Engine Treatment package, and original dated store identified sales receipt indicating purchase of TM8 between June 1, 1996 and August 31, 1996 to:
\$3.00 TM8 Rebate
P.O. Box 4058
Young America, MN 55558-4058

3. And receive a \$3.00 check by mail.

Rebate requests must be received by September 15, 1996. Limit of one rebate per household, address or organization. Rebate requests must be made on this special order form and may not mechanically reproduced. Trading of proof-of-purchase is strictly prohibited. Requests from P.O. Boxes will not be honored. Use of fictitious names, multiple addresses, or P.O. Boxes to obtain additional rebates is fraud and is in violation of Federal law, and may result in prosecution and a term of imprisonment, fine, or both. Offer void where prohibited.

taxed or otherwise restricted by law. Please allow eight weeks for shipment of your rebate check.

This coupon cannot be used in conjunction with any other Valvoline offer. Materials become the property of The Valvoline Company, a division of Ashland Inc.

(Please print, no address labels accepted)

Name _____

Address _____ Apt. # _____

City _____ State _____ Zip _____

Complaint

EXHIBIT E

Featured Product: TM8

<http://www.valvoline.com/lube/tm8/>



TM8 Engine Treatment
 Because driving is more stop and go.



There's good reason so many cars today have cellular phones, stereos that can play 12 CDs, and even fax machines. People are spending more and more time stuck in traffic.

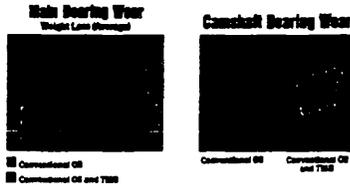
And while stop and go driving is hard on you, it's even harder on your engine. Over time, stop-and-go driving creates deposits that rob your engine of performance and dramatically shorten its life.



Each Year, *Lubricants World* presents its Outstanding Products Awards to recognize advancements that benefit not only the lubricants field but also society in general. Valvoline is proud to receive a 1996 Outstanding Products Award for its TM8 engine treatment.

That's why Valvoline developed TM8 engine treatment. TM8 is a blend of eight scientifically formulated components - including DuPont's TEFLON fluoroaditive - that chemically bond to critical engine surfaces, reducing engine friction and wear.

"TM8 is a product that works," said Fran Lockwood, Ph.D., Valvoline's vice president of technology and product development. "Our customers have requested that we produce an engine treatment for a long time, but we weren't convinced that they help engines perform better. We've found scientific evidence in laboratory experiments and in a variety of engines that TM8 provides significant additional protection. Our tests showed that when treated with TM8, conventional oil formed a thicker film between moving parts and worked at a broader range of temperatures, both hot and cold."



Recommended for use every 50,000 miles. TM8 protects engines during both stop-and-go and highway driving. Its patent-pending formulation delivers the following attributes:

Complaint

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EXHIBIT E

Featured Product: TM8

<http://www.valvoline.com/tube/tm8/>

- Gives engine oil up to twice the protection in high temperature conditions
- Protects engines at start-up, especially at low temperatures
- Improves fuel economy
- Protects against thermal breakdown

Learn even more about TM8 by reading our special question and answer section.

Get \$3.00 off on TM8

Check out the following magazines for a special TM8 coupon offer:

Car & Driver	4 wheel & Off
Road & Track	Road
Car Craft	Field & Stream
Hot Rod	Popular
Sport Truck	Mechanics
	Sport

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Complaint

EXHIBIT E

TM8 Q&A

http://www.valvoline.com/tube/tm8/tm8_qa.html

TM8 Q&A

Q. Why did Valvoline decide to become the first motor oil marketer to develop its own engine treatment?

Valvoline customers have been asking us to manufacture an engine treatment product for years. They knew that because of Valvoline's reputation for developing superior motor oils, a Valvoline engine treatment product would be a big hit with consumers.

We took a very hard look at the category and determined that there was a need for a high-quality engine treatment product, one that works -- a product that has been fully tested in standard ASTM engine tests, as well as in more strenuous experimental engine tests. And that's why we developed TM8.

Q. What was learned during Valvoline's testing of engine treatment products?

We spent a great deal of time testing the existing products and experimenting with our own formulations to determine what worked and what didn't. Through extensive testing, we developed TM8. Our research shows that TM8:

- protects the engine during "Stop and Go" driving
- gives engine oil up to twice the protection in high temperature conditions
- improves fuel economy
- protects engine at startup, especially at low temperatures

Q. Who should consider using TM8 Engine Treatment?

All of our oils -- including Valvoline® All-Climate®, DuraBlend® and High Performance Synthetic -- are of the highest quality and do not require additives. However, TM8 is designed for motorists looking for the most protection possible.

Q. What's the difference between TM8 and Pyroil® Oil Treatment?

TM8 treats the engine. It contains a synergistic combination of additives that form protective films over an unusually broad temperature range. This helps in start-up and stop-and-go (cold) conditions, as well as in highway (hot) conditions. More specifically, TM8 is a blend of eight scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear.

Pyroil Oil Treatment is a formula of carefully blended viscosity index improvers designed to reduce oil thinning at high engine temperatures.

Q. How often should TM8 be used?

Complaint

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EXHIBIT E

TM8 Q&A

http://www.valvoline.com/tube/tm8/tm8_qa.htm

TM8 is designed to be used at least once every 30,000 miles. For optimum results, an engine may be re-treated with TM-8 once a year.

Q. Can TM8 be used in diesel, marine, V8, V6 and V4 engines?

TM8 may be used in V-8, V-6 and V-4 engines. TM-8 is not designed to be used in diesel or marine engines or in automatic transmissions, gear boxes or two-stroke engines.

Q. Will using TM8 void a new car's warranty?

TM8 will not void new car warranties and is safe for use in new or rebuilt engines during the break-in period.

Q. How much TM8 should be used?

In 4-quart capacity engines, substitute one quart of TM8 for one quart of motor oil. For larger or smaller engines, use mixtures of approximately 25 percent TM-8 and 75 percent motor oil.

Q. Is TM8 compatible with motor oils other than Valvoline?

Yes. TM8, with Valvoline® High Performance Synthetic as its carrier oil, gives optimum performance when added to Valvoline All-Climate, DuraBlend or High Performance Synthetic and has been shown to significantly enhance performance when added to other leading motor oils. TM8 is compatible with other motor oils and improves low-temperature performance of conventional motor oils.

Q. Will any of TM8's scientifically formulated components be removed by the oil filter?

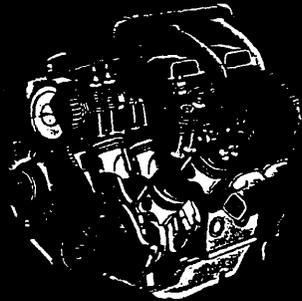
No. None of TM8's components will be removed by the oil filter during normal engine operation.

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EXHIBIT F

WITH TEFLON[®]
Fluoroadditive

ENGINE TREATMENT



TREATS THE ENGINE, NOT THE OIL

- Protects engine during "Stop and Go" driving
- Gives engine oil up to twice the protection in high temperature conditions
- Improves fuel economy
- Protects engine at startup, especially at low temperatures
- Compatible with all motor oils

A blend of eight scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear.



NET 32 FL. OZ. (1 QT) 946mL

ENGINE TREATMENT

Next Generation in Engine Treatments Treats The Engine Not The Oil

TM-8 Engine Treatment moves engine performance and protection a generation ahead with its patent pending blend of eight scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear.

Serious Results

Just add one quart of TM-8, the next generation engine treatment, to an oil change of your favorite motor oil. TM-8 will:

- Protect engine during "Stop and Go" driving.
- Gives engine oil up to twice the protection in high temperature conditions.
- Improve fuel economy.
- Protect engine at startup, especially at low temperatures.
- Compatible with all motor oils.

TEFLON[®] is a registered trademark of DuPont



Valvoline Car Care Products
Division of Ashland, Inc.
Lexington, KY 40509

Part No. TM8-32
Made in USA ©1995

2-2-F-1

EXHIBIT F

ENGINE TREATMENT

WITH TEFLON[®]
Fluoroadditive

ENGINE TREATMENT



TREATS THE ENGINE, NOT THE OIL

- Protects engine during "Stop and Go" driving
- Gives engine oil up to twice the protection in high temperature conditions
- Improves fuel economy
- Protects engine at startup, especially at low temperatures
- Compatible with all motor oils

A blend of eight scientifically formulated components that chemically bond to critical engine surfaces, reducing friction and engine wear.



NET 32 FL. OZ. (1 QT) 946mL

DIRECTIONS

1. Pour 1/2 pint (16 oz.) of TFL-8 Engine Treatment into the oil filler neck of your engine. For larger engines, use 1 pint (32 oz.) of TFL-8 Engine Treatment. For smaller engines, use 1/4 pint (8 oz.) of TFL-8 Engine Treatment.

2. Run the motor 5 minutes at 1500 RPM. This will help the TFL-8 Engine Treatment bond to the critical engine surfaces.

3. Repeat the procedure in TFL-8 Engine Treatment every 5000 miles. For maximum protection, repeat the procedure in TFL-8 Engine Treatment every 2500 miles.

TFL-8 is compatible with all motor oils.
TFL-8 will not void new car warranties and is safe for use in new or rebuilt engines during the break-in period.

CAUTION: DO NOT use in engines with a compression ratio of 10:1 or higher. Do not use in engines with a compression ratio of 10:1 or higher.

DISPOSAL INFORMATION: TFL-8 Engine Treatment is a petroleum-based product. Do not pour it down the drain or into the ground. It should be disposed of in a proper manner.

KEEP OUT OF THE REACH OF CHILDREN.
CONTAINS ...
AVOID EYES. ...
IF SWALLOWED ...

24 HOUR EMERGENCY NUMBER: 1-800-274-5263

TEFLON is a registered trademark of DuPont.

Valvoline Car Care Products
Division of Ashland Inc.
Lexington, KY 40509

Part No. TFL-8 92
Made in USA 1993

Ex =

DECISION AND ORDER

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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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 Ashland, Inc., is a Kentucky corporation, with its office and principal place of business located at 1000 Ashland Drive, Russell, KY.
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:

"Engine treatment" shall mean packaged chemical ingredients sold to consumers as a supplement to fully-formulated motor oil in a vehicle's engine and as having the capacity to affect the engine or the engine's performance even after a subsequent oil change.

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

I.

It is ordered, That respondent Ashland, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of Valvoline TM8 Engine Treatment or any other engine treatment, 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:

1. That such product bonds polytetrafluoroethylene, Teflon, or any other substance to engine parts;
2. That, compared to motor oil alone, such product:
 - a) Reduces engine wear.
 - b) Reduces camshaft bearing wear by up to 75%, or by any other amount.
 - c) Reduces main bearing wear by up to 75%, or by any other amount.
 - d) Under high temperature conditions experienced by engines, provides twice as much, or any other incremental degree, of wear protection.
 - e) Extends the duration of engine life.
 - f) Improves fuel economy;
3. That one or any other number of treatments of such product lasts for 50,000 or any other number of miles; or

4. Regarding the performance or attributes 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 the representation.

B. Misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

II.

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

A. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;

B. All materials that were relied upon to substantiate any representation covered by this order; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradicts, qualifies, or calls into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers or governmental entities.

III.

It is further ordered, That respondent, its successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the 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.

IV.

It is further ordered, That respondent, its successors and assigns, shall forthwith 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 and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, and shall obtain from each such person or entity a signed statement acknowledging receipt of the order.

V.

It is further ordered, That this order will terminate on January 5, 2018, 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 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.

VI.

It is further ordered, That respondent, its successors and assigns, shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF
TOYOTA MOTOR SALES, U.S.A., INC.

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

Docket C-3776. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, the California-based automobile manufacturer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondent to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Barry Cutler, Baker & Hostetler, Washington, D.C. and Barbara Arnold, in-house counsel, Torrance, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Toyota Motor Sales, U.S.A., Inc., a corporation ("respondent" or "Toyota"), 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 Toyota Motor Sales, U.S.A., Inc. is a California corporation with its principal office or place of business at 19001 South Western Avenue, 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 Toyota vehicles, including but not necessarily limited to the attached Toyota Exhibits A - C. Toyota Exhibits A and B are television lease advertisements (attached hereto in video and storyboard format). Toyota Exhibit C is a direct mail advertisement. These advertisements contain the following statements:

A. [Audio:] "... And the car that's become the gold standard can now be leased for as little as \$229 a month, which includes automatic transmission, air conditioning, power windows and door locks and more. The new 1995 Toyota Camry lease, starting at just \$229 a month. So low for a car that aims so high."

[Video:] "Camry Leases Start At \$229/A MO.

First Month's Payment And \$275 Refundable Security Deposit Also Due At Signing."

[The advertisement contains the following lease disclosure at the bottom of the screen in light-colored fine print superimposed on a background of similar shade and accompanied by background sounds and images:]

"95 CAMRY DX, 4-SPD. AT. CLOSED-END LEASE. \$2,354 DUE AT SIGNING. \$16,003 CAPITALIZED COST BASED ON \$1850 DOWN AND DEALER PARTICIPATION...

TAXES, LICENSE, TITLE, INSURANCE, OPTIONAL AND REGIONALLY REQUIRED EQUIP. AND DEALER CHARGES EXTRA. LESSEE PAYS MAINTENANCE, EXCESS WEAR & TEAR, 10c MI. OVER 15,000 YR. LEASE-END PURCHASE OPTION \$11,097. DISPOSITION FEE, NOT TO EXCEED \$150, MAY BE DUE AT LEASE END...

...95 CAMRY LE V6 SHOWN WITH OPTIONAL ALLOW WHEELS AT ADDITIONAL COST."

[The fine print is displayed in blocks on three screens of at least three lines, and each block appearing for approximately three seconds.] (Toyota Exhibit A).

B. [Audio:] [Street Noise. Ballroom Dance Music.]

"You're invited to the 16th Annual Toyotathon featuring Camry starting at \$16,418. And special \$239 lease program on the newly restyled and refined Camry Sedan or Camry Coupe."

[Video:] "\$239/MO."

[The advertisement contains the following lease disclosure in light-colored print superimposed on a light-colored, moving background and accompanied by background sound and other moving images. The information is displayed on two screens, each containing a block of two lines, and each block appearing for approximately four seconds:]

"36-mo. Lease. \$1850 down plus first month's payment and refundable \$275 security deposit due at signing."

[The advertisement contains the following lease disclosure at the bottom of the screen in light-colored fine print superimposed on a background of similar shade and accompanied by background sounds and images:]

"... CAMRY LE V6 WITH OPTIONAL ALLOY WHEELS SHOWN... CLOSED-END LEASE ON '95 CAMRY DX SEDAN 4-CYL. OR '95 CAMRY LE COUPE. 4-CYL. \$2,364 DUE AT SIGNING... MONTHLY PAYMENTS TOTAL \$8,604...LESSEE PAYS MAINTENANCE, EXCESS WEAR & TEAR AND \$0.10/MI. OVER 15,000/YR. LEASE-END PURCHASE OPTION \$11,097, \$11,013 (COUPE). DISPOSITION FEE, NOT TO EXCEED \$150, MAY BE DUE AT LEASE END..."

[The fine print is displayed on three screens, each containing a block of at least three lines, and each block appearing for approximately three seconds.] (Toyota Exhibit B).

C. "GREAT TOYOTA TOUCH LEASE VALUES!

Factory discounted lease rates for 36 months are available on selected Toyota models during this sale!!! Just look at the special values:

'94 Tercel	'94 4x2 Truck	'94 Corolla
\$149/mo. ¹	\$149/mo. ⁶	\$179/mo. ²
\$500 down/36mo.	\$1,000 down/36mo.	\$500 down/36mo.

'94 Camry	'94 Celica	'94 4Runner
\$249/mo. ⁴	\$259/mo. ³	\$319/mo. ⁵
\$1,500 down/36mo.	\$1,000 down/36mo.	\$2,000 down/36mo."

[The advertisement contains a lease disclosure that appears at the bottom of the advertisement in fine print.] (Toyota Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION OF INCEPTION FEES

5. In lease advertisements, including but not necessarily limited to Exhibits A and C, 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, amount "down," and/or other amounts due at lease inception.

6. In truth and in fact, consumers cannot lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount, amount "down," and/or other amounts due at lease inception. Consumers must also pay additional fees beyond the prominently stated terms, such as the capitalized cost reduction, first month's payment, and/or security deposit, to lease the advertised vehicles. Therefore, respondent's representation as alleged in paragraph five was, and is, false and 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 lease advertisements, including but not necessarily limited to Exhibits A - C, 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. These advertisements do not adequately disclose additional terms pertaining to the lease offer, such as the total amount of any payments due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Toyota 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 Toyota Exhibits A - C, state a monthly payment amount but fail to disclose clearly and conspicuously certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms: that the transaction advertised is a lease; the total amount of any payments such as a capitalized cost reduction required at lease inception; that a security deposit is required; and the number, amount, and timing of scheduled payments.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Toyota Exhibits A and B, are not clear and conspicuous because they appear on the screen in small type, for a very short duration, against a background of distracting sounds and images. The lease disclosures in respondent's direct mail advertisements, including but not necessarily limited to Toyota 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, Section 213.5 of

Regulation M, 12 CFR 213.5, and Section 213.7(d) of revised Regulation M, 61 Fed. Reg. at 52,246, 52,261 (October 7, 1996)(to be codified at 12 CFR 213.7(d)), as amended.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

EXHIBIT A

SAATCHI & SAATCHI DFS

TELEVISION COPY

Southern California

File Name: T5-223	Campaign/Project: REVISED MY 95 CAMRY SEDAN TV	AS PRODUCED
Client: TMS		Page 1 of 1
Job No.: TCS-223	Title: "3RD QTR LEASE/TOWER"	Code No.: TYCC 5178/5177-DLR
Acct. Exec.: J. ANASTAS	Product: CAMRY SEDAN	Length: 30, 25/05
Rev. No.:	Date/Time: 04/19/95 12:10 pm	Writer/Urwp: DC/Arva

AUDIO ONLY

1. ANNCR VO: Onward...
2. ...and upward.
3. The awards, the honors for the Toyota Camry...
4. ...continue to rise.
5. And the car that's become...
6. ...the gold standard...
7. ...can now be leased for as little as \$229 a month...
8. ...which includes automatic transmission, air conditioning...
9. ...power windows and door locks and more.
10. The new 1995 Toyota Camry lease, starting at just \$229 a month.
11. So low for a car...
12. ... that aims so high.
- 13.

SUPER AND DISCLAIMER INFORMATION:

- FRAME 7. SUPER: CAMRY LEASES START AT \$229 A MO. DISCLAIMER: '95 CAMRY DX, 4-SPD. AT CLOSED-
END LEASE \$2,354 DUE AT SIGNING. \$16,000 CAPITALIZED COST BASED ON \$1,650 DOWN AND DEALER PARTICIPATION.
MAY VARY BY DEALER. MSRP \$19,815 INCL. FREIGHT. NO. PAYMENTS TOTAL \$5,244. YOUR PAYMENT MAY VARY
DEPENDING ON FINAL PRICE.
- FRAME 8. SUPER: \$229 A MO. DISCLAIMER: TAXES, LICENSE, TITLE, INSURANCE, OPTIONAL AND REGIONALLY
REQUIRED EQUIP. AND DEALER CHARGES EXTRA. LESSEE PAYS MAINTENANCE, EXCESS WEAR & TEAR, 10¢ MI. OVER
15,000 YR. LEASE. END PURCHASE OPTION \$11,097. DISPOSITION FEE, NOT TO EXCEED \$150, MAY BE DUE AT LEASE END.
- FRAME 9. SUPER: FIRST MONTH'S PAYMENT AND \$275 REFUNDABLE SECURITY DEPOSIT ALSO
DUE AT SIGNING. DISCLAIMER: TO QUALIFIED LESSEES THROUGH TOYOTA MOTOR CREDIT CORPORATION.
SIMILAR LEASE IN AL, FL, GA, NC & SC THROUGH WORLD OMNI FINANCIAL CORPORATION. PAYMENTS HIGHER IN AR, CT,
LA, MA, MD, MS, OK, RI, TX, VA & WV. NOT AVAILABLE IN HI. RETAIL DELIVERY BY 8/30/95. '95 CAMRY LE V6 SHOWN WITH
OPTIONAL ALLOY WHEELS AT ADDITIONAL COST.
- FRAME 10. SUPER: SEE YOUR PARTICIPATING TOYOTA DEALER FOR DETAILS.
- FRAME 13. SUPER & LOGO: TOYOTA CAMRY. I LOVE WHAT YOU DO FOR ME. 1-800-GO-TOYOTA

020004

Toyota Exhibit A

EXHIBIT B

SAATCHI & SAATCHI DFS

TELEVISION COPY

Southern California

File Name: TS-086-3-AP	Campaign/Project: DECEMBER SALES EVENT	AS PRODUCED
Client: TMS		Page 1 of 2
Job No.: TD5-086	Title: "PARTY"	Code No.: TYEC 5081/5082
Acct. Exec.: E. FRANCO	Product: CAMRY	Length: 30. 25/05
Rev. No.:	Date/Time: 12/08/94 11:30 am	Writer/brwp: OC/cn/vms

AUDIO ONLY

1. (SFX UNDER: STREET NOISE.)
2. (SFX: STREET NOISE CONTINUED.)
3. (SFX UNDER: BALLROOM DANCE MUSIC.)
You're invited to the 16th Annual Toyotathon...
4. ...featuring Camry starting at \$16,418...
5. And special \$239 lease program...
6. ...on the newly restyled and refined Camry Sedan...
7. ...or Camry Coupe.
8. We're celebrating...
9. ...not only the new shape...
10. ...but also, what's taking shape with Camry.
11. So see the...
12. ..."best car built in America"...
13. ...and the best all-star lineup of new Toyotas ever...
14. ...at the 16th Annual Toyotathon.
15. New year, new cars, great Toyotathon deals. At your Toyota dealer now!

SUPER AND DISCLAIMER INFORMATION:

FRAME 4. SUPER: STARTING AT \$16,418. DISCLAIMER: STARTING MSRP W/O FREIGHT FOR '95 CAMRY DX 5-SPD. ACTUAL DEALER PRICES MAY VARY. CAMRY LE V8 WITH OPTIONAL ALLOY WHEELS SHOWN. OFFER NOT AVAILABLE IN HI.

FRAME 5. SUPERS: CAMRY DX SEDAN AND LE COUPE 36-MO. LEASE \$239/MO. \$1,850 DOWN PLUS FIRST MONTH'S PAYMENT AND... DISCLAIMER: CLOSED-END LEASE ON '95 CAMRY DX SEDAN 4-CYL OR '95 CAMRY LE COUPE 4-CYL \$2,384 DUE AT SIGNING \$18,440 (SEDAN) \$18,321 (COUPE) CAPITALIZED COSTS BASED ON \$1,350 DOWN AND DEALER PARTICIPATION MAY VARY BY DEALER. MSRP \$19,815 (SEDAN) \$19,665 (COUPE) INCLUDING FREIGHT. MONTHLY PAYMENTS TOTAL \$8,504.

Complaint

125 F.T.C.

EXHIBIT B

SAATCHI & SAATCHI DFS

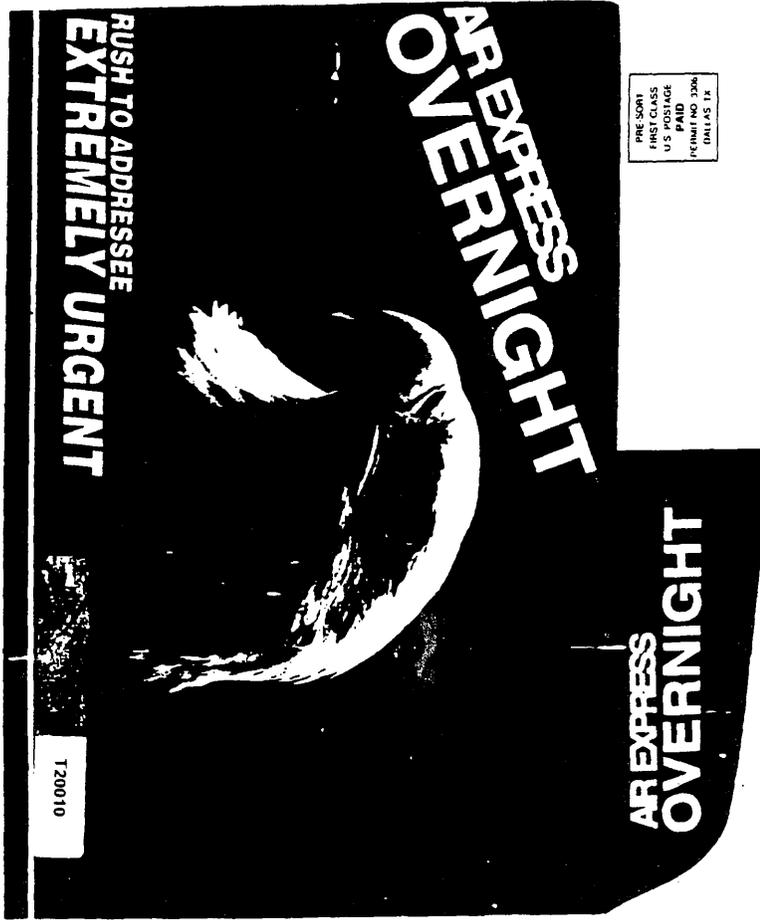
TELEVISION COPY

Southern California

File Name: TS-086-8-AP	Campaign/Project: DECEMBER SALES EVENT	AS PRODUCED
Client: TMS		Page 2 of 2
Job No.: TD5-086	Title: "PARTY"	Code No.: TYEC 5081/5082
Acct. Exec.: E. FRANCO	Product: CAMRY	Length: 30 : 25/05
Rev. No.:	Date/Time: 12/08/94 11:30 am	Writer/brwp: DC/cv/ms

AUDIO ONLY

- FRAME 6. SUPERS: CAMRY DX SEDAN AND LE COUPE 36-MO. LEASE, \$239/MO. REFUNDABLE \$275 SECURITY DEPOSIT DUE AT SIGNING. DISCLAIMER: YOUR PAYMENT MAY VARY DEPENDING ON FINAL PRICE, TAXES, LICENSE, TITLE, INSURANCE, REGIONALLY REQUIRED EQUIPMENT AND DEALER CHARGES EXTRA. LESSEE PAYS MAINTENANCE, EXCESS WEAR & TEAR AND 20,10MI. OVER 15,000YR. LEASE-END PURCHASE OPTION \$11,087 (SEDAN), \$11,013 (COUPE). DISPOSITION FEE, NOT TO EXCEED \$150, MAY BE DUE AT LEASE END, TO QUALIFIED LESSEES THROUGH TOYOTA.
- FRAME 7. DISCLAIMER: MOTOR CREDIT CORPORATION, SIMILAR LEASE IN AL, FL, GA, NC & SC THROUGH WORLD OMNI FINANCIAL CORPORATION. PAYMENTS HIGHER IN AR, CT, LA, MA, MD, MS, OK, RI, TX, VA & WV. OFFER NOT AVAILABLE IN HI. RETAIL DELIVERY BY 1/8/95. SEE YOUR PARTICIPATING TOYOTA DEALER FOR DETAILS.
- FRAME 12. SUPER: "BEST CAR BUILT IN AMERICA." AUTOMOBILE MAGAZINE, MAR. '93.
- FRAME 13. SUPER: MOST CAMRYS ARE BUILT IN THE U.S.
- FRAME 15. SUPER: TOYOTATHON LOGO, ENDS JANUARY 8TH.

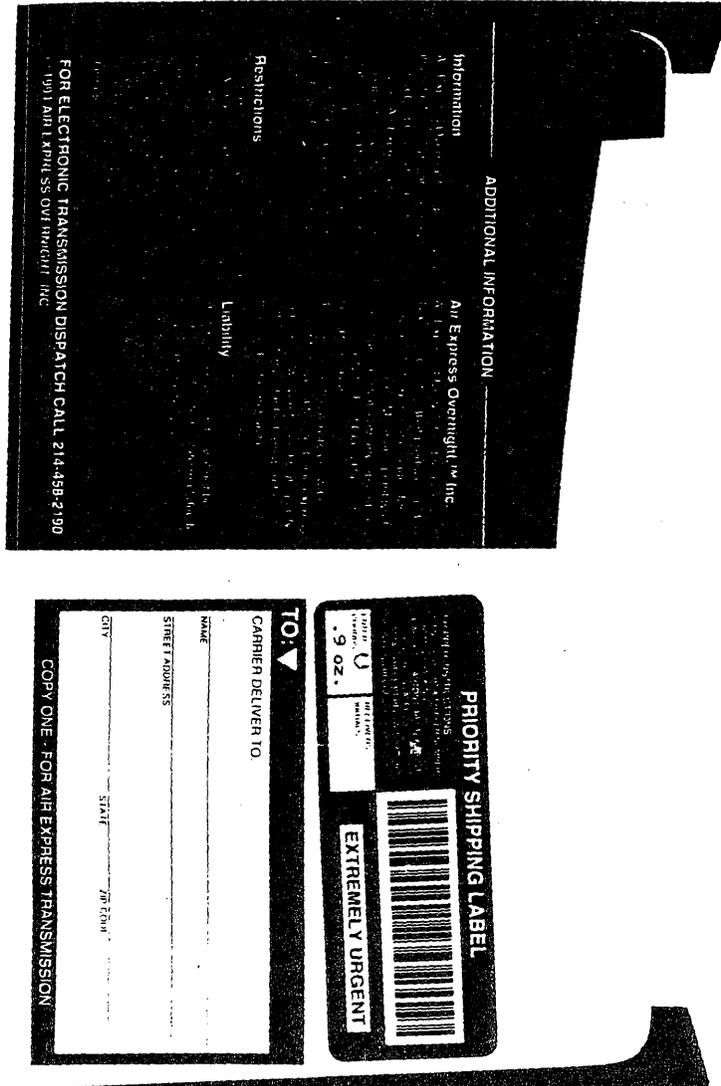


TOYOTA EXHIBIT C

Complaint

125 F.T.C.

EXHIBIT C



Complaint

EXHIBIT C



John E. Kramer
General Manager
Chicago Region

April 23, 1994

Dear Toyota Prospect:

It gives me great pleasure to invite you to the biggest sales event in the history of your Indianapolis Toyota dealers.

As all Indianapolis natives know, Spring is when you start to think about buying that new car or truck that you have always wanted. To help convince you that your next car or truck should be the highest quality vehicle in the world...**TOYOTA**...! have challenged my associates and all of the Indianapolis Toyota dealers to put together the enclosed "Toyota. No Comparison!" sales event.

Toyota's great-looking, all-new 1994 cars and trucks were the hit of the recent leading consumer magazine's automotive issue. With unquestioned, "best in class" quality, Toyota has a line-up of products you'll enjoy driving for many years to come. I know you'll be impressed and you'll find that new Toyotas are affordable!

So, if you are not already in your car on your way to your local Toyota dealer to buy the new Toyota car or truck of your dreams, get there soon because the sale will not be extended beyond the dates published in the enclosed brochure.

Hurry on down to get the best selection at the biggest sales event in Indianapolis Toyota history.

Sincerely,

A handwritten signature in dark ink, appearing to read "John E. Kramer", is written over a horizontal line.

John E. Kramer

EXHIBIT C

T100 CASH BONUS OFFER FROM TOYOTA

"TOYOTA. NO COMPARISON!"

Indianapolis Toyota Dealers

\$500 CERTIFICATE

Valid Through May 3, 1994

Customer Name _____ Dealership Name _____

Customer Phone# _____ Dealer Code _____

Home Work

Date Issued* _____ Dealer Signature _____

*See reverse side for details.

 **TOYOTA** TOYOTA MOTOR SALES U.S.A., INC.

Valid only with purchase of T100

8151

39

Complaint

EXHIBIT C

Endorse Here (Customer)

T100 V.I.N. or Serial # _____

 Check payable to customer. Check payable to Toyota Dealer.

Customer mailing address:

Address _____

City _____

State _____ Zip Code _____

Phone () _____

This certificate entitles you to \$500.00 savings on a new & unused 1993/1994 Toyota T100. Negotiate your best price with any authorized U.S.A. Toyota dealer, present this certificate, have the dealer validate your purchase, then send the certificate and a copy of the final customer Bill of Sale to Toyota in Touch Headquarters and a check will be mailed directly to you, or use the amount of the certificate toward your down payment. Redemption instructions are below.

REDEMPTION INSTRUCTIONS

1. Offer valid April 28, 1994 through May 3, 1994.
2. Offer not valid on a T100 purchase prior to certificate issue date (indicated on front of certificate). Must take retail delivery of a new 1993/1994 Toyota T100 out of dealer stock by May 3, 1994.
3. Application for a check or down payment must be received before June 2, 1994.
4. Offer void where prohibited.
5. Only the original certificate will be honored. Mechanical reproductions or facsimiles are not valid.
6. Only one certificate per eligible retail purchase or lease.
7. Certificate valid on any new 1993/1994 Toyota T100 purchase from an authorized Toyota dealer.
8. After you negotiate your best price with your dealer, present this certificate. Your dealer will then validate the certificate. Send the validated certificate and a copy of the final Bill of Sale on your T100 to: Toyota in Touch Headquarters, 1225 19th Street, Suite 260, Gardena, CA 90248.
9. See your participating dealer for details.
10. Make sure T100 V.I.N. or serial number is clearly printed in the space above.
11. When customer uses certificate as a down payment, the dealer must completely fill out the certificate and send it to Program Headquarters (note address above) with a copy of the final Bill of Sale for reimbursement.

EXHIBIT C

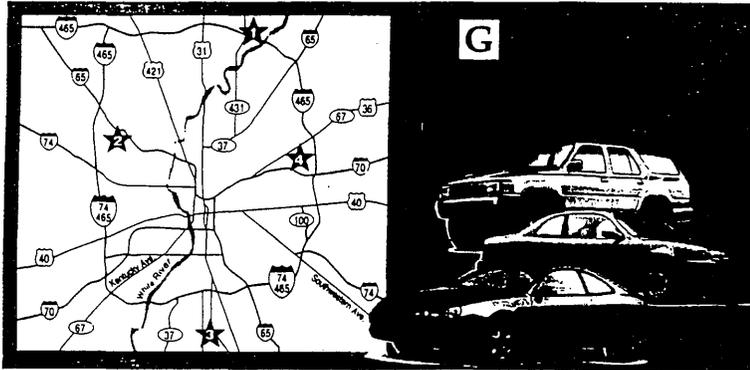
Your Participating Indianapolis Toyota Dealers:

★ **Butler Toyota**
96th and N. Keystone
Indianapolis, IN 46240
(317) 846-9600

★ **Beck Toyota**
8055 U.S. 31 South
Indianapolis, IN 46227
(317) 882-2600

★ **Tom Wood Toyota**
4202 Lafayette Road
Indianapolis, IN 46254
(317) 297-2444

★ **O'Brien Toyota**
2550 N. Shadeland
Indianapolis, IN 46219
(317) 351-7000



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 Toyota Motor Sales, U.S.A., Inc. is a California corporation with its principal office or place of business located at 19001 South Western Avenue, 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 signing or delivery*" 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. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

3. Unless otherwise specified, "*respondent*" as used herein shall mean Toyota Motor Sales, USA, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*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) and 62 Fed. Reg. 15,364 (April 1, 1997)(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 signing or delivery, 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 signing or delivery 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 signing or delivery.

C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery 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 signing or delivery;
3. Whether or not 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, 3009-473 (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 and 62 Fed. Reg. at 15,368 (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 signing or delivery") 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 Toyota Motor Sales, U.S.A., 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 Toyota Motor Sales, U.S.A., 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 Toyota Motor Sales, U.S.A., 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 Toyota Motor Sales, U.S.A., 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 January 5, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF
BEUCKMAN FORD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3777. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, the St. Louis Missouri-area automobile dealership and its officer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondents to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Lauren Steinfeld* and *David Medine*.

For the respondents: *Joe D. Jacobson, Green, Schaaf & Margo*,
St. Louis, MO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beuckman Ford, Inc., a corporation, and Fred J. Beuckman, III, individually and as an officer of the corporation ("respondents"), have 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 Beuckman Ford, Inc. is a Missouri corporation with its principal office or place of business at 15675 Manchester Road, Ballwin, Missouri. Respondent offers automobiles for sale or lease to consumers.

2. Respondent Fred J. Beuckman, III 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 Beuckman Ford, Inc.

3. Respondents have 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.

4. Respondents have 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.

5. 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, 15 U.S.C. 44.

LEASE ADVERTISING

6. Respondents have disseminated or have caused to be disseminated consumer lease advertisements ("lease advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibits A, B, and C. These lease advertisements contain the following statements:

A. "1994 AEROSTAR STARTING AT \$14,988 OR \$278.80**24 MONTH RCL INCLUDES ALL TAXES, LICENSE & FEES"

[A fine print statement at the bottom of the ad states, "***10% of MSRP down plus 1st & security, includes all rebates and incentives to qualified buyers."] (Exhibit A)

B. "'95 WINDSTAR GL \$17,588* or \$273* PER MO. 24 MONTH RCL INCLUDES ALL TAXES & FEES!"

[A fine print statement at the bottom of the ad states, "*All prices include Ford rebates, college graduate or commercial rebates where applicable. All payments based on 9.5 APR to qualified buyers. 60 months. No money down.**10% of MSRP plus rebates."] (Exhibit B)

C. "1995 WINDSTAR GL \$16,986 OR \$259.99 PER MO. 24 MONTH RCL INCLUDES TAX AND LICENSE"

[A fine print statement at the bottom of the ad states, "Windstar lease payment in lieu of purchase rebate. Reg. 10% of MSRP down plus 1st month and security deposit."] (Exhibit C)

FEDERAL TRADE COMMISSION ACT VIOLATIONS COUNT I: FAILURE TO DISCLOSE ADEQUATELY INCEPTION FEES

7. In lease advertisements, including but not necessarily limited to Exhibits A, B, and C, respondents have 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.

8. These lease advertisements do not adequately disclose additional terms pertaining to obligations at lease inception, including but not necessarily limited to one or more of the following charges: a required downpayment, security deposit, first month's payment, and taxes. This information does not appear at all, appears in very fine print, and/or is referenced by asterisks that do not correspond to the asterisks depicted in the main text of the advertisements.

9. These additional terms would be material to consumers in deciding whether to visit respondents' dealership and/or whether to lease an automobile from respondents. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

10. Respondents' 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 THAT THE TRANSACTION
ADVERTISED IS A LEASE

11. In lease advertisements, including but not necessarily limited to Exhibits A, B, and C, respondents have represented, expressly or by implication, that consumers can purchase the advertised vehicles by financing the vehicles through credit at the advertised monthly payment and term.

12. These lease advertisements fail to disclose that the term "RCL" is an abbreviation for "Red Carpet Lease" or to otherwise disclose that the advertised monthly payment and term are components of a lease offer. The existence of this additional information would be material to consumers in deciding whether to visit respondents' dealership and/or whether to lease or purchase an automobile from respondents. The failure to disclose adequately this additional term, in light of the representation made, was, and is, a deceptive practice.

13. Respondents' 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).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS
COUNT III: FAILURE TO DISCLOSE REQUIRED INFORMATION
CLEARLY AND CONSPICUOUSLY

14. In lease advertisements, including but not necessarily limited to Exhibits A, B, and C, respondents have stated a monthly payment amount, the number of required payments, and/or an amount "down."

15. These lease advertisements have failed to disclose clearly and conspicuously the following items of information 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 scheduled 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, in lieu of disclosure of the price, 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.

16. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

CREDIT ADVERTISING

17. Respondents have disseminated or have caused to be disseminated credit sale advertisements ("credit advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibit B. These advertisements contain the following statements:

" '95 MUSTANG GT COUPE \$17,988* OR \$377.99 PER MO NO MONEY DOWN"

[A fine print statement at the bottom of the ad states, "All payments based on 9.5 APR to qualified buyers. 60 months, no money down."] (Exhibit B)

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS
COUNT IV: FAILURE TO DISCLOSE REQUIRED INFORMATION
CLEARLY AND CONSPICUOUSLY

18. In credit advertisements, including but not necessarily limited to Exhibit B, respondents have stated a monthly payment amount and/or an amount "down" as terms for financing the purchase of the advertised vehicles.

19. These credit advertisements have failed to disclose clearly and conspicuously the following items of information required by Regulation Z: the annual percentage rate and the terms of repayment.

20. The items of information required by Regulation Z are not clear and conspicuous because they appear in very fine print.

21. Respondents' practices have violated Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

Commissioner Thompson and Commissioner Swindle not participating.

EXHIBIT A

Beuckman Exhibit A

<p>1995 WINDSTAR GL Preferred Equipment Pkg. 470A</p> <ul style="list-style-type: none"> • 7 Passenger • Air Conditioning - CFC Free • Tinted Windows • Deluxe Wheel Covers • 3.0L SEFI Engine • And More  <p>STARTING AT \$17,588* OR \$285.77** 24 MONTH RCL Includes All Taxes, License & Fees</p> <p>55 AVAILABLE</p>	<p>1994 AEROSTAR Preferred Equipment Pkg. 401A</p> <ul style="list-style-type: none"> • 7 Passenger With Dual Captain Chairs • Air Conditioning - CFC Free • Privacy Glass • Speed Control/Tilt • Steering • Automatic • Rear Window Defroster • AM/FM Stereo • Cassette • And More  <p>STARTING AT \$14,988* OR \$278.80** 24 MONTH RCL Includes All Taxes, License & Fees</p> <p>20 AVAILABLE</p>
<p>1994 PROBE Preferred Equipment Pkg. 251A</p> <ul style="list-style-type: none"> • Electric Remote Mirrors • Rear Window Defroster • Tilt Steering • Interval Wipers • Tinted Glass • Air Conditioning • CFC Free • AM/FM Stereo Cassette • And More  <p>STARTING AT \$12,199* OR \$232.65** 24 MONTH RCL Includes All Taxes, License & Fees</p> <p>35 AVAILABLE</p>	<p>1995 MUSTANG GT COUPE Preferred Equipment Pkg. 249A</p> <ul style="list-style-type: none"> • Speed Control • Elec. AM/FM Stereo Cassette • Air Conditioning • CFC Free • Anti-Lock Brakes • 4 Way Power Driver's Seat • And More  <p>STARTING AT \$17,988* OR \$283.99** 24 MONTH RCL Includes All Taxes, License & Fees</p> <p>45 AVAILABLE</p>
<p>BEUCKMAN FORD 227-5700</p> <p>15675 MANCHESTER RD., ELLISVILLE, MO 6 MILES WEST OF I-270 YOUR WEST COUNTY FORD DEALER</p>   	

THE LONG...AND SHORT OF IT

SAVINGS FOR EVERY LIFESTYLE

Beuckman Exhibit C

1995 WINDSTAR GL



\$ 16,986
From
OR \$ 259^{99*} PER MO.
24 MO. RCL
INCLUDES TAX
AND LICENSE

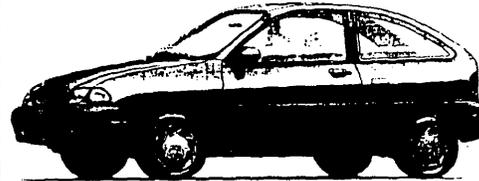
Rear Defroster
3.8L V-6 Engine
Front Airbags
CFC Free A/C
Automatic Trans
Fold Away Mirrors
AM/FM Stereo

Side Intrusion
Door Beams
Front Wheel Drive
Anti Lock Brakes
7 Passenger Seating
Rear Window Wiper
Child Proof Door Locks
Rear Flip Out Windows

Halogen Headlights
5 MPH Bumpers
Solar Tint Glass
13 oz. Carpeting
15" BSW Tires
Digital Clock
Full Tank of Gas

140 UNITS AVAILABLE

1995 ASPIRE



\$ 6978
From
OR \$ 149^{99*}** PER MO.
NO MONEY DOWN

Dual Air Bags
Front Wheel Drive
1.3L EFI SOHC 1-4 Engine

Independent MacPherson Strut Front End
Full Length Console With Dual Cup Holders

15 UNITS AVAILABLE

BEUCKMAN FORD 227-5700

15675 MANCHESTER RD. ELLISVILLE, MD 6 MILES WEST OF I-270 YOUR WEST COUNTY

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 the respondents with violation of the Federal Trade Commission Act, the Consumer Leasing Act and its implementing Regulation M, and the Truth in Lending Act and its implementing Regulation Z; 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 the 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 Regulations, 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 Beuckman Ford, Inc. is a Missouri corporation with its principal office or place of business at 15675 Manchester Road, Ballwin, Missouri.
2. Fred J. Beuckman, III is an officer of the corporate respondent. His principal office or place of business is the same as that of Beuckman Ford, Inc.
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

DEFINITIONS

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

1. "*Clearly and conspicuously*" shall mean as follows:

a. In a television or video 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 print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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.

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

2. "*Equal prominence*" shall mean as follows:

a. In a television or video advertisement, the video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. The audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

b. In a print advertisement, the disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

c. In a radio advertisement, the disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

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

3. "*Total amount due at lease inception*" 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.

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

5. Unless otherwise specified, "*respondents*" shall mean Beuckman Ford, Inc., a corporation, its successors and assigns and its officers; Fred J. Beuckman, III, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the costs of leasing a vehicle, including but not necessarily limited to the total amount due at lease inception.

B. State any amount due at lease inception (or that no such amount is required), except for the statement of a periodic payment, unless the advertisement also states with equal prominence the total amount due at lease inception.

C. State the term "RCL" without disclosing clearly and conspicuously that such term refers to a lease transaction.

D. State the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease unless all of the following items are disclosed, clearly and conspicuously, as required by Regulation M, as amended:

(1) That the transaction advertised is a lease;

(2) 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;

(3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method

of determining the price may be substituted for disclosure of the price); and

(5) 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 and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondents may comply with the requirements of this subparagraph by utilizing Section 184(a) of the Consumer Leasing Act ("CLA"), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a)) ("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (October 7, 1996) and 62 Fed. Reg. 15364, 15368 (Apr. 1, 1997) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(c)) ("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

E. Fail to comply in any other respect with Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended. Respondents may comply with the requirements of this subparagraph regarding Regulation M by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) and 62 Fed. Reg. 15364 (Apr. 1, 1997) (to be codified at 12 CFR 213), as amended.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection

with any advertisement to promote, 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. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c), as amended, as follows:

1. The amount or percentage of the downpayment;
2. The terms of repayment; and
3. The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

B. Fail to comply in any other respect with Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended.

III.

It is further ordered, That respondent Beuckman Ford, Inc., and its successors and assigns, and respondent Fred J. Beuckman, III 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 all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondent Beuckman Ford, Inc., and its successors and assigns, and respondent Fred J. Beuckman, III 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 such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Beuckman Ford, 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 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.

VI.

It is further ordered, That respondent Fred J. Beuckman, III, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. The notice shall include respondents' 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.

VII.

It is further ordered, That respondent Beuckman Ford, Inc., and its successors and assigns, and respondent Fred J. Beuckman, III 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.

VIII.

This order will terminate on January 5, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

VOLKSWAGEN OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3778. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998*

This consent order prohibits, among other things, the Michigan-based automobile manufacturer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondent to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Joseph S. Folz and Debra Kingsbury,*
in-house counsel, Auburn Hills, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Volkswagen of America, Inc., a corporation ("respondent" or "Volkswagen"), 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 Volkswagen of America, Inc. is a New Jersey corporation with its principal office or place of business at 3800 Hamlin Road, Auburn Hills, Michigan. Respondent offers Volkswagen and Audi 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 Volkswagen and Audi vehicles, including but not necessarily limited to the attached Volkswagen Exhibits A - D. Volkswagen Exhibits A - D are television lease advertisements (attached in video and storyboard format). The advertisements contain the following statements:

A. [Video:] "Golf K2 Limited Edition \$215 a month 48 month lease"

[The advertisement contains the following lease disclosure in black fine print superimposed on a white background and accompanied by background sound:

"\$214.83 first month's payment, \$300 down payment, \$225.00 refundable security deposit and \$450 acquisition fee due at lease inception. Monthly payments total \$10,311.84. . . . Requires dealer discount of \$650 which could affect final negotiated transaction. Price includes all costs to be paid by a consumer except for other options, dealer charges, licensing costs, registration fees and taxes. Lessee responsible for insurance. At lease end, lessee responsible for \$0.10/mile over 48,000, for damage and excessive wear. Purchase option at lease end for \$7,504.80. Dealers set actual prices. . . ."

The fine print is displayed on one screen of 12 lines, appearing for approximately 4 seconds.] (Volkswagen Exhibit A).

B. [Video:] "219* a month The Jetta GL Lease"

[The advertisement contains the following lease disclosure in black fine print superimposed on a white background and accompanied by background sound:

"\$218.81 first month's payment, \$300 down payment, \$225.00 refundable security deposit and \$450 acquisition fee due at lease inception. Monthly payments total \$10,502.88. . . . 48-month closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers. . . . Requires dealer discount of \$750 which could affect final negotiated transaction. Price includes all costs to be paid by a consumer except for other options, dealer charges, licensing costs, registration fees and taxes. Lessee responsible for insurance. At lease end, lessee responsible for \$0.10/mile over 48,000 miles, for damage and excessive wear. Purchase option at lease end for \$8,371.65. Dealers set actual prices. © 1997 Volkswagen. See dealer for details.

The fine print is displayed on one screen of 12 lines, appearing for approximately 4 seconds.] (Volkswagen Exhibit B).

C. [Video:] "The Audi A6 quattro Lease for \$429 mo."

[The advertisement contains the following lease disclosure in white fine print superimposed on a varied-color background and in black print superimposed on a white background and accompanied by background sound:

39 mo. closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers through 3/31/97. \$1,999 down pmt., \$429 1st month's pmt., \$450 ref. sec. dep. and \$450 acq. fee due at lease inception. Price includes all costs to be paid by a consumer, except licensing, registration, taxes, dlr. prep., and other

options. Lessee responsible for insurance. Mo. pmts. total \$16,731. At lease end, lessee responsible for \$0.15 mile over 32,500 for damage & excess wear & for a \$250 disposal fee. Option to purchase at lease end for \$20,583 in example shown. The fine print is displayed on three screens, each screen contains 4 lines, and the three screens appear together for approximately 7 seconds.] (Volkswagen Exhibit C).

D. [Video:] "The Audi A6. Only Quattro. Only from Audi. Lease for \$439 mo./\$1,999 down"

[The advertisement contains the following lease disclosure in white fine print superimposed on a varied-color background or gray background and accompanied by background sound:

"39 mo. closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers through 01/02/97. \$1,999 down pmt., \$439 1st month's pmt., \$450 ref. sec. dep. and \$450 acq. fee due at lease inception. Price includes all costs to be paid by a consumer, except for licensing, registration, taxes, dlr. prep., and other options. Lessee responsible for insurance. Mo. pmts. total \$17,121. At lease end, lessee responsible for \$0.15 mile over 32,500 for damage & excess wear & for a \$250 disposal fee. Option to purchase at lease end for \$21,666 in example shown.

The fine print is displayed on three screens, each screen contains 4-5 lines, and the three screens appear together for approximately 7 seconds.] (Volkswagen Exhibit D).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION IN LEASE ADVERTISING

5. In lease advertisements, including but not necessarily limited to Exhibit D, 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 limited to the monthly payment amount and the amount stated as "down."

6. In truth or in fact, consumers cannot lease the advertised vehicles at the terms prominently stated in the advertisements, including but not limited to the monthly payment amount and the amount stated as "down." Consumers must also pay additional fees beyond the prominently stated terms, such as the first month's payment, a security deposit, and an acquisition fee, 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, including but not necessarily limited to Exhibits A - D, 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. These advertisements do not adequately disclose additional terms pertaining to the lease offer, such as the total amount of any payments due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Volkswagen or Audi 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 Volkswagen Exhibits A - D, state a monthly payment amount but fail to disclose clearly and conspicuously certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms: that the transaction advertised is a lease; the total amount of any payments due at lease inception; whether or not a security deposit is required; and the number, amount, and timing of scheduled payments.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Volkswagen Exhibits A - D, are not clear and conspicuous because they appear on the screen in very small type, for a very short duration, and/or accompanied by background sounds and images.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, Section 213.5(c) of Regulation M, 12 CFR 213.5(c), and Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52,246, 52,261 (October 7, 1996) and 62 Fed. Reg. 15,364, 15,368 (April 1, 1997)(to be codified at 12 CFR 213.7(d)), as amended.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

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EXHIBIT A

Exhibit A

Audio:

[Announcer and skier voice overs:]

"For years, snow boarders ('knuckle draggers') and skiers have shared an uneasy truce. The equipment, ('two plankers'), the clothes ('who's your tailor?') they agreed ('Dweeb' 'Delinquent') on nothing until now. Introducing the Golf K2. A Volkswagen tricked out for frosty weather with a roof rack and a K2 snowboard or a pair of K2 skis. Thus, the cold war ended and there was peace in our time. On the road of life, there are passengers and there are drivers."

Video:

[Moving footage of two skiers on snowy mountain with footage of moving Golf K2 on snow.]

[Disclaimer:] "Professional driver. Closed road. Do not attempt."

[Super:] "Golf K2 Limited Edition
\$215 a month 48 month lease"

[Disclaimer:] "\$214.83 first month's payment, \$300 down payment, \$225.00 refundable security deposit and \$450 acquisition fee due at lease inception.

Monthly payments total \$10,311.84.

Manufacturer's Suggested Retail Price of \$15,635.00 for a 1997 Golf K2 Limited Edition with 5 speed manual transmission, air conditioning, AM/FM Stereo cassette and freight. 48-month closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers."

Supplies limited, must take retail delivery by 12/31/96. Requires dealer discount of \$650

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EXHIBIT A

which could affect final negotiated transaction. Price includes all costs to be paid by a consumer except for other options, dealer charges, licensing costs, registration fees and taxes. Lessee responsible for insurance. At lease end, lessee responsible for \$0.10/mile over 48,000, for damage and excessive wear. Purchase option at lease end for \$7,504.80. Dealers set actual prices.

Ski bindings not included. © 1996

Volkswagen.

See dealer for details"

[Footage of Golf K2 on road]

[Super:] [Volkswagen logo]

"Drivers wanted

1 800 DRIVE VW"

Complaint

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EXHIBIT B

Exhibit B

Audio:

"This is the latest video game we're developing. And this is our inspiration, my Volkswagen Jetta. \$219 a month -- excellent. When you write code for 15 hours straight, you gotta get out. The Jetta's a real German road car with plenty of room for four carbon-based life forms. It's got dual air bags, daytime running lights, and side impact door beams. 'Cause in real life, there is no reset button. On the road of life, there are passengers and there are drivers. [music throughout]

Video:

[flashing images of four people in and around the Jetta]
 [Super:]
 "219* a month
 The Jetta GL Lease"
 [Disclaimer:] "Airbags are a Supplemental Restraint System."
 [Disclaimer:] "\$218.81 first month's payment, \$300 down payment, \$225.00 refundable security deposit and \$450 acquisition fee due at lease inception. Monthly payments total \$10,502.88. Manufacturer's Suggested Retail Price of \$16,415.00 for a 1997 Jetta GL with 5 speed manual transmission, air conditioning, AM/FM Stereo cassette and freight. 48-month closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers. Supplies limited, must take retail delivery by 3/31/97. Requires dealer discount of \$750 which could affect final negotiated transaction. Price includes

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EXHIBIT B

all costs to be paid by a consumer except for other options, dealer charges, licensing costs, registration fees and taxes. Lessee responsible for insurance. At lease end, lessee responsible for \$0.10/mile over 48,000 miles, for damage and excessive wear. Purchase option at lease end for \$8,371.65. Dealers set actual prices.

© 1997 Volkswagen.

See dealer for details"

[Footage of Jetta on road]

[Super:] [Volkswagen logo]

"Drivers wanted.

<http://www.vw.com>"

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EXHIBIT C

Exhibit C

Audio:

"Okay if we just follow the . . . I'm sure we're . . . You're lost aren't you? We're, we're, we're lost. Do you have any idea where we're going? Yea we're right, right . . . it wasn't a highway, it was a catsup stain."

[Announcer:] "Where are more and more people taking their rugged off road vehicles these days? . . . The Audi A6 quattro, with quattro all wheel drive. It's where more and more four by four owners are heading every day. Only quattro. Only from Audi."

Video:

[Two men driving in a four by four vehicle - looking at road map] [Shot of Audi dealership with several Audi vehicles outside]

[Super:] "The Audi A6 quattro Lease for \$429 mo."

[Disclaimer:] "39 mo. closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers through 3/31/97. \$1,999 down pmt., \$429 1st month's pmt., \$450 ref. sec. dep. and \$450 acq. fee due at lease inception. Rate based on \$36,110 MSRP of 1997 Audi A6 quattro Sedan incl. auto. trans., QTV special value pkg. (incl. quattro glass sunroof, 16" tires and alloy wheels), cold-weather pkg. & dest. chg., less required dlr. contribution, which could affect final negotiated transaction. Price includes all costs to be paid by a consumer, except licensing.

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EXHIBIT C

registration, taxes, dlr. prep., and other options. Lessee responsible for insurance. Mo. pmts. total \$16,731. At lease end, lessee responsible for \$0.15 mile over 32,500 for damage & excess wear & for a \$250 disposal fee. Option to purchase at lease end for \$20,583 in example shown. See your dealer for details. Model shown \$34,350 including quattro and all-weather pkg."

[Super:] [Audi symbol rings]

"Audi

See your Washington Metropolitan area Audi Dealer for a test drive today, or call 1-800-FOR-AUDI."

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EXHIBIT D

Exhibit D

Audio:

"The day will soon come when you'll see only Audis on the road. It's called January. The Audi A6 quattro. All-wheel drive. All the time."

Video:

[Winter scene - Audi driving through snow]
 [Super:] "The Audi A6. Only Quattro. Only from Audi. Lease for \$439 mo./\$1,999 down"
 [Disclaimer:] "39 mo. closed-end lease offered to qualified customers by VW Credit, Inc. through participating dealers through 01/02/97. \$1,999 down pmt., \$439 1st month's pmt., \$450 ref. sec. dep. and \$450 acq. fee due at lease inception. Rate based on \$36,110 MSRP of 1997 Audi A6 quattro Sedan incl. QTV special value pkg. (incl. quattro glass sunroof, 16" tires, cold-weather pkg.) & dest. chg., less required dlr. contribution, which could affect final negotiated transaction. Price includes all costs to be paid by a consumer, except for licensing, registration, taxes, dlr. prep., and other options. Lessee responsible for insurance. Mo. pmts. total \$17,121. At lease end, lessee responsible for \$0.15 mile over \$2,500 for damage & excess wear &

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EXHIBIT D

for a \$250 disposal fee. Option to purchase
at lease end for \$21,666 in example shown.
See your dealer for details. Model shown
\$34,720 including quattro and all-weather
package"

[Super:] [Audi rings symbol]

"Audi

See your Washington Metropolitan area
Audi Dealer for a test drive today, or call

1-800-FOR-AUDI."

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 Volkswagen of America, Inc. is a New Jersey corporation with its principal office or place of business located at 3800 Hamlin Road, Auburn Hills, 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 signing or delivery*" 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. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

3. Unless otherwise specified, "*respondent*" as used herein shall mean Volkswagen of America, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*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) and 62 Fed. Reg. 15,364 (April 1, 1997)(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 signing or delivery, 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 signing or delivery 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 signing or delivery.

C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery 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 signing or delivery;
3. Whether or not 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, 3009-473 (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 and 62 Fed. Reg. at 15,368 (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 signing or delivery") 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 Volkswagen 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 Volkswagen 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.

VI.

It is further ordered, That respondent Volkswagen 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.

VII.

It is further ordered, That respondent Volkswagen 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 January 5, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF
SUNTRUP BUICK-PONTIAC-GMC TRUCK, INC. ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3779. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, two St. Louis Missouri-area automobile dealerships and their officer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondents to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Lauren Steinfeld* and *David Medine*.

For the respondents: *Paul Simon, Helfrey, Simon & Jones*, St. Louis, MO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., corporations, and Thomas Suntrup, individually and as an officer of the corporations ("respondents"), have 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 Suntrup Buick-Pontiac-GMC Truck, Inc. is a Delaware corporation with its principal office or place of business at 4200 N. Service Road, St. Peters, Missouri. Respondent offers automobiles for sale or lease to consumers.

2. Respondent Suntrup Ford, Inc. is a Missouri corporation with its principal office or place of business at 12750 Saint Charles Rock

Road, Bridgeton, Missouri. Respondent offers automobiles for sale or lease to consumers.

3. Respondent Thomas Suntrup 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 offices or places of business are the same as those of Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc.

4. Respondents have 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.

5. Respondents have 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.

6. 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, 15 U.S.C. 44.

LEASE ADVERTISING

7. Respondents have disseminated or have caused to be disseminated consumer lease advertisements ("lease advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibits A through E. These lease advertisements contain the following statements:

A. "NO PAYMENT TIL APRIL '95 -- '95 GRAND AM SEDAN \$225** per mo. lease"

[A fine print statement at the bottom of the ad states, "***36 mo. lease with 10% of MSRP cap reduction plus first payment sec. deposit & license plus tax with 12,000 mi. per yr. and approved credit."]

* * *

"NO PAYMENT TIL APRIL '95 -- 1995 THUNDERBIRD LX . . . \$275** per mo. lease"

[A fine print statement at the bottom of the ad states, "***24 mo. lease with 10% of MSRP cap reduction plus first payment sec. dep. & license plus tax with 15,000 mi. per year and approved credit." (Exhibit A)]

B. "NO PAYMENT TIL APRIL '95 -- '95 BONNEVILLE SE SEDAN . . . \$281** per mo. lease"

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[A fine print statement at the bottom of the ad states, "***36 mo. lease with 10% of MSRP cap reduction plus first payment sec. deposit & license plus tax with 12,000 mi. per yr. and approved credit."]

* * *

"1994 ESCORT LX \$178** per mo. lease"

[A fine print statement at the bottom of the ad states, "***24 mo. lease with 10% of MSRP cap reduction plus first payment sec. dep. & license plus tax with 15,000 mi. per year and approved credit.")(Exhibit B)

C. "1995 PONTIAC GRAND AM COUPE . . . LEASE \$188** 36 MONTHS"

[A fine print statement at the bottom of the ad states, "*All prices include all rebates and incentives, and commercial rebates where applicable. For conv. vans add \$799 for trim kit. Vehicle pictures may differ from actual pictures. 10% of MSRP cap reduction plus first payment sec. deposit and license plus tax with 12,000 miles per year and approved credit."]

* * *

"LEASE \$249** PER MO. \$13,999* 1995 TAURUS"

[A fine print statement at the lower right hand corner of the ad states, "*** 24 mo. Lease with 10% of MSRP cap reduction plus first payment sec. dep & license plus tax with 15,000 mi. per year and approved credit.")(Exhibit C)

D. "NO PAYMENT TIL MARCH '95 -- '95 GRAND AM COUPE SE . . . LEASE \$262** per mo."

[A fine print statement at the bottom of the ad states, "***36 mo. lease with 10% of MSRP cap reduction plus first payment sec. deposit & license plus tax with 15,000 mi. per yr. and approved credit."] (Exhibit D)

* * *

"\$1995 PROBE LEASE \$215** PER MO."

[A fine print statement at the bottom of the ad states, "**24 mo. lease with 10% of MSRP cap reduction plus first payment sec. dep. & license plus tax with 15,000 mi. per year and approved credit."] (Exhibit D)

E. "'95 CENTURY SEDAN \$249** per mo. lease"

[A fine print statement at the bottom of the ad states, "***36 mo. lease with 10% of MSRP cap reduction plus first payment sec. deposit & license plus tax with 15,000 mi. per yr. and approved credit."] (Exhibit E)

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION OF INCEPTION FEES

8. In lease advertisements, including but not necessarily limited to Exhibits A, B, and D, respondents have represented, expressly or by implication, that consumers have no monetary obligations at lease signing, including no obligation to pay a periodic payment.

9. In truth and in fact, consumers are required to pay significant amounts at lease signing, including but not limited to one or more of the following: a downpayment, security deposit, documentary fee, a periodic payment, and taxes. Therefore, respondents' representation as alleged in paragraph eight was, and is, false or misleading.

10. Respondents' 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 INCEPTION FEES

11. In lease advertisements, including but not necessarily limited to Exhibits A through E, respondents have 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.

12. These lease advertisements do not adequately disclose additional terms pertaining to obligations at lease inception, including but not necessarily limited to one or more of the following charges: a required downpayment, security deposit, documentary fee, first month's payment, and taxes. This information does not appear at all, appears in very fine print, and/or is referenced by asterisks that do not correspond to the asterisks depicted in the main text of the advertisements.

13. These additional terms would be material to consumers in deciding whether to visit respondents' dealership and/or whether to lease an automobile from respondents. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

14. Respondents' 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).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS
COUNT III: FAILURE TO DISCLOSE REQUIRED INFORMATION
CLEARLY AND CONSPICUOUSLY

15. In lease advertisements, including but not necessarily limited to Exhibits A through E, respondents have stated a monthly payment amount and/or the number of required payments.

16. These lease advertisements have failed to disclose clearly and conspicuously the following items of information required by Regulation M: 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 scheduled 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, in lieu of disclosure of the price, 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.

17. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

CREDIT ADVERTISING

18. Respondents have disseminated or have caused to be disseminated credit sale advertisements ("credit advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibits A, B, and E. These advertisements contain the following statements:

A. " '95 FIREBIRDS . . . \$17,995*"

[A fine print statement at the bottom of the ad states, "*All prices include all rebates & incentives. Also includes \$1000 cash or trade equity and commercial rebates where applicable. . ."] (Exhibit A)

B. " '95 SONOMA . . . \$13,995*"

[A fine print statement at the bottom of the ad states, "*All prices include all rebates & incentives. Also includes \$1000 cash or trade equity and commercial rebates where applicable. . ."]

* * *

"FORD CARS 3.9% FINANCING" (Exhibit B)

C. Along with the statements described in paragraph five, Exhibit C contains the following credit terms, "6.75% A.P.R. FINANCING ON CONTOURS for 48 Mos. PLUS \$500 REBATE"

* * *

"3.9% FINANCING or \$600 REBATE . . .1995 RANGER XLT" (Exhibit C)

D. "2.9% APR FINANCING FOR 48 MONTHS OR \$750 CASH BACK '95 FORD TAURUS" (Exhibit D)

E. " '95 BONNEVILLE SE SEDAN . . . 3.6% FINANCING Available on Bonnevilles . . . \$18,995*" [A bar is superimposed over this sale price figure that states "MAKE US AN OFFER!"]

[A fine print statement at the bottom of the ad states, "***\$1000 DOWN CASH OR TRADE EQUITY. FOR QUALIFIED FIRST TIME NEW CAR OR TRUCK BUYERS & GMC REBATE."] (Exhibit E)

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS
COUNT IV: FAILURE TO DISCLOSE REQUIRED INFORMATION

19. In credit advertisements, including but not necessarily limited to Exhibits A through E, respondents have stated the amount of a

downpayment and/or the number of payments or period of repayment as terms for financing the purchase of the advertised vehicles.

20. These advertisements have failed to disclose the following items of information required by Regulation Z: the amount or percentage of the downpayment, the terms of repayment, and/or the "annual percentage rate," using that term and if the rate may be increased after consummation, that fact.

21. Respondents' practices have violated Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT V: FAILURE TO STATE RATE OF FINANCE CHARGE AS
AN ANNUAL PERCENTAGE RATE

22. In credit advertisements, including but not necessarily limited to Exhibits B, C, and E, respondents have stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR," as required by Regulation Z.

23. Respondents' practices have violated Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b).

Commissioner Thompson and Commissioner Swindle not participating.

EXHIBIT A

STUDIOS POST-DESIGN

BUICK PONTIAC GMC Truck **SUNTRUP** Ford

1995 NEW YEAR SELL-A-BRATION

**4200 NORTH SERVICE ROAD
ST. PETERS, MO.
939-0800
TOLL FREE 1-800-262-8425**

SALE HOURS:
MON. WED. FRI. 9-9
TUE. THURS. 9-8
SATURDAY 9-5

SERVICE HOURS:
MON. THRU FRI. 7-6

**ST. CHARLES ROCK ROAD AT I-270
BRIDGETON, MO.
291-2334
TOLL FREE 1-800-831-6365**

SERVICE HOURS:
MON. WED. FRI. 9-9
TUE. THURS. 9-8
SAT. 9-5

BUICK NO PAYMENT TIL APRIL '95

'94 CENTURY SEDAN
LIST \$16,602 SALE PRICE **\$13,995***

'94 BUICK SKYLARK CUSTOM COUPE
LIST \$14,954 SALE PRICE **\$13,695***

'94 REGAL CUSTOM COUPE
LIST \$23,507 SALE PRICE **\$19,995***

'94 ESCORT LX
OVER 40 TO CHOOSE FROM Starting **\$9,595***

1995 PROBE
OVER 90 TO CHOOSE FROM Starting At **\$13,795***

'94 FORD TAURUS
Starting At **\$15,138***

1995 THUNDERBIRD LX
Starting At **\$15,995***

PONTIAC NO PAYMENT TIL APRIL '95

'95 GRAND AM SEDAN
LIST \$22,225 SALE PRICE **\$19,995***

'95 BONNEVILLE SE SEDAN
LIST \$29,122 SALE PRICE **\$19,995***

'95 GRAND PRIX SE SEDAN
LIST \$16,495 SALE PRICE **\$16,495***

'95 FIREBIRDS
13 TO CHOOSE FROM Starting At **\$17,995***

GMC TRUCK

'95 SONOMA
LIST \$9,795 SALE PRICE **\$9,795***

'95 GMC SIERRA 1/2 TON
LIST \$13,995 SALE PRICE **\$13,995***

'94 GMC 4x4 JIMMY
LIST \$20,995 SALE PRICE **\$20,995***

FULL SIZE VAN
from **\$18,995***

Ford TRUCKS NO PAYMENT TIL APRIL '95

1994 RANGER
Starting At **\$9,495***

1994 FORD EXPLORER
Starting At **\$21,395***

NEW '95 F-150
Stock #5303 AIR CONDITIONING
4.9 6 Cyl. 5 Spd. Manual. P235 Tires.
Headliner, Insulation Pkg., Rear Step Bumper.
LIMITED TIME ONLY
Starting At **\$12,595***

Ford VANS

GULF STREAM SPORT VAN
Starting At **\$18,995***

'95 WINDSTAR
Starting At **\$17,899***

1995 AEROSTAR
LEASE FOR ONLY **\$348³²***

SUNTRUP Buick Pontiac-GMC Truck **SUNTRUP** FORD

EXHIBIT B

**BUICK PONTIAC
GMC Truck**

SUNTRUP



1995 NEW YEAR SELL-A-BRATION

4200 N. SERVICE ROAD AT I-70
CAVE SPRINGS, ST. PETERS, MO.

939-0800
FREE 1-800-262-8425

SALE HOURS:
MON - FRI 9:30 - 5:30
SATURDAY 9:30 - 5:00
SERVICE HOURS:
MON - FRI 7-8

ST. CHARLES ROCK ROAD AT I-270
BRIDGETON, MO.

291-2334
FREE 1-800-831-6365

SALE HOURS:
MON - FRI 9:30 - 5:30
SAT 9:30 - 5:00
SERVICE HOURS:
MON - FRI 7-8

BUICK

NO PAYMENT TIL APRIL '95



'94 CENTURY SEDAN
MSRP \$16,602
SALE PRICE \$13,995*



'94 BUICK SKYLARK CUSTOM COUPE
MSRP \$14,954
SALE PRICE \$13,695*



'94 REGAL CUSTOM COUPE
MSRP \$23,507
SALE PRICE \$17,995*



'94 LESABRE CUSTOM SEDAN
MSRP \$41,112
SALE PRICE \$19,395*

FORD CARS

3.9% FINANCING



1994 ESCORT LX
Starting At \$9,295*



1995 PROBE
Starting At \$13,795*



'95 FORD TAURUS
Starting At \$15,895*



1995 THUNDERBIRD LX
Starting At \$15,995*

PONTIAC

NO PAYMENT TIL APRIL '95



'95 GRAND AM SEDAN
MSRP \$13,995*



'95 GRAND PRIX SE SEDAN
MSRP \$16,495*



'95 BONNEVILLE SE SEDAN
MSRP \$19,595*



'95 FIREBIRDS 13 TO CHOOSE FROM
MSRP \$17,995*

FORD TRUCKS



1994 RANGER
Starting At \$9,495*

NEW '95 F-150 AIR CONDITIONING!
LIMITED TIME ONLY
Starting At \$12,395*



1994 BRONCO XLT
Starting At \$20,995*

GMC TRUCK



'95 SONOMA
MSRP \$9,795*



'94 GMC JIMMY
MSRP \$20,995*



'95 GMC SIERRA 1 1/2 TON
MSRP \$13,995*



FULL SIZE VAN
MSRP \$18,995*

FORD VANS



1994 FULL SIZE CONVERSION VAN
Starting At \$16,988*



1994 AEROSTAR
Starting At \$14,995*

SUNTRUP

Buick-Pontiac-GMC 939-0800 **Ford Cars-Trucks-Vans 291-2334**

Suntrup Exhibit C

ST. LOUIS POST-DEPOTCH WEDNESDAY, JULY 28, 1995

SUMMER SAVINGS BLAST

SUNTRUP AUTO

FORD CARS

Up To \$2500 CASH BACK!

* 7.5% FINANCING FOR 48 MOS. 3 Down Only 7.28, 7.29, 7.31

<p>3 DAYS ONLY — JULY 28, 29, 31</p> <p>6.75% A.P.R. FINANCING ON CONTOURS for 48 Mos. PLUS \$500 REBATE!</p> <p>LEASE \$198 PER MONTH</p> <p>1995 CONTOUR</p> <p>38 AVAILABLE \$12,995*</p>	<p>LEASE \$249 PER MO.</p> <p>\$13,999</p> <p>1995 TAURUS</p> <p>\$500 REBATE DUAL AIR BAGS</p> <p>LEASE \$269 PER MO.</p> <p>\$15,495</p> <p>1995 THUNDERBIRD LX</p>	<p>LEASE \$235 PER MO.</p> <p>\$12,988*</p> <p>1995 PROBE</p> <p>Up To \$300 CASH BACK!</p> <p>LEASE \$188 PER MO.</p> <p>\$8,477*</p> <p>1995 ESCORT</p> <p>3.9% FINANCING OR \$500 REBATE</p>
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FORD TRUCKS

Up To \$1000 CASH BACK

Up To \$1500 CASH BACK

<p>LEASE \$235 PER MO.</p> <p>\$13,499*</p> <p>1995 F-150</p> <p>LEASE \$255 PER MO.</p> <p>\$17,498*</p> <p>1995 WINDSTAR</p>	<p>LEASE \$179 PER MO.</p> <p>\$10,688*</p> <p>1995 RANGER XLT</p> <p>138 WHEEL BASE</p> <p>LEASE \$179 PER MO.</p> <p>\$17,988*</p> <p>1994 FULL SIZE CONVERSION VAN</p>
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FORD VANS

Up To \$1000 CASH BACK

Up To \$1500 CASH BACK

138 WHEEL BASE

1994 FULL SIZE CONVERSION VAN

SUNTRUP Ford

St. Charles Rock Road at I-270 Bridgeton, MO 291-2334 or 1-800-831-6365

SALES, SERVICE, PARTS, FINANCING, RENTALS, LEASES, MAINTENANCE, TIRE SERVICE, BODY REPAIRS, CAR WAX, CAR CARE PRODUCTS

BUICK

<p>1995 BUICK LESABRE</p> <p>\$1000 REBATE</p> <p>Final Price \$19,970</p>	<p>1995 BUICK SKYLARK LIMITED SEDAN</p> <p>\$1500 REBATE</p> <p>Final Price \$14,750</p>	<p>1995 BUICK CENTURY SPECIAL</p> <p>\$1500 REBATE</p> <p>Final Price \$14,898</p>
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PONTIAC

<p>1995 PONTIAC GRAND AM COUPE</p> <p>\$1000 REBATE</p> <p>Final Price \$19,278</p>	<p>1995 PONTIAC GRAND PRIX SEDAN</p> <p>\$500 REBATE</p> <p>Final Price \$16,298</p>	<p>1995 PONTIAC BONNEVILLE</p> <p>\$1500 REBATE</p> <p>Final Price \$18,495</p>
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GMC TRUCKS

<p>1995 SIERRA 4X4 EXTENDED CAB</p> <p>Final Price \$19,990</p>	<p>1995 SONOMA EXTENDED CAB</p> <p>\$500 CASH REBATE</p> <p>Final Price \$11,990</p>	<p>SHERROD 110" VANDURA</p> <p>Final Price \$17,990</p>
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SUNTRUP BUICK PONTIAC GMC TRUCKS

2200 North Service Road at I-70 & Curve Springs St. Peters, MO 291-2300 or 1-800-250-9436

EXHIBIT D

ST. LOUIS POST-DISPATCH Friday, December 20, 1994

**4200 NORTH SERVICE ROAD
ST. PETERS, MO.
939-0800**

TOLL FREE 1-800-262-8425

MON. WED. FRI. 9-5
SALE HOURS: SATURDAY 9-3

MON. WED. FRI. 9-5
SERVICE HOURS: THRU FRI. 7-8

**BUICK PONTIAC
GMC Truck**

SUN

1994 YEAR END

BUICK

NO PAYMENTS TIL MARCH '95

<p>'94 CENTURY SEDAN</p> <p>Stock #10188 Sport Bench Seat, Rear Window Defogger, Cruise Control and Much More</p> <p>MSRP LIST \$16,602 SUNTRUP VALUE \$2,607 DISCOUNT \$13,995*</p>	<p>'94 REGAL CUSTOM COUPE</p> <p>Stock #1219</p> <p>MSRP LIST \$22,995 SUNTRUP VALUE \$5,000 DISCOUNT \$17,995*</p>	<p>'94 BUICK PARK AVENUE CLEARANCE SALE ULTRA</p> <p>Stock #1228</p> <p>MSRP LIST \$33,734 SUNTRUP VALUE \$6,239 DISCOUNT \$27,495*</p>	<p>'94 BUICK SKYLARK CUSTOM COUPE</p> <p>Stock #1218</p> <p>MSRP LIST \$14,954 SUNTRUP VALUE \$1,259 DISCOUNT \$13,695*</p>	<p>'94 LESABRE CUSTOM SEDAN</p> <p>Stock #1219</p> <p>MSRP LIST \$23,507 SUNTRUP VALUE \$4,112 DISCOUNT \$19,395*</p>
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PONTIAC

NO PAYMENTS TIL MARCH '95

<p>'95 GRAND AM SEDAN</p> <p>LEASE \$266/mo</p> <p>MSRP LIST \$17,995 SUNTRUP VALUE \$3,000 DISCOUNT \$14,995*</p>	<p>'95 BONNEVILLE SE SEDAN</p> <p>LEASE \$333/mo</p> <p>MSRP LIST \$22,995 SUNTRUP VALUE \$3,000 DISCOUNT \$19,995*</p>	<p>'95 GRAND PRIX SE SEDAN</p> <p>LEASE \$294/mo</p> <p>MSRP LIST \$17,995 SUNTRUP VALUE \$1,259 DISCOUNT \$16,495*</p>
<p>'95 GRAND AM COUPE SE</p> <p>LEASE \$266/mo</p> <p>MSRP LIST \$17,995 SUNTRUP VALUE \$3,000 DISCOUNT \$14,995*</p>	<p>'94 PONTIAC TRANSPORT</p> <p>LEASE \$264/mo</p> <p>MSRP LIST \$17,995 SUNTRUP VALUE \$1,259 DISCOUNT \$16,995*</p>	<p>'95 FIREBIRDS</p> <p>LEASE \$294/mo</p> <p>MSRP LIST \$17,995 SUNTRUP VALUE \$1,259 DISCOUNT \$17,995*</p>

GMC TRUCK AND VAN

NO PAYMENTS TIL MARCH '95

<p>'95 SONOMA SLS</p> <p>LEASE \$202/mo</p> <p>MSRP LIST \$11,695 SUNTRUP VALUE \$1,259 DISCOUNT \$11,695*</p>	<p>'95 GMC SIERRA 1/2 TON</p> <p>LEASE \$264/mo</p> <p>MSRP LIST \$14,995 SUNTRUP VALUE \$1,259 DISCOUNT \$14,995*</p>	<p>'94 GMC 4x4 JIMMY</p> <p>LEASE \$310/mo</p> <p>MSRP LIST \$20,995 SUNTRUP VALUE \$1,259 DISCOUNT \$20,995*</p>
<p>'95 GMC JIMMY</p> <p>LEASE \$363/mo</p> <p>MSRP LIST \$23,995 SUNTRUP VALUE \$1,259 DISCOUNT \$23,995**</p>	<p>GMC SAFARI EXTENDED MINIVAN</p> <p>LEASE \$16,995</p> <p>MSRP LIST \$16,995 SUNTRUP VALUE \$1,259 DISCOUNT \$16,995*</p>	<p>FULL SIZE VAN</p> <p>from \$18,995*</p>

EXHIBIT D

TRUP

ST. CHARLES ROCK ROAD AT I-270
BRIDGETON, MO.
291-2334
TOLL FREE 1-800-831-6365

SALE HOURS: M-F 9-9, Tu-Fri 9-8, Sat 9-5
SERVICE HOURS: M-F 7-4, Sat 8-4

FORD CARS & TRUCKS

1995 PROBE

S/N: #173 Auto. Air AM/FM Cassette

LEASE \$215⁺

\$13,795*

OVER 50 TO CHOOSE FROM

'94 ASPIRE

S/N: #2609 2 Dr. Rear Window Defroster. 5 spd.

LEASE \$166⁺

Starting \$6799*

DUAL AIR BAGS & FREE ROADSIDE ASSISTANCE

1994 ESCORT LX

Drive Side Air Bag. 24" CDX. 5 Speed. 1.9 Liter. 4 Cyl. Air Conditioning. AM/FM Stereo. Power Mirrors. Your Choice of 3 Dr. or Wagon. Excellent Value.

LEASE \$176⁺

Starting \$9595*

OVER 40 TO CHOOSE FROM

2.9%

APR FINANCING FOR 48 MONTHS

OR \$750 CASH BACK

'95 FORD TAURUS

S/N: #2923 Air Conditioning. Rear Window Defroster. Power Steering. AM/FM Stereo. Dual Air Bags.

LEASE \$209⁺

\$14,738*

OVER 40 TO CHOOSE FROM

'95 MUSTANG GT

S/N: #102 249A Pkg. V8 5 Liter. 5 Spd. Anti-Lock Brakes. Dual Air Bags. Loaded.

LEASE \$355⁺

\$17,995*

1995 THUNDERBIRD LX

Stock #256. V-8. Power Windows. Power Door Locks. Cruise. Floor Mats.

LEASE \$275⁺

Starting \$15,995*

1994 RANGER

Stock #1553 Pkg 86AA. 4LT. AM/FM Stereo. Cassette. Sliding Rear Window. Chrome Rear Step Bumper. Floor Console. Cass. Alum. Wheels. 50/40 Split Bench Seat.

LEASE \$152⁺

\$9495*

1994 FORD EXPLORER

S/N: #5465. Auto. Power Windows. Power Locks. Luggage Rack. Aluminum Wheels.

LEASE \$418⁺

\$21,395*

NEW '95 F-150

Stock #5303. AIR CONDITIONING. 4.9 6 Cyl. 5 Spd. Manual. P235 Tires. Heavier Insulation Pkg. Rear Step Bumper.

LIMITED TIME ONLY \$12,595*

MIDWEST LARGEST FORD CONVERSION VAN DEALER!

GULF STREAM SPORT VAN

23 Month Lease

LEASE \$277⁺

\$18,995*

STARQUEST CONV. VAN

23 Month Lease

LEASE \$333⁺

\$22,900*

CARRIAGE LUXURY VAN

23 Month Lease

LEASE \$348⁺

\$22,900*

ALL NEW '95 WINDSTAR

S/N: #3191

LEASE \$256⁺

\$17,899*

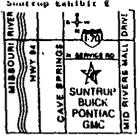
1995 AEROSTAR

S/N: #5455

LEASE FOR ONLY \$348³²**

23 Month Lease

MON. WED., FRI 9-9
 TUE-S. THURS. 9-6
 SATURDAY 9-5
 SERVICE HOURS:
 1991
 1990
 FRI 7-6



MAKE US AN OFFER!

'95 CENTURY SEDAN
 \$249**
 \$15,195*

'95 BUICK REGAL CUSTOM COUPE
 \$319**
 \$16,095*

'95 SKYLARK LIMITED SEDAN
 \$249**
 \$15,195*

'95 LESABRE CUSTOM SEDAN
 \$339**
 \$19,995*

WE'LL SAY YES! **ACCEPTED**

GMC TRUCKS

'95 SONOMA SLS \$10,990*

'95 GMC SIERRA 1/2 TON \$14,400*

THE ALL NEW 4 DR. '95 GMC JIMMY \$20,995*

'95 CARRIAGE CONVERSION VAN \$20,995*

'95 GRAND AM SEDAN
 \$219**
 \$13,595*

'95 GRAND PRIX SE SEDAN
 \$249**
 \$15,995*

'95 BONNEVILLE SE SEDAN
 \$299**
 \$18,995*

'95 FIREBIRDS
 \$269**
 \$16,495*

PROGRAM CAR HEADQUARTERS

'94 PONTIAC SUNBIRDS Starting At \$8,979	'94 PONTIAC GRAND AM'S Starting At \$11,489	'94 BUICK CENTURYS Starting At \$11,789
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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 the respondents with violation of the Federal Trade Commission Act, the Consumer Leasing Act and its implementing Regulation M, and the Truth in Lending Act and its implementing Regulation Z; 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 the 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 Regulations, 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 Suntrup Buick-Pontiac-GMC Truck, Inc. is a Delaware corporation with its principal office or place of business at 4200 N. Service Road, Saint Peters, Missouri.
2. Respondent Suntrup Ford, Inc. is a Missouri corporation with its principal office or place of business at 12750 Saint Charles Rock Road, Bridgeton, Missouri.
3. Thomas Suntrup is an officer of the corporate respondents. His principal offices or places of business are the same as those of Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc.

4. 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 the purposes of this order, the following definitions shall apply:

1. "*Clearly and conspicuously*" shall mean as follows:

a. In a television or video 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 print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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.

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

2. "*Equal prominence*" shall mean as follows:

a. In a television or video advertisement, the video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. The audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

b. In a print advertisement, the disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

c. In a radio advertisement, the disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

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

3. "*Total amount due at lease inception*" 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.

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

5. Unless otherwise specified, "*respondents*" shall mean Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., corporations, their successors and assigns and their officers; Thomas Suntrup, individually and as an officer of the corporations; and each of the above's agents, representatives, and employees.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the costs of leasing a vehicle, including but not necessarily limited to the total amount due at lease inception.

B. State any amount due at lease inception (or that no such amount is required), except for the statement of a periodic payment, unless the advertisement also states with equal prominence the total amount due at lease inception.

C. State the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease unless all of the following items are disclosed, clearly and conspicuously, as required by Regulation M, as amended:

- (1) That the transaction advertised is a lease;
- (2) 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;

(3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and

(5) 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 and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondents may comply with the requirements of this subparagraph by utilizing Section 184(a) of the Consumer Leasing Act ("CLA"), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a)) ("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (October 7, 1996) and 62 Fed. Reg. 15364, 15368 (Apr. 1, 1997) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(c)) ("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

D. Fail to comply in any other respect with Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended. Respondents may comply with the requirements of this subparagraph by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) and 62 Fed. Reg. 15364 (Apr. 1, 1997) (to be codified at 12 CFR 213), as amended.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, 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. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c), as amended, as follows:

1. The amount or percentage of the downpayment;
2. The terms of repayment, including but not necessarily limited to the amount of any balloon payment; and
3. The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term, as required by Section 144 of the TILA, 15 U.S.C. 1664, as amended, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(b), as amended.

C. Fail to comply in any other respect with Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended.

III.

It is further ordered, That respondents Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., and their successors and

assigns, and respondent Thomas Suntrup 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 all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondents Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., and their successors and assigns, and respondent Thomas Suntrup 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 such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondents Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not necessarily 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.

VI.

It is further ordered, That respondent Thomas Suntrup, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. 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.

VII.

It is further ordered, That respondents Suntrup Buick-Pontiac-GMC Truck, Inc. and Suntrup Ford, Inc., and their successors and assigns, and respondent Thomas Suntrup shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on January 5, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

LOU FUSZ AUTOMOTIVE NETWORK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3780. Complaint, Jan. 5, 1998--Decision, Jan. 5, 1998

This consent order prohibits, among other things, the St. Louis Missouri-area automobile dealership and its officer from omitting or burying key cost information in small, and at times, unreadable print in their automobile lease advertisements and from misrepresenting the costs of leasing, including the total amount due at lease signing. The consent order requires the respondents to disclose certain information clearly and conspicuously and to comply with all provisions of the specified acts and regulations.

Appearances

For the Commission: *Lauren Steinfeld* and *David Medine*.

For the respondents: *E. Perry Johnson*, *Bryan Cave, LLP*, St. Louis, MO. and *Elaine Foreman*, *Bryan Cave, LLP*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lou Fusz Automotive Network, Inc., a corporation, and Louis J. Fusz, Jr., individually and as an officer of the corporation ("respondents" or "Lou Fusz"), have 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 Lou Fusz Automotive Network, Inc. is a Missouri corporation with its principal office or place of business at 925 North Lindbergh Blvd., St. Louis, Missouri. Respondent offers automobiles for sale or lease to consumers.

2. Respondent Louis J. Fusz, Jr. 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 Lou Fusz Automotive Network, Inc.

3. Respondents have 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.

4. Respondents have 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.

5. 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, 15 U.S.C. 44.

LEASE ADVERTISING

6. Respondents have disseminated or have caused to be disseminated consumer lease advertisements ("lease advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibits A through F. These lease advertisements contain the following statements:

A. "0 DOWN PLUS NO PAYMENT TIL SPRING -- 1995 ALTIMA GXE ... LEASE FOR ONLY \$217* per month -- 1994.5 SENTRA LE ... (sic) LEASE FOR ONLY \$186* PER MONTH"

[A fine print statement at the bottom of the ad states, "*36 month, 10% down cash or trade. 5.97% Mo. tax, personal property tax included. Only to qualified buyers." (Exhibit A)]

B. [Sunfire Coupe Offer]: "Available Only at LOU FUSZ PONTIAC -- 0 DOWN NO SEC. DEPOSIT Sunfire Leases start at \$219.12* per mo."

[A fine print statement at the bottom of the ad states, "*39 mo. lease, 36,000 mi., Stock #75015. First month payment taxes & lease fee not included."]

[Grand Prix Offer]: "Lease: \$233/mo."

[A fine print statement at the bottom of the ad states "36 month closed end lease. 10% down cash or trade. First month's payment and security deposit due at time of lease. Taxes and fees not included. 12,000 mi. per year." (Exhibit B)]

C. "1995 TOYOTA CAMRY LE LEASE FROM \$269* per mo."

[A fine print statement at the bottom of the ad states, "*36 mo. lease, 12,000 miles per year, all taxes included." (Exhibit C)]

D. "LEASE: \$159/mo. '95 Mitsubishi Galant ES"

[A fine print statement in the center of the ad states, "30 month closed end lease. 10% down cash or trade. 1st month's payment, refundable security deposit and license fees due at time of lease. 10,000 miles per year. Residual value \$11,644. Taxes excluded."] (Exhibit D)

E. "'95 Grand Am . . . \$234* Per Month 36 Month 1 Payment Lease"

[A fine print statement at the bottom of the ad states, "*All payments due at delivery, includes \$1000 customer cash & \$1000 cap. reduction. Taxes not included."] (Exhibit E)

F. "1995 NISSAN PATHFINDER . . . \$279 per mo.

[A fine print statement at the bottom of the ad states, "***12 mo. lease Pathfinder, 24 mo. Altima, 36 mo. 240 SX & 3002X. 10% down cash or trade. Based on 5.975% MO tax, 15,000 mi per year."] (Exhibit F)

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION OF INCEPTION FEES

7. In lease advertisements, including but not necessarily limited to Exhibit A and the Sunfire Coupe offer in Exhibit B, respondents have represented, expressly or by implication, that the amount stated as "down" is the total amount consumers must pay at lease inception to lease the advertised vehicles.

8. In truth and in fact, the amount stated as "down" in respondents' lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers are required to pay significant amounts at lease signing, including but not limited to one or more of the following: a downpayment, security deposit, lease fee, first month's payment, and taxes. Therefore, respondents' representation as alleged in paragraph seven was, and is, false or misleading.

9. Respondents' 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 INCEPTION FEES

10. In lease advertisements, including but not necessarily limited to Exhibits A through F, respondents have 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."

11. These lease advertisements do not adequately disclose additional terms pertaining to obligations at lease inception, including

but not necessarily limited to one or more of the following charges: a required downpayment, security deposit, lease fee, first month's payment, and taxes.

12. These additional terms would be material to consumers in deciding whether to visit respondents' dealership and/or whether to lease an automobile from respondents. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

13. Respondents' 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: MISREPRESENTATION OF LEASE TERMS
ACTUALLY AVAILABLE

14. In lease advertisements, including but not necessarily limited to Exhibit A, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the advertised terms, including but not limited to the monthly payment amount and amount stated as "down."

15. In truth and in fact, respondents have not offered the advertised vehicles at the advertised lease terms. Therefore, respondents' representation as alleged in paragraph fourteen was, and is, false or misleading.

16. Respondents' 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 IV: MISREPRESENTATION OF ONE PAYMENT LEASE PLANS

17. In advertisements for Lou Fusz's "one payment" lease plan, including but not necessarily limited to Exhibit E, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles by making equal monthly payments for a specified lease term.

18. In truth and in fact, under Lou Fusz's "one payment" lease plan, consumers must pay all lease payments at lease signing. Therefore, respondents' representation as alleged in paragraph seventeen was, and is, false or misleading.

19. Respondents' 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).

CONSUMER LEASING ACT AND REGULATION M VIOLATIONS
COUNT V: FAILURE TO DISCLOSE REQUIRED INFORMATION

20. In lease advertisements, including but not necessarily limited to Exhibits A through F, respondents have stated a monthly payment amount, the number of required payments, and/or an amount "down."

21. These lease advertisements have failed to disclose the following items of information required by Regulation M: 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 scheduled 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, in lieu of disclosure of the price, 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.

22. Respondents' practices have violated Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, and Section 213.5 of Regulation M, 12 CFR 213.5(c).

COUNT VI: FAILURE TO MAKE ADVERTISED TERMS
USUALLY AND CUSTOMARILY AVAILABLE

23. In lease advertisements, including but not necessarily limited to Exhibit A, respondents have represented, expressly or by implication, that consumers can lease the advertised vehicles at the advertised terms, including but not limited to the monthly payment amount and amount stated as "down."

24. Respondents have not usually and customarily offered the advertised vehicles at the advertised lease terms.

25. Respondents' practices have violated Section 213.5(a) of Regulation M, 12 CFR 213.5(a).

CREDIT ADVERTISING

26. Respondents have disseminated or have caused to be disseminated credit sale advertisements ("credit advertisements") for automobiles in the print media, including but not necessarily limited to the attached Exhibit F. These advertisements contain the following statements:

Complaint

125 F.T.C.

"1995 NISSAN QUEST 1.9%* APR FINANCING"

[A fine print statement at the bottom of the ad states, "*To qualified buyers, 24 mo. term, special rates on 24, 36 and 48 mo."] (Exhibit F)

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS
COUNT VII: FAILURE TO DISCLOSE REQUIRED INFORMATION

27. In credit advertisements, including but not necessarily limited to Exhibit F, respondents have stated the number of payments or period of repayment as terms for financing the purchase of the advertised vehicles.

28. These advertisements have failed to disclose the following items of information required by Regulation Z: the amount or percentage of the downpayment and the monthly payment amount.

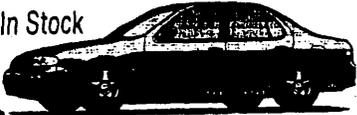
29. Respondents' practices have violated Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

Commissioner Thompson and Commissioner Swindle not participating.

Lou FUSZ
AUTOMOTIVE NETWORK

0 DOWN
PLUS NO PAYMENT TIL SPRING

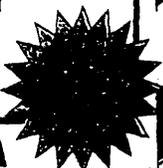
1995 ALTIMA GXE
Choose From More Than 100 ALTIMAS In Stock

LEASE FOR ONLY **\$217*** per month 

1994.5 SENTRA LE



Limited Edition! Power Windows and Locks, AM/FM Cassette, Air Conditioning, Cruise, Fold Down Rear Seat

LEASE FOR ONLY **\$186*** per month 

1995 NISSAN MAXIMA

190 Horsepower, Air Conditioning, Power Windows and Locks, AM/FM Cassette, Tilt Wheel, Cruise Control and More

Starting From **\$19,995*** 

*36 month, 10% down cash or trade. 5.97% Mo. tax. personal property tax included. Only to qualified buyers

Lou Fusz
NISSANTM
Lindbergh & Olive

997-3400

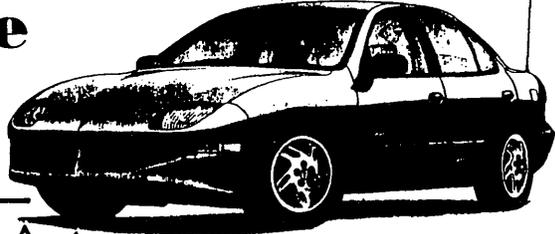


With Respect!
Lou Fusz

Lou Fusz

Come See the All-New '95 Sunfire!

Over 20 to choose from—hurry in for the best selection!

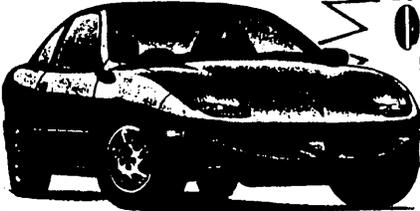


'95 Sunfire Sedan

Available Only At
LOU FUSZ PONTIAC

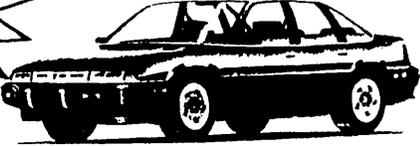
0 DOWN
NO SEC. DEPOSIT
Sunfire Leases start at
\$219¹² per mo.

Lease: **\$233/mo.**



'95 Sunfire Coupe

ABS Brakes, Dual Air Bags, AM/FM Cassette
*39 mo. lease, 36,000 mi., Stock #75015. First month payment taxes & lease fee not included.



'95 Grand Prix Dual air bags. AM/FM stereo. Power locks and windows. Much more!
36 month closed end lease. 10% down cash or 1st mo. First month's payment and security deposit due at time of lease. Taxes and fees not included. 12,000 mi. per year.
© 1995 GM Corp. Pontiac Division, Inc.
*The Hearst Corporation.

Lou Fusz PONTIAC
Lindbergh & Olive • 994-1500




Lou Fusz Exhibit C

EXHIBIT C

Complaint

Lou Fusz
AUTOMOTIVE NETWORK

AUTO SHOW SPECIALS

<p style="text-align: center;">1995 TOYOTA TERCEL</p> <p><small>Deluxe! Stock #95-0398. Auto., Air, Power Steering & Brakes, Stereo, Cassette, Dual Air Bags & Much More</small></p> <p style="text-align: right;">LEASE FROM \$199⁺</p>  <p><small>*30 mo. lease, \$1500 down, 15,000 mi. per year, all taxes included.</small></p>	<p style="text-align: center;">1995 TOYOTA AVALON</p> <p><small>19 AVAILABLE</small></p> <p style="text-align: center;">MISSOURI'S #1 AVALON DEALER!</p>  <p style="text-align: center;">TOYOTA'S NEWEST LUXURY CAR</p>	<p style="text-align: center;">1995 TOYOTA CAMRY LE</p> <p><small>Stock #950374. Auto., Air, Power Steering, Brakes, Door Locks, Windows, Tilt, Cruise, Cassette.</small></p> <p style="text-align: right;">LEASE FROM \$269⁺</p> <p style="text-align: center;">ALL TAXES INCLUDED</p>  <p><small>*36 mo. lease, 12,000 miles per year, all taxes included.</small></p>
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LOU FUSZ TOYOTA™ LINDBERGH & MANCHESTER 966-5404

©1991 KCI

EXHIBIT D

Lou Fusz Exhibit D

-on For Sale 6100—Automobiles For Sale

D OF YEAR CLEARANCE

Score Big Savings!

Time is running out on the biggest sale of the year on all 14 Lou Fusz car lines. Take advantage of clearance prices on all inventory in stock—at our lowest prices of the year. Lou Fusz offers Network discounts nobody else in town can touch on any car, truck or van—new or used—currently in stock. Hurry—sale ends this Saturday!

With Respect



FINAL DAYS!

LOU FUSZ

AUTOMOTIVE NETWORK®

TIME

Let Fusz - Where
The Fun Begins
Quality Under
Hood

St. Louis' Largest Dealer!

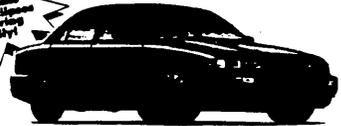
Lease: \$159/mo.-

'95 Mitsubishi Galant ES

Air. Dual air bags. AM/FM cassette. Power windows/locks/mirrors. Cruise control. Tilt wheel. Much more!

30 month closed end lease. 10% down cash or trade. 1st month's payment, refundable security deposit and license fees due at time of lease. 10,000 miles per year. Residual value \$17,644. Taxes excluded.

1995
Delivers
and begins
arriving
daily!





LOU FUSZ MITSUBISHI

15978 Manchester Rd. in Ellisville
2 blocks west of Clarkson 394-5700

Ellisville's Largest Buick Dealer!

MSRP: \$30,725

Lease: \$369/mo.



Includes
LUXURY
PACKAGE

'95 Buick Park Avenue

Full size comfort—loaded with extras!
30 month closed end lease with 10% of MSRP down as cap cost reduction. 12,000 miles per year included. Sales and personal property tax excluded.



LOU FUSZ BUICK

15970 Manchester Rd. in Ellisville
2 blocks west of Clarkson 394-4000



LOU FUSZ ANNOUNCES NEW LEASE PROGRAM ON '95's!

'95 Grand Am	'95 Transport	'95 Bonneville
		
<p>6 Cyl., Air, AM/FM Cassette, Cruise, ABS Brakes, Air Bag, Auto., 4 Spd., Intermittent Wipers, Auto Door Locks, Child Safety Locks, Power Windows</p> <p>\$234* Per Month 36 Month 1 Payment Lease</p> <p><small>*All payments due at delivery, includes \$1000 customer cash & \$1000 cap. reduction. Taxes not included.</small></p>	<p>4 Spd., Auto., Air, Cruise, AM/FM Radio System With Clock & Cassette, Power Door Locks, Power Windows, Electric Rear Window, De-fogger, 7 Passenger Seating, Power Sliding Door, Remote Keyless Entry</p> <p>\$287* Per Month 36 Month 1 Payment Lease</p> <p><small>*Includes 12,000 mi. per year. All payments due at delivery, includes \$1000 cust. cash & \$1000 cap. reduction. Taxes not included.</small></p>	<p>Keyless Entry, Custom Interior, 3.8 Liter V-6, 4 Spd., Auto., Alum. Alloy Wheels, 16" Touring Tires, Spoiler, Illum. Entry System, AM/FM Cassette, Power Windows, Power Mirrors, Power Door Locks, Power Seat, Variable Effort Steering</p> <p>\$321* Per Month 36 Month 1 Payment Lease</p> <p><small>*All payments due at delivery, includes \$1000 customer cash & \$1000 cap. reduction. Taxes not included. 12,000 mi. Luxury lease.</small></p>
<p>LOU FUSZ</p> <p>PONTIAC LINDBERGH & OLIVE 994-1500</p>		

EXHIBIT F

If  you want to  save money on a new NISSAN

'95 SENTRA
Power Steering, Power Brakes, Rear Detroit, Dual Air Bags
\$10,995 DELIVERED

1995 200 SX
\$13,995

'95 ALTIMA GXE MODEL
\$21,995 / \$14,995

1995 NISSAN PATHFINDER
4 DOOR ZX 5 SPEED

'95 MAXIMA GXE MODEL
190 Horsepower, Air, Power Mirrors, Power Locks, AM/FM Cassette, TR, Cruise and Much More
\$18,995 DELIVERED

1995 NISSAN QUEST
Winner Of The Driver's Choice - Best Minivan by PBS Motorweek
1.9% APR FINANCING

12 MONTH LEASE! Air, 4 Wheel Drive Convenience Package
\$279 PER MONTH
MSRP \$25,168 DISCOUNT \$4,168 SALE PRICE \$21,000

1995 300 ZX CPE, T-TOPS
3 Doors, 3.0L DOHC 24 Val, LTD Sng, 4 Wheel Disc, Air Brakes, Power Windows, Power Mirrors, Power Seat, Alarm System, Cruise Control, Power Locks, AM/FM Cassette
\$479 PER MONTH LEASE

1995 240 SX CPE-5 SPD!
Pearl glow paint, convenience air-conditioner
\$279 PER MONTH LEASE



LOU FUSZ NISSAN LINDBERGH & OLIVE
- PHONE 997-340C

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 the respondents with violation of the Federal Trade Commission Act, the Consumer Leasing Act and its implementing Regulation M, and the Truth in Lending Act and its implementing Regulation Z; 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 the 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 Regulations, 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 Lou Fusz Automotive Network, Inc. is a Missouri corporation with its principal office or place of business at 925 North Lindbergh Blvd., St. Louis, Missouri.

2. Respondent Louis J. Fusz, Jr. is an officer of the corporate respondent. His principal office or place of business is the same as that of Lou Fusz Automotive Network, Inc.

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

DEFINITIONS

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

1. "*Clearly and conspicuously*" shall mean as follows:

a. In a television or video 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 print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

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.

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

2. "*Equal prominence*" shall mean as follows:

a. In a television or video advertisement, the video disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, duration, and placement. The audio disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

b. In a print advertisement, the disclosure shall be presented in the same or similar format, including but not necessarily limited to type size, shade, contrast, and placement.

c. In a radio advertisement, the disclosure shall be delivered in the same or similar manner, including but not necessarily limited to volume, cadence, pace, and placement.

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

3. "*One payment lease*" shall mean a lease transaction where all or substantially all payments due under the lease contract are to be paid at lease inception.

4. "*Total amount due at lease inception*" 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.

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

6. Unless otherwise specified, "*respondents*" shall mean Lou Fusz Automotive Network, Inc., a corporation, its successors and assigns and its officers; and Louis J. Fusz, Jr., individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the costs of leasing a vehicle, including but not necessarily limited to the total amount due at lease inception.

B. State any amount due at lease inception (or that no such amount is required), except for the statement of a periodic payment, unless the advertisement also states with equal prominence the total amount due at lease inception.

C. Misrepresent the type of the transaction advertised, including but not necessarily limited to the fact that the offer is for a one payment lease.

D. State that a specific lease of any vehicle at specific amounts or terms is available unless respondents usually and customarily lease or will lease such property at those amounts or terms.

E. State the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease unless all of the following

items are disclosed, clearly and conspicuously, as required by Regulation M, as amended:

- (1) That the transaction advertised is a lease;
- (2) 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;
- (3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;
- (4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and
- (5) 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 and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondents may comply with the requirements of this subparagraph by utilizing Section 184(a) of the Consumer Leasing Act ("CLA"), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a)) ("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (October 7, 1996) and 62 Fed. Reg. 15364, 15368 (Apr. 1, 1997) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), 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, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(c)) ("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondents may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

F. Fail to comply in any other respect with Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended. Respondents may comply with the requirements of this subparagraph regarding Regulation M by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) and 62 Fed. Reg. 15364 (Apr. 1, 1997) (to be codified at 12 CFR 213), as amended.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote, 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. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c), as amended, as follows:

1. The amount or percentage of the downpayment;
2. The terms of repayment; and
3. The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

B. Fail to comply in any other respect with Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended.

III.

It is further ordered, That respondent Lou Fusz Automotive Network, Inc., and its successors and assigns, and respondent Louis J. Fusz, Jr. 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 all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondent Lou Fusz Automotive Network, Inc., and its successors and assigns, and respondent Louis J. Fusz, Jr. 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 such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Lou Fusz Automotive Network, 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 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.

VI.

It is further ordered, That respondent Louis J. Fusz, Jr., for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising and/or extension of a "consumer lease," as that term is defined in the CLA and its implementing Regulation M, or the advertising and/or extension of "consumer credit," as that term is defined in the TILA and its implementing Regulation Z. 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.

VII.

It is further ordered, That respondent Lou Fusz Automotive Network, Inc., and its successors and assigns, and respondent Louis J. Fusz, Jr. 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.

VIII.

This order will terminate on January 5, 2018, 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 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 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

MONTEDISON S.P.A, ET AL.

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

Docket C-3580. Consent Order, May 25, 1995--Modifying Order, Jan. 9, 1998

This order reopens the proceeding and modifies the 1995 consent order (119 FTC 676) by eliminating the prior approval provision and substituting a limited prior notice provision for certain acquisitions.

ORDER REOPENING AND MODIFYING ORDER

On August 11, 1997, Montedison S.p.A ("Montedison"), Montell N.V. ("Montell"), Shell Oil Company ("Shell"), Royal Dutch Petroleum Company, and The "Shell" Transport and Trading Company p.l.c. ("the petitioners"), filed a Petition To Reopen And Modify Order ("Petition") in Docket No. C-3580 ("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 ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the order to eliminate the prior approval provision set forth in paragraph VII of the order. The Petition was placed on the public record for thirty days and one comment was received. The Commission has determined to reopen the order and to grant the Petition in part.

The complaint in this matter alleged that the petitioners' formation of Montell, a joint venture that merged the majority of Shell's and Montedison's worldwide polyolefins businesses, violated 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, by lessening competition and tending to create a monopoly in, among other markets, the licensing of polypropylene technology, polypropylene technology and the licensing of polypropylene catalysts and catalyst technology "throughout the world."²

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep., (CCH) ¶ 13,241.

² Complaint ¶¶ III and V.

The complaint alleged, among other things, that the formation of Montell would eliminate actual competition between Montedison and Shell in the relevant markets; substantially increase the level of concentration in the relevant markets; increase Montedison's and Shell's ability to unilaterally exercise market power in the relevant markets; and reduce Montedison's and Shell's incentives to license polypropylene technology or polypropylene catalysts to polypropylene resin manufacturers that compete with Montell.³

The order required Shell to divest the "Properties to Be Divested," as defined in paragraph I.Q of the order.⁴ On December 21, 1995, the Commission approved Shell's application to divest the "Properties to Be Divested" to Union Carbide Corporation. Under the order, the petitioners are prohibited from acquiring without the prior approval of the Commission any stock or related assets of any concern engaged in certain enumerated activities.⁵

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.⁶ 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."⁷

³ *Id.* at ¶ V.

⁴ Order ¶ VII.

⁵ The covered activities are:

1. The research and development... or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;
2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or
3. The manufacture or sale of Propylene Polymers in the United States or Canada"

Order ¶ VII.

⁶ Prior Approval Policy Statement at 2.

⁷ *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some 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, engage in an otherwise unreportable anticompetitive merger."⁸

The Commission in its Prior Approval Policy Statement announced 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."⁹ 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.¹⁰ Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3580 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive acquisition that would not be subject to the premerger notification and waiting period requirements of the HSR Act. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

Based on the record, the Commission has determined that the limited circumstances which the Prior Approval Policy Statement identifies as appropriate for retention of a narrow prior approval requirement, that is, a credible risk that, but for the prior approval provision, the petitioners would attempt the same or approximately the same merger, do not exist in this matter. Accordingly, pursuant to the Prior Approval Policy, the Commission has determined to delete the prior approval requirement of paragraph VII of the order.

The Commission has also determined that the record in this case shows a credible risk that the petitioners could engage in future anticompetitive acquisitions covered by the order that would not be reportable under the HSR Act. The order contains a broad prohibition on acquiring any stock or related assets of any concern engaged in propylene polymers research and development, or licensing of propylene polymers research and development technology or catalyst technology anywhere in the world.¹¹ The petitioners could acquire the exclusive polypropylene or catalyst technology of one of the few firms competing with the respondents around the world that licenses such technology on a world-wide basis. Such an acquisition could foreclose the entry of the licensor into the relevant markets as a competitor of the respondents, but would not be reportable under the HSR Act if the acquired entity has not made substantial sales of the technology being acquired in the United States market. Even where the acquired technology has been used to construct a polypropylene plant in the United States, the revenue realized by the foreign firm for licensing its technology would not ordinarily be reportable under the HSR Act.¹²

Given the non-reportable nature of these types of transactions, there exists a credible risk that the petitioners could engage in unreportable anticompetitive acquisitions supporting prior notice

¹¹ Order ¶ VII.

¹² The acquisition of assets located outside the United States, to which no sales in or into the United States are attributable, is not subject to the requirements of the HSR Act. In addition, the acquisition of assets located outside the United States, to which sales in or into the United States are attributable, is not subject to the requirements of the HSR Act unless, as a result of the acquisition, the acquiring person would hold assets of the acquired person to which such sales aggregating \$25 million or more during the acquired person's most recent fiscal year were attributable. *See* 16 CFR 802.50.

substitution for paragraphs VII.A.1 and 2 and VII.B.1 and 2, the technology and licensing activities covered by the order.

The record contains no evidence that there exists a credible risk that the petitioners could engage in future anticompetitive acquisitions of stock or assets of any concern engaged in the manufacture and sale (as opposed to research and development) of polypropylene in the United States or Canada that would not be reportable under the HSR Act.¹³ Even if such a transaction were to occur, the purchase price likely would be far in excess of \$15 million and, therefore, reportable under the HSR Act. There is no evidence in this record that any company engaged in the manufacture and sale of polypropylene in the United States or Canada could be acquired for less than \$15 million, or that any competitively significant assets of companies described in paragraphs VII.A.3 and VII.B.3 of the order have been offered for sale at a price below \$15 million. Therefore, the Commission has determined to delete paragraphs VII.A.3 and VII.B.3 from the order consistent with its determination to delete the prior approval requirement and substitute a prior notice provision for the acquisitions described in paragraphs VII.A.1 and 2 and VII.B.1 and 2 of the order.

Although the Petition does not explicitly seek such modification, the Commission may reopen the order and substitute a prior notice provision for the prior approval provision because the petitioners seek relief from the prior approval provision under the Prior Approval Policy Statement. In the Prior Approval Policy Statement, the Commission stated that although "a general policy of requiring prior approval is no longer needed, . . . the Commission reserves its equitable power to fashion remedies needed to protect the public interest," including ordering narrow prior notification requirements in certain limited circumstances.¹⁴ Because the petitioners seek reopening of the order pursuant to the Prior Approval Policy Statement, they have invoked the Commission's authority to modify the order consistent with the Statement. Setting aside the prior approval requirement and modifying the order by substituting the lesser obligation of filing prior notification for acquisitions not otherwise reportable under the HSR Act is consistent with the Prior Approval Policy Statement.

¹³ Order ¶¶ VII.A.3 and VII.B.3.

¹⁴ Prior Approval Policy Statement at 2.

Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to reopen the proceeding in Docket No. C-3580 and modify the order to delete the prior approval requirement of paragraph VII and to substitute a prior notification requirement for paragraphs VII.A.1 and 2 and VII.B.1 and 2. The Commission has also determined to delete paragraphs VII.A.3 and VII.B.3 of the order.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph VII of the order in Docket No. C-3580, issued on May 25, 1995, be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for ten (10) years from the date this order becomes final, Shell, Montedison and Montell shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, other than the acquisition by Shell or Montedison of additional shares of Montell, engaged in at the time of such acquisition, or within two (2) years preceding such acquisition engaged in,

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world; or

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world.

B. Acquire any assets used for or previously used for (and still suitable for use for),

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world; or

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world.

Provided, however, these prohibitions shall not relate to the construction of new facilities or the acquisition of new or used equipment in the ordinary course of business from a person other than the persons referred to in paragraph VII.A of this order. Provided, further, that this paragraph VII of this order shall not apply to the acquisition of Technipol by Montell following completion of the divestiture of the Properties to Be Divested and expiration of the attached Hold Separate Agreement.

Notification required under this provision 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 respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

BRAKE GUARD PRODUCTS, INC., ET AL.

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

Docket 9277. Complaint, Sept. 27, 1995--Final Order, Jan. 15, 1998

This final order prohibits, among other things, the Washington-based corporation and its president from misrepresenting the performance characteristics of the braking devices, the availability of insurance discounts resulting from installation of the devices and their compliance with certain government standards. In addition, the final order prohibits the respondents from continuing advertisements that claim their add-on braking system performed as effectively as factory installed antilock braking systems and prohibits the company from using the term ABS in marketing their braking devices. The final order requires the respondents to notify distributors and consumers of FTC findings.

Appearances

For the Commission: *Theodore Hoppock, Janet Evans, Mamie Kresses, Sydney Knight and C. Lee Peeler.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Brake Guard Products, Inc., a corporation, and Ed F. Jones, 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 Brake Guard Products, Inc., is a Washington corporation, with its offices and principal place of business located at 1047 W. Garland Avenue, Spokane, Washington.

Respondent Ed F. Jones is or was at relevant times herein an officer and director of Brake Guard Products, Inc. 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 office and principal place of business is at 1047 W. Garland Avenue, Spokane, Washington.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed certain after-market automotive products including Brake Guard Safety System, also known as the Advanced Braking System, or Brake Guard ABS (herein collectively referred to as "Brake Guard"), a device that is installed on a vehicle to improve its braking performance.

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 caused to be disseminated advertisements and promotional materials for Brake Guard, including but not necessarily limited to the advertisements and promotional materials attached hereto as Exhibits A through H. These advertisements and promotional materials contain the following statements and depictions:

(a) Could you stop?

[Photo of child about to enter path of vehicle on muddy road.]

FULL TIME FOUR WHEEL SAFETY SYSTEM (WITH ANTI-LOCK BENEFITS)

ADVANCED BRAKING SYSTEM ABS™ SAFETY SYSTEM

REDUCES WHEEL LOCK-UP FOR ALL VEHICLES WITH HYDRAULIC BRAKES

WHAT IS ADVANCED BRAKING SYSTEM?

- * It is a Safety System with "Anti-lock" benefits for all vehicles with hydraulic brakes, including motor homes and trucks, etc.
- * It works to inhibit wheel lock-up, skidding and loss of control when braking.
- * It stops vehicles straighter and shorter with better steering control and power.
- * It operates automatically, every time the brakes are applied.

HOW ADVANCE BRAKING SYSTEM WORKS:

* * * *

Like a computer, Advanced Braking System's patented systems (modified gas/hydraulic) compensate 4-wheel braking up to 120-140 times per second @ 60 mph, every time brakes are applied resulting in smoother, shortened and controlled stopping with nearly double the braking power, efficiency and control.

SAFETY SCOREBOARD

LIFE SAVING FEATURES	Advanced Braking System Safety Systems		ALL OTHER ELECTRONIC A.B.S.		
	yes	no	yes	no	some-times
1. Stops Vehicle in A Shorter Distance	√				X
2. Operates Automatically Every Time The Brakes Are Applied	√			X	
3. Helps Steering Control During "Panic" Stops	√		X		
4. Reduces Brake Fade Hot Spots, And Break Wear	√			X	
5. Increases Braking Power ..	√			X	
6. Helps Compensate for Unequal Brake Adjustment Air and Wear Differences in Tire and Uneven Loading	√			X	
7. Reduces Wear to Front End Assembly, Tires and Master Cylinder	√			X	
8. Nearly Doubles Over-all Breaking Efficiency	√			X	
9. Available for All Vehicles With Hydraulic Brakes - including Motor Homes, etc. .	√			X	
10. Available As An "Aftermarket" (Retrofit) System	√				X
11. Transferable From One Vehicle To Another in Less Than One Hour	√			X	

* * * *

Advanced Braking System will reduce skidding under all conditions. However, it is still possible to lock wheels and skid especially at slower speeds and on slippery surfaces.

QUALIFICATION FOR A.B.S. INSURANCE RATE DISCOUNT

Advanced Braking System is a four wheel Safety System with Anti-Lock benefits and is in compliance with the National Highway Traffic Safety Administration (NHTSA) a division of the Department of Transportation (DOT) as defined by their standard No. 105; Hydraulic Brake System. The (S4) definition "Anti-Lock Systems" means a portion of the service system that automatically controls the degree of rotational wheel slop at one or more road wheels of the vehicle during braking. [EXHIBIT A]

(b) ANSWERS TO COMMON QUESTIONS ABOUT BRAKE-GUARD ABS

(ABS - Advanced Braking system)

Q: Why should I consider BRAKE-GUARD ABS as an aftermarket item?

A: Anti-Lock brakes are one of the most advertised options of the decade. Virtually everything your new car buyer reads today has advertisements and positive press regarding Anti-Lock brakes.

* * * *

Q: How does BRAKE-GUARD ABS differ from electronic ABS systems?

A: Electronic ABS systems only work after the wheel(s) lock up. BRAKE-GUARD ABS works every time you use your brakes.

* * * *

Q: Will your customer qualify for an ABS insurance rate discount on their premiums?

A: With BRAKE-GUARD ABS installed on your new or used vehicle, you will qualify for an insurance rate discount if allowed by your carrier.

* * * *

Q: How can I be sure that BRAKE-GUARD ABS will perform as advertised?

A: We claim that the inclusion of BRAKE-GUARD on a vehicle will stop that vehicle straighter and in a significantly shorter distance, while reducing or eliminating premature wheel lock up, brake fade, brake pull while substantially increasing brake life. [EXHIBIT B]

(c) COULD YOU STOP?

[Depiction of child about to enter path of car on muddy road.]

FULL TIME FOUR WHEEL SAFETY SYSTEM (WITH ANTI-LOCK BENEFITS) Anti-Lock BRAKE-GUARD Safety System®

* * * *

The Brake * Guard Safety System meets or exceeds the Society of Automotive Engineers (SAE) wheel slip brake control system road test code SAE J46. The Brake * Guard Safety System is A*B*S "Anti-Lock Braking System" and is in compliance with the National Highway Traffic Safety Administration (NHTSA) a division of the Department of Transportation (DOT) as defined by their standard No. 105; Hydraulic Brake System. The (S4) definition "Anti-Lock Systems" means a portion of the service brake system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking. [EXHIBIT C]

(d) STANDARD HYDRAULIC BRAKE SYSTEM FUNCTION AND BRAKE-GUARD ABS FUNCTION: (ABS- Advanced Braking System)

* * * *

Brake-Guard ABS is a full-time four wheel safety system with anti-lock benefits.

* * * *

Complaint

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This principle of operation substantially decreases brake wear and brake fade while inhibiting premature lock-up; The vehicle's brakes now have maximum braking efficiency with less pedal effort. It works with any configuration of braking system, front/rear split or diagonal split, and stops the vehicle an average of 20% to 30% shorter. . . . [EXHIBIT D]

(e) Videotape Transcript:

Host: Hi. Let's talk about safety for a moment. It's probably already happened to you. You are driving down the highway when suddenly you have to stop. And in those few short seconds your life and those of others will depend upon the reliability of your braking system. Will your wheels lock up causing your car to careen out of control or will your car come to a smooth straight stop well short of impact?

The difference could be a revolutionary product called Brake Guard. Brake Guard is a full time safety system with anti-lock benefits. Brake Guard Safety System eliminates some of the hazards of conventional braking systems, dramatically shortening your stopping distance, but more importantly giving you back control of your car in that emergency situation.

* * * *

This patented proven braking system dramatically increases your braking, power, efficiency and control resulting in straighter shorter stops in all kinds of conditions.

* * * *

Announcer: Q: Why do vehicles need the Brake Guard Safety System?

A: That's a good question. When a driver slams on the brakes in a panic stop, excess braking pressure is created, causing the brakes to lock up and skid. The Brake Guard Safety System equalizes braking pressure before it reaches the wheels, therefore reducing skids stopping the vehicle in a much shorter distance and more importantly giving the driver excellent control of their vehicle.

* * * *

Announcer: Q: How much shorter is the stopping distance with Brake Guard Safety System installed?

A: Results can vary depending on road conditions, the weight of the vehicle and a number of other conditions. With Brake Guard Safety System installed, it's been found to reduce stopping distance up to 30%.

* * * *

Announcer: Q: Does the Brake Guard Safety System user qualify for an ABS insurance rate discount on their premiums?

A: Yes, With Brake Guard safety system installed on your new or used vehicle, you will qualify for an insurance rate discount if your carrier offers ABS discounts. [EXHIBIT E]

(f) BRAKE-GUARD	Anti-Lock	WORLD CLASS	Anti-Lock
BRAKE*GUARD	BRAKING	BRAKE*GUARD	Safety System®
Safety System®	Add-on ABS Saves Lives		Reduces Accidents

"A Full-Time" Four Wheel Safety System (with anti-lock benefits) for All vehicles with Hydraulic Brakes.

WHAT IS BRAKE*GUARD?

* It is a Safety System with "Anti-Lock" benefits for vehicles with hydraulic brakes.

* It operates automatically, every time the brakes are applied.

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- * It works to inhibit wheel lock-up, skidding and loss of control when braking.
- * It stops vehicles straighter and shorter with better steering control. [EXHIBIT F]

* * * *

(g) BG's Hot Sheet

* * * *

BG TESTIMONIALS

HERE'S WHAT BRAKE GUARD CUSTOMERS ARE SAYING

This letter is to inform you of the results we have had with the Brake Guard products that we have installed on three vehicles.

The first was a 1956 Ford F100 pickup. The unit drastically improved the stopping of the pickup, especially on wet streets, NO rear wheel lockup!!

The second was on a 1980 Porsche 911SC. The results were excellent. After repeated stops from 60 MPH there was no brake fade, just controlled stops. Also, stops made at 70 MPH on a wet surface produced NO lockup, just smooth controlled stops.

The third vehicle was a 1989 Honda GL1500 Motorcycle. The installation was done on the rear unitized brake. Again the results were shorter, smoother stops. Further tests will be conducted after installing the unit on the front brake.

Allen Smith, Tulsa Enterprises, Huntington Beach, CA

* * * *

I am writing this letter to express my complete satisfaction with your product. I became interested after reading your brochure. My 1977 GMC Motor Home braking has improved both to feel and ability to stop from any speed far beyond my expectations.

Since the installation in mid 1991, I have convinced many of my fellow R.V.ers, mostly GMCs but some others 20' to 36', to install your units and all have found under actual tests that our panic stops require one third less distance (i.e. 200' instead of 300'). Also brake fade is no longer apparent on drawn out stops as in steep off ramps, etc. . . .

Bob Desaussure, San Rafael, CA

* * * *

[EXHIBIT G]

(h) STOP STOP STOP

[ABS logo] with A FULL TIME FOUR WHEEL SAFETY SYSTEM WITH LIMITED ANTI LOCK BENEFITS

[Photo of child about to enter path of vehicle on muddy road.]

ADVANCED BRAKING SYSTEM IS USED BY PEOPLE WHO CARE FOR SHORTER STRAIGHTER SAFER CONTROLLED STOPPING

WHAT IS ADVANCED BRAKING SYSTEM?

A four wheel Safety System for all vehicles with hydraulic brakes.

WHAT HAPPENS TO YOUR BRAKE SYSTEM?

Heat and other factors cause brake drums and rotors to become warped and out of round, when the brakes are applied the contact surface at each wheel is uneven resulting in unequal braking performance, premature wheel lockup, skidding, loss of control and unwanted accidents.

HOW ADVANCED BRAKING SYSTEM WORKS

Like a computer, Advanced Braking System's patented regulator system (modified gas/hydraulic) operates every time the brakes are applied, compensating for unequal braking, resulting in smoother, shortened straighter stopping with much greater control.

Advanced Braking System can reduce skidding under all conditions. It is still possible to lock wheels and skid especially at slower speeds and on slippery surfaces.

* * * *

QUALIFICATION FOR INSURANCE RATE DISCOUNT

Advanced Braking System is a four wheel Safety System and is in compliance with the Department of Transportation as defined by their F.M.V.S.S. No. 105; Hydraulic Brake System. Properly equipped vehicles qualify for insurance rate discounts where applicable. [EXHIBIT H]

PAR. 5. Through the use of the trade names Brake Guard ABS and Advanced Braking System ABS; the logo containing the legend "Advanced Braking System" and the acronym "ABS"; 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 H; respondents have represented, directly or by implication, that Brake Guard is an antilock braking system.

PAR. 6. In truth and in fact, Brake Guard is not an antilock braking system. Therefore, the representation set forth in paragraph five was, and is, 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 through H, respondents have represented, directly or by implication, that:

(a) Brake Guard prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(e) Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;

(f) Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Testimonials from consumers appearing in the advertisements and promotional materials for Brake Guard reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 8. In truth and in fact:

(a) Brake Guard does not prevent or substantially reduce wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of Brake Guard will not qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) Brake Guard does not comply with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 ("SAE J46"). SAE J46 sets forth a test procedure for evaluating the performance of antilock brake systems, but contains no performance standard. Moreover, Brake Guard has not been subjected to the testing set forth in SAE J46;

(d) Brake Guard does not comply with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration. The provision referred to establishes only a definition pertaining to antilock braking systems, and Brake Guard does not meet that definition;

(e) Brake Guard does not reduce stopping distances by 20 to 30% or by up to 30%;

(f) Brake Guard does not provide antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Testimonials from consumers appearing in the advertisements and promotional materials for Brake Guard do not reflect the typical or ordinary experience of members of the public who have used the product.

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

PAR. 9. 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 H, respondents have represented, directly or by implication, that:

(a) In emergency stopping situations, a vehicle equipped with Brake Guard will stop in a shorter distance than a vehicle that is not equipped with the device; and

(b) Installation of Brake Guard will make operation of a vehicle safer than a vehicle that is not equipped with the device.

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 through H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, seven, and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraphs five, seven, and nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. 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

**NEW VEHICLE INSTALLATION OF
Advanced Braking System ABS**
 DOES NOT VOID OR ALTER NEW VEHICLE
 WARRANTIES!
 REFERENCE SOURCE: General Motors Corp. - Ford
 Motor Co. - Chrysler - Nissan - Toyota - Subaru



**Qualification for
A.B.S. Insurance
Rate Discount**

Advanced Braking System is a four wheel Safety System with Anti-Lock benefits and is in compliance with the National Highway Traffic Safety Administration (NHTSA) a division of the Department of Transportation (DOT) as defined by their standard No. 105: Hydraulic Brake System. The (S4) definition "Anti-Lock Systems" means a portion of the service system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking.

**LIMITED WARRANTY:
100,000 miles or 10 years.**
 Manufactured by:
**Brake Guard Products, Inc.
 Spokane, Wa., U.S.A.**



**Could
You
Stop?**



**FULL TIME
FOUR WHEEL
SAFETY SYSTEM**
 (WITH ANTI LOCK BENEFITS)



**REDUCES WHEEL LOCK-UP
FOR ALL VEHICLES
WITH HYDRAULIC BRAKES**

EXHIBIT A

What Is Advanced Braking System?

- It is a Safety System with "Anti-lock" benefits for all vehicles with hydraulic brakes, including motor homes and trucks, etc.
- It works to inhibit wheel lock-up, skidding and loss of control when braking.
- It stops vehicles straighter and shorter with better steering control and power.
- It operates automatically, every time the brakes are applied.

How Advanced Braking System Works:

Heat and other dimension factors cause brake drums and rotors to become slightly warped and out-of-round. So, when the brakes are applied, the contact surfaces are correspondingly uneven causing an unequal transmission of braking effort from the wheels to the roadway resulting in premature wheel lock-up, early brake fade, uneven wear, skidding and loss of control. Like a computer, Advanced Braking System's patented systems (modified gas/hydraulic) compensate 4-wheel braking up to 120-140 times per second @ 60 mph, every time brakes are applied resulting in smoother, shortened and controlled stopping with nearly double the braking power, efficiency and control.



BRAKE • GUARD INTERNATIONAL HEADQUARTERS

Safety Scoreboard

LIFE SAVING FEATURES	Advanced Braking System		ALL OTHER BRAKES	
	YES	NO	YES	NO
1. Stops Vehicle in A Shorter Distance	✓			
2. Operates Automatically Every Time The Brakes Are Applied	✓			X
3. Helps Steering Control During "Panic" Stops	✓		X	
4. Reduces Brake Fade, Hot Spots, And Brake Wear	✓			X
5. Increases Braking Power	✓			X
6. Helps Compensate for Unequal Brake Adjustment, Air and Wear Differences in Tires and Uneven Loading	✓			X
7. Reduces Wear to Front End Assembly, Tires and Master Cylinder	✓			X
8. Nearly Doubles Over-all Braking Efficiency	✓			X
9. Available for All Vehicles With Hydraulic Brakes - Including Motor Homes, Etc.	✓			X
10. Available As An "Aftermarket" Retrofit System	✓			X
11. Transferable From One Vehicle to Another in Less Than One Hour	✓			X

ROAD SURFACE	COHESION FACTOR
Dry Asphalt	80%o-90%
Wet Surface	30%o-40%
Snow	15%o-20%
Ice	5%o-10%

Advanced Braking System will reduce skid under all conditions. However, it is still possible to lock wheels and skid especially at slow speeds and on slippery surfaces.

ADVANCED BRAKING SYSTEM IS PATENTED INTERNATIONALLY AND UNDER U.S. PATENT NUMBERS 4,571,009 and 5,070,000 OTHER PATENTS ARE PENDING.

EXHIBIT B

ANSWERS TO COMMON QUESTIONS ABOUT
BRAKE-GUARD ABS

(ABS - Advanced Braking System)

Q: Why should I consider BRAKE-GUARD ABS as an aftermarket item?

A: Anti-Lock brakes are one of the most advertised options of the decade. Virtually everything your new car buyer reads today has advertisements and positive press regarding Anti-Lock brakes.

Q: What about profits?

A: BRAKE-GUARD ABS is an excellent profit item; higher than most aftermarket items.

Q: How does BRAKE-GUARD ABS differ from electronic ABS systems?

A: Electronic ABS systems only work after the wheel(s) lock up. *BRAKE-GUARD ABS works every time you use your brakes.*

Q: Will the inclusion of BRAKE-GUARD ABS change the way the brake pedal feels?

A: Yes, your customer will feel a softer pedal, but they will notice increased braking power with less effort. The pedal will not pulsate like the electronic ABS systems.

Q: Will BRAKE-GUARD ABS void your customer's factory warranty?

A: No, the inclusion of BRAKE-GUARD ABS on your vehicle does not void or alter new or used vehicle warranties.

Q: Will your customer qualify for an ABS insurance rate discount on their premiums?

A: With BRAKE-GUARD ABS installed on your new or used vehicle, you will qualify for an insurance rate discount if allowed by your carrier.

Q: How long and complicated is the BRAKE-GUARD ABS installation?

A: The BRAKE-GUARD ABS installation usually requires less than one hour; using special fittings, without modifying any manufacturer's part (15 minute removal). The installation guide takes you through step by step; covering all applications.

Q: What happens in the event of a malfunction?

A: Should the system malfunction, your vehicle will still maintain its normal brakes.

Q: How long has BRAKE-GUARD ABS been on the market?

A: BRAKE-GUARD ABS, produced by Brake-Guard Products, Inc., has been marketed since 1982, directly to police departments and ambulance companies. New car dealers now offer these systems as an option and undercar shops are also finding these systems very marketable. Overseas markets have shown great success with our system.

Q: What about liability?

A: BRAKE-GUARD ABS is insured with product liability insurance for \$1,000,000 with never a claim on it or any other similar system. This is in addition to the current liability you may already carry.

Q: How can I be sure that BRAKE-GUARD ABS will perform as advertised?

A: We claim that the inclusion of BRAKE-GUARD ABS on a vehicle will stop that vehicle straighter and in a significantly shorter distance, while reducing or eliminating premature wheel lock up, brake fade, brake pull while substantially increasing brake life.

Complaint

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EXHIBIT C

NEW VEHICLE INSTALLATION
Optional Brake Guard ABS
 DOES NOT AFFECT NEW VEHICLE
 WARRANTIES
 REFERENCE SOURCES: General Motors Corp. - Ford
 Motor Co. - Chrysler - Nissan - Toyota - Subaru



**Qualification for
 A.B.S. Insurance
 Rate Discount:**

The Brake • Guard Safety System meets or exceeds the Society of Automotive Engineers (SAE) wheel slip brake control system road test code SAE J46. The Brake • Guard Safety System is A*B*S "Anti-Lock Braking System" and is in compliance with the National Highway Traffic Safety Administration (NHTSA) a division of the Department of Transportation (DOT) as defined by their standard No. 105; Hydraulic Brake System. The (S4) definition "Anti-Lock Systems" means a portion of the service brake system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking.

LIMITED WARRANTY:
 100,000 miles or 10 years.
 Brake • Guard Products, Inc.
 Spokane, Wa., U.S.A.

**Could
 You
 Stop?**



**REDUCES WHEEL LOCK
 FOR ALL VEHICLES
 WITH HYDRAULIC BRA**

EXHIBIT C

What Is Brake-Guard?

- It is a Safety System with "Anti-lock" benefits for all vehicles with hydraulic brakes, including motor homes and trucks, etc.
- It works to inhibit wheel lock-up, skidding and loss of control when braking.
- It stops vehicles straighter and shorter with better steering control and power.
- It operates automatically, every time the brakes are applied.

How Brake-Guard Works:

Heat and other dimension factors cause brake drums and rotors to become slightly warped and out-of-round. So, when the brakes are applied, the contact surfaces are correspondingly uneven causing an unequal transmission of braking effort from the wheels to the roadway resulting in premature wheel lock-up, early brake fade, uneven wear, skidding and loss of control. Like a computer, BRAKE-GUARD's patented systems (modified gas/hydraulic) compensate 4-wheel braking at 120-140 times per second @ 60 mph, every time brakes are applied—resulting in smoother, shortened and controlled stopping with nearly double the braking power efficiency and control.



BRAKE-GUARD INTERNATIONAL HEADQUARTERS

Safety Scoreboard

LIFE SAVING FEATURES	BRAKE GUARD		ALL OTHER	
	YES	NO	YES	NO
1. Stops Vehicle in a Shorter Distance	✓			
2. Operates Automatically Every Time The Brakes Are Applied	✓			X
3. Helps Steering Control During "panic" Stops	✓		X	
4. Reduces Brake Fade and Squeal and Brake Wear	✓			X
5. Increases Braking Power	✓			X
6. Compensates for Load, Imbalance, Air and Wheel Differences in Tire and Uneven Loading	✓			X
7. Reduces Wear to Front End Suspension, Tires and Motor	✓			X
8. Nearly Doubles Over-all Braking Efficiency	✓			X
9. Available for All Vehicles With Hydraulic Brakes - Including Motor Homes, Etc.	✓			X
10. Available as An "Automatic" Retard System	✓			
11. Transferable From One Vehicle to Another in Less Than One Hour	✓			X

ROAD SURFACE	COHESION FACTOR
Dry Asphalt	80%
Wet Surface	30%
Snow	15%
Ice	5%

Brake-Guard will reduce skidding under conditions. However, it is still possible to wheel and skid especially at slower so and on slippery surfaces.

BRAKE-GUARD IS PATENTED INTERNATIONALLY AND US PATENT NUMBERS 4,871,008 and 5,074,885. OTHER PATENTS PENDING.

Complaint

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EXHIBIT D

STANDARD HYDRAULIC BRAKE SYSTEM FUNCTION AND
BRAKE-GUARD ABS FUNCTION:

(ABS - Advanced Braking System)

Brakes are a friction device and are about 50% efficient from a mechanical and operational standpoint. Heat and other dimensional factors cause drums/rotors to become slightly warped and out-of-round, creating high and low spots in the metal of the drums/rotors. Therefore when the brakes are applied and the shoes/pads make contact with the high spots on the drums/rotors there is a rapid rise in brake fluid pressure in the brake lines. When they make contact in the low spots, there is a rapid fall in fluid pressure.

When brakes are applied with hard braking effort the shoes/pads correspondingly strike against the high spot contact - creating a rise in fluid pressure causing excessive friction, heat, wear and tear on the shoes/drums and rotors/pads. Brake fluid is non-compressible and will not reciprocate through the brake lines; consequently, the shoes/pads are not allowed to back off from these high spots. The brake fluid pressures in the brake lines are increased and decreased in conjunction with the high and low spot contact. Wheel lock-up occurs at these high spot contacts between the shoes/drums and rotors/pads, due to the higher pressure and excessive friction involved. This leads to loss of vehicle control.

Brake-Guard ABS is a full-time four wheel safety system with anti-lock benefits. It incorporates a pressure sensitive metering system in each unit (two units to a set per vehicle). Though small in size the Brake-Guard ABS is powerful in operation. This is possible through unique engineering incorporating a principle called hydro-equalization meaning the hydraulic pressures in the brake lines are equalized at all four wheels instantly and automatically at all different speeds. Brake-Guard ABS is a hydromechanical device with no electronics. The engineering technical terminology is Hydro Static Equalization.

The inclusion of Brake-Guard ABS on a vehicle boosts braking efficiency to approximately 90%. This is accomplished by modifying the braking system to a simple hydraulic system to an air-over hydraulic system. Air is pre-charged around the periphery of the metering system. The pre-charged air allows the metering system to function within the parameters needed to operate in correspondence with the pressures already existing in the brake lines during light, medium, or hard braking. This delivers optimum response and performance every time the brakes are applied.

The metering system expands and contracts (pulsates) approximately 60 to 80 times per second @30 Mph and approximately 120 to 140 times per second @60 Mph. Pulsations will vary in number depending on wheel size and mph. The brake fluid is now allowed to reciprocate through the brake lines, resulting in the constant equalization of brake-line pressure. The shoes/pads now back-off from the high pressure, out-of-round spots; conversely, the metering system contracts in response to low spot contact. Along with this equalization comes more efficient contact, with more braking surface between the shoes/drums and rotors/pads.

This principle of operation substantially decreases brake wear and brake fade while inhibiting premature wheel lock-up, at the same time it substantially increases brake life and utilizes more braking surfaces. The vehicle's brakes now have maximum braking efficiency with less pedal effort. It works with any configuration of braking system, front/rear split or diagonal split, and stops the vehicle an average of 20% to 30% shorter. The inclusion of Brake-Guard ABS on a vehicle with hydraulic brakes will improve the overall braking by a varying degree between 50% to 90%+.

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EXHIBIT E

[On Screen: Product Logo]

Exhibit E

Anti-Lock
Brake Guard
Safety System

Host: Hi. Let's talk about safety for a moment, it's probably already happened to you. You are driving down the highway when suddenly you have to stop. And in those few short seconds your life and those of others will depend upon the reliability of your braking system. Will your wheels lock up causing you to careen out of control, or will your car come to a smooth straight stop well short of impact?

The difference could be a revolutionary product called Brake Guard. Brake Guard is a full time safety system with anti-lock benefits. Brake Guard Safety System eliminates some of the hazards of conventional braking systems, dramatically shortening your stopping distance, but more importantly giving you back control of your car in that emergency situation.

Please watch closely at the following demonstration. This Lincoln TownCar is traveling at approximately 65 mph, on dry pavement. As it makes a sudden hard stop the wheels lock unevenly causing the car to spin out of control. Now watch the same car, with Brake Guard Safety System installed. Again the pavement is dry, the speed about 65. The stop is smooth and even 53 feet shorter than before, but most importantly it was a controlled stop.

And so we have seen just how powerful the Brake Guard Safety System is in operation. This patented proven braking system dramatically increases your braking, power, efficiency and control resulting in straighter shorter stops in all kinds of conditions. It's a fact that regular hydraulic brakes only perform at about 60% efficiency, while the Brake Guard Safety System installed on your vehicle will give you peak efficiency around 90% or better. Remember, most safety devices work only when there is an accident, but the Brake Guard Safety System works every time you use your brakes. Helping prevent accidents before they happen. Now let's answer some of the most asked questions we receive about this remarkable product.

[Questions in superscript as well as audio]

Announcer Q: Why do vehicles need the Brake Guard safety system?

Complaint

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EXHIBIT E

A: That's a good question. When a driver slams on the brakes in a panic stop situation, excess braking pressure is created, causing the brakes to lock up and skid. The Brake Guard Safety System equalizes braking pressure before it reaches the wheels, therefore reducing skids stopping the vehicle in a much shorter distance and more importantly giving the driver excellent control of their vehicle.

Q: How does Brake Guard safety system differ from electronic anti-lock braking systems?

A: Electronic systems only work after the wheels lock up. Electronic ABS systems usually contain two or four wheel sensors, a computer and a fluid pump. They must first detect wheel lock-up before moving into action. On the other hand, Brake Guard Safety System works automatically every time you use your brakes, to retard wheel lock-up before it occurs by equalizing the pressure and allowing the shoes or pads to back off from the high spots on the drums or rotors. Brake Guard Safety System works with much greater simplicity than electronic ABS systems. There are no computers that can fail, wiring or fluid pumps. The Brake Guard Safety System is an all-mechanical continuously operating safety system with anti-lock benefits.

Q: How much shorter is the stopping distance with Brake Guard safety system installed?

A: Results can vary depending on road conditions, the weight of the vehicle and a number of other conditions. With Brake Guard Safety System installed, it's been found to reduce stopping distance up to 30%.

Q: Will the Brake Guard Safety System improve the performance of vehicles with worn brakes?

A: Yes; however, no add-on safety system or electronic ABS system can improve the safety if the brakes are inherently bad or need to be replaced.

Q: How long does it take to install the Brake Guard Safety System?

A: Installation usually requires less than a half an hour.

Q: Is there any breaking-in time required when the Brake Guard safety system is first installed?

A: The Brake Guard Safety System requires no break-in, but the hydraulic brakes do. Immediately after installation, make several hard, fast stops just below

EXHIBIT E

the skid point if conditions permit. This will train the brake pistons at each wheel to operate with the Brake Guard Safety System. However, the break-in process takes a little time. The braking will continue to improve during this period. After the break-in run, always re-check all fittings again, looking for any possible leaks.

Q: Will the addition of the Brake Guard Safety System change the way your brake pedal feels?

A: Yes. Most drivers say they feel a softer, more manageable pedal, and notice increased braking power with less effort.

Q: Does the Brake Guard Safety System user qualify for an ABS insurance rate discount on their premiums?

A: Yes. With Brake Guard Safety System installed on your new or used vehicle, you will qualify for an insurance rate discount if your carrier offers ABS discounts.

Q: Will Brake Guard void your factory warranty?

A: No. The installation of Brake Guard Safety System on your vehicle does not void or alter new or used vehicle warranties.

Q: On what type of vehicle can Brake Guard Safety System be used?

A: Brake Guard Safety System is used on vehicles with all types of hydraulic brakes: cars, motor homes, vans, small trucks and emergency vehicles such as ambulances and police cars.

Q: What's the most important benefit of the Brake Guard Safety System?

A: Well, as I said before, the Brake Guard Safety System works every time you use your brakes, helping prevent accidents before they happen. And with Brake Guard Safety System you get a controlled shorter stop that could very well make the difference in saving a life or the lives of those you love.

Complaint

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EXHIBIT F

**Add-On ABS Saves Lives****Reduces Accidents**

"A Full-Time" Four Wheel Safety System (with anti-lock benefits) for All Vehicles with Hydraulic Brakes.

WHAT IS BRAKE-GUARD?

- It is a Safety System with "Anti-Lock" benefits for vehicles with hydraulic brakes.
- It operates automatically, every time the brakes are applied.
- It works to inhibit wheel lock-up, skidding and loss of control when braking.
- It stops vehicles straighter and shorter with better steering control.

OTHER BENEFITS OF BRAKE-GUARD:

- Positive reduction in brakefade and hot spots (dangerous conditions caused by hard brake use).
- Increases brake life substantially.
- Reduces wear to critical front-end assembly, tires, and master cylinder.
- Helps compensate for unequal brake adjustment, air and wear difference in tires and uneven loading.
- Makes driving easier, safer and more fun while reducing the chance of accident, injury or lawsuit.

DISTRIBUTED BY: **LIST PRICE**
\$595⁰⁰

EXHIBIT G



ing this letter
my complete
on with your
the movement
your brakes.
Master Home
approved both
ability to stop
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a.
Installation
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by GMC's but
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rate and all
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and honest
a Distributor
in Dallas, CA
convenient to
also contact-

NICKY ISSUE:

- BG develops special ap-
plications for Honda
GoldWing motorcycles
- Results from South
West Research Insti-
tute in San Antonio
Texas on the effects of
Brake Guard systems.
- The physics behind
proportioning valves
and Brake Guard ap-
plications

If you would like to send
us your testimonial, or
have other questions or
comments about Brake
Guard Products, please
contact us at:

Brake Guard Products
P.O. Box 9888
Spokane, WA 99209
Tel: 1-800-ABS-STOP
Fax: (509) 328-2881



**International
Sales Foot High
Growth Rates**

Brake Guard is
currently marketing both
the Brake Guard name
and the Advanced
Braking System (ABS) in
over 30 countries. Sales of
the Brake Guard and ABS
systems have taken off
overseas. In some Ameri-
cans aren't the only ones
concerned about safety
and saving lives.

**New BG Posters
Hot Off the Press**

Brake Guard has just
received new posters to
assist you in your market-
ing efforts. If you're ready
to hang up some new
marketing ideas, please
feel free to contact us.

**Brake Guard Pub-
lishes Quarterly
Newsletter**

This is the first issue of
BG's Hot Sheet, a quarterly
news publication from
Brake Guard Products, Inc.
Future issues will include
installation tips, marketing
techniques, testimonials,
and more.

Installation Tips from the Pros
The Dual Diagonal Dilemma

Dual-diagonal brake de-
signs appear to present a
problem when installing
Brake Guards, but such is not
the case. With four brake lines
coming from the master cy-
linder, deciding which lines
to attach the Brake Guards
requires simple understand-
ing of the mechanics behind a
dual-diagonal arrangement.
The dual-diagonal system



BRAKE GUARD PRODUCTS International sales and advertising
in Spokane, Washington

Jaguars are Unique Animals

When you think of luxury
cars, one would assume that
with the increase in price
comes an increase in all-
around safety. Yet even in the
finest automobiles in the
world, hydraulic brake sys-
tems can be drastically im-
proved with Brake Guard.

Many would consider the
Jaguar automobile the one of
the finest in the world. Very
few cars can claim to have
been in production for so
many years with very few
changes in body style. But
not only is a Jaguar distinc-
tive on the outside, there are
many unique characteristics

to these automobiles on the
inside. One characteristic re-
fers to the Brake Guard in-
stallation in the master cylin-
der. While most production
cars use one or a combination
of 8 standard lines and 5 sur-
vive lines, the Jaguar requires
its own special line. Our engi-
neers at Brake Guard have
modified the standard 7921
and 7979 lines provided with
other brake guard sets and
we now have these in stock.

If you have an approxi-
mation to install a Brake Guard
system on a Jaguar, please
request two of these modifi-
ed lines for the installation.

When viewing the master
cylinder, it's easy to see that
two brake lines are emerging
from the front of the cylinder
and two from the rear of the
master cylinder. Because
brake fluid flows freely within
each chamber, installing one
Brake Guard in either of the
front two lines emerging from
the cylinder, and one Brake
Guard in either of the rear
cylinder brake lines provides
maximum pressure regula-
tion in all brake lines. Be-
cause brake fluid is incom-
pressible, installing a Brake
Guard at any point along the
circuit regulates the pressure
within that chamber of the
cylinder.

If you have come across
installation questions, or have
developed solutions of your
own, we would like to hear
from you. Contact informa-
tion for Brake Guard Prod-
ucts is located at the end of
this newsletter. Next month
we will feature an article on
the function of proportioning
valves.

000013:

Complaint

125 F.T.C.

EXHIBIT G



BG TESTIMONIALS



HERE'S WHAT BRAKE GUARD CUSTOMERS ARE SAYING

This letter is to inform you of the results we have had with the Brake Guard products that we have installed on three vehicles.

The first was a 1966 Ford F100 pickup. The unit drastically improved the stopping of the pickup, especially on wet streets. NO rear wheel lockup!!

The second was on a 1980 Porsche 911SC. The results were excellent. After repeated stops from 60 MPH there was no brake fade, just controlled stops. Also, stops made at 70 MPH on a wet surface produced NO lockup, just smooth controlled stops.

The third vehicle was a 1989 Honda GL1500 Motorcycle. The installation was done on the rear unitized brake. Again the results were shorter, smoother stops. Further tests will be conducted after installing the unit on the front brake.

Allen Smith
Tulsa Enterprises
Huntington Beach, CA
You are currently being contacted on Honda Marketing applications. Look for test results in next issue.

In January 1991 a new company (vehicle) was purchased. The need was given to the Chevrolet 3/4 Ton Long Bed. The truck was equipped with G.M.'s Anti-Lock Brakes.

Within 4-6 months, the rear wheels would lock at very slow speed on wet surfaces such as the L.A. free-

way traffic at 3-5 MPH. The " idiot " light on the dash began to stay on. The dealer made the necessary repairs, but within 3-4 months the same thing once more. The needed part was not in stock and the mechanic who was assigned to my truck told me, and I quote, " This is the only real way to fix the problem, " as he un-plugged the unit.

One week ago the Brake Guard (system) was installed, and what a difference! Perhaps you should present your product to Chevy dealers who must be embarrassed by the repair procedure.

Kelly Tidwell
S.T.D. Enterprises
Huntington Beach, CA

In June 1991, I had an anti-lock braking system (Brake Guard) installed on my 1990 V-4 4X4 pickup. I have now had an opportunity to test this system on pavement, gravel roads, and ice.

I am very satisfied with this installation. In all situations it has provided shorter stops without loss of maneuverability. On gravel roads, I particularly like the increased control when going down steep, rough roads. On ice, I like the increased control that comes from being able to stop in the shortest distance without skidding—thus being able to continue to steer the vehicle.

Kenneth Strand
Ridgeway, N.C.

I am writing this letter to express my complete satisfaction with your product. I became interested after reading your brochure. My 1977 GMC Motor Home braking has improved both as to feel and ability to stop from any speed far beyond my expectations.

Since the installation in mid 1991, I have convinced many of my fellow R.V.'ers, mostly GMC's but some others 26' to 36', to install your units and all have found under actual tests that our panic stops require one third less distance (i.e. 200' instead of 300'). Also, brake fade is no longer apparent on drawn out stops as in steep off ramps, etc.

I am sure my enthusiasm will continue for at least the 100,000 mile guarantee and hopefully fellow travelers I meet along the way will heed my advice. Thank you for an amazing and honest product.

Bob Zimmerman
San Rafael, CA
We're sending you some brochures to pass out to your fellow motorhome-

In September 1990 at Camping World in Nashville Tennessee, I had brake guard installed on my 1986 Beauder (33 feet). It has a 460 cu. in. engine, John Deere chassis, and four wheel disc brakes.

After having the brake guard system installed, we were traveling home to New York on Route 81 in the state of Virginia. We were travel-

ing approximately 55 MPH and came up on a car doing approximately 10 MPH with no 4 way flashers. We had to make a quick slow down, and I believe the Brake Guard system made a positive difference in the performance of the brakes. We now tow a car behind on a dolly and are very pleased the way the brakes are performing. I highly recommend Brake Guard to anyone who wants their brake system improved.

Bill Peery
Ridgeway, NY

NEXT ISSUE:

- BG develops special application for Honda GoldWing motorcycles
- Results from South West Research Institute in San Antonio Texas on the effects of Brake Guard systems.
- The physics behind proportioning valves and Brake Guard applications

If you would like to send us your testimonial, or have other questions or comments about Brake Guard Products, please contact us at:

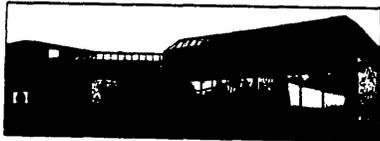
Brake Guard Products
P.O. Box 9689
Spokane, WA 99209
Tel: 1-800-ABS-STOP
Fax: (509) 328-7261

EXHIBIT H



ADVANCED BRAKING SYSTEM
DOES NOT VOID ORIGINAL
NEW VEHICLE WARRANTY

REFERENCE SOURCE: GENERAL MOTORS CORP., FORD MOTOR CORP.,
CHRYSLER, NISSAN, TOYOTA, MITSUBISHI, SUBARU, HONDA, MAZDA, HYUNDAI



BRAKE-GUARD INTERNATIONAL, INC.

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STOP

with
A FULL TIME
FOUR WHEEL
SAFETY SYSTEM
WITH LIMITED-ANTI LOCK BENEFIT

**ADVANCED BRAKING SYSTEM
IS USED BY
PEOPLE WHO CARE
SHORTER
STRAIGHTER
SAFER
CONTROLLED STOPPING**

EXHIBIT H

WHAT IS ADVANCED BRAKING SYSTEM?

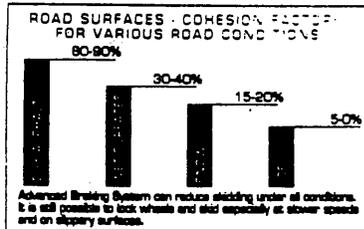
A four wheel Safety System for all vehicles with hydraulic brakes.

WHAT HAPPENS TO YOUR BRAKE SYSTEM?

Heat and other factors cause brake drums and rotors to become warped and out of round, when the brakes are applied the contact surface at each wheel is uneven resulting in unequal braking performance, premature wheel lockup, skidding, loss of control and unwanted accidents.

HOW ADVANCED BRAKING SYSTEM WORKS

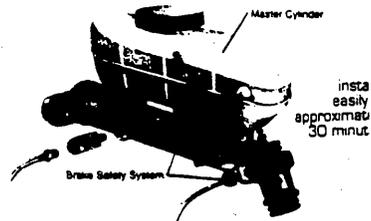
Like a computer, Advanced Braking System's patented regulator system (modified gas/hydraulic) operates everytime the brakes are applied, compensating for unequal braking, resulting in smoother, shortened, straighter stopping with much greater control.



ADVANCED BRAKING SYSTEM IS PATENTED INTERNATIONALLY AND UNDER U.S. PATENT NUMBERS 4,571,008 and 5,074,825. OTHER PATENTS ARE PENDING.

MAILED
OCT 4 1995
DOCUMENT PROCESSING

EASE OF INSTALLATION



ADVANCED BRAKING SYSTEM IS USED BY

- Emergency Vehicles • R.V.'s • Motorhome
 - Fleets • Performance Automotive • New C and
- and
PEOPLE WHO CARE

7 REASONS WHY YOU SHOULD HAVE ADVANCED BRAKING SYSTEM INSTALLED...	
LIFE SAVING FEATURES	BRAKE-RELATED Safety Feature
1. Saves Vehicle In A Shorter Distance.....	<input checked="" type="checkbox"/>
2. Operates Automatically Every Time The Brakes Are Applied.....	<input checked="" type="checkbox"/>
3. Reduces Brake Pad, Hub, Spins and Brake Wear.....	<input checked="" type="checkbox"/>
4. Holds Compensates for Unequal Brake Pad/rotors, Air and Wear Differences in Tires and Uneven Loading.....	<input checked="" type="checkbox"/>
5. Increases Overall Braking Efficiency.....	<input checked="" type="checkbox"/>
6. Available for All Vehicles With Hydraulic Brakes - Including Motor Homes, Etc.....	<input checked="" type="checkbox"/>
7. Available As An "Aftermarket" (Retrofit) System.....	<input checked="" type="checkbox"/>

QUALIFICATION FOR INSURANCE RATE DISCOUNT

Advanced Braking System is a four wheel Safety System and is in compliance with Department of Transportation as define their F.M.V.S.S. No. 105: Hydraulic E System. Properly equipped vehicles qualify insurance rate discounts where applic

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

MAY 2, 1997

I. INTRODUCTION

The Commission issued the complaint in this case and two companion cases on September 27, 1995. I issued a default decision in one case (D. 9276) on October 16, 1996 and an initial decision in another (D. 9275) on March 3, 1997.

The complaint in this case charges that Brake Guard Products, Inc. ("BGPI"), and Ed F. Jones, individually and as an officer and director of Brake Guard, have violated the Federal Trade Commission Act by representing, through advertisements and promotional materials for aftermarket automotive products including the Brake Guard Safety System, also known as the Advanced Braking System or Brake Guard ABS ("Brake Guard"), that Brake Guard is an antilock braking system when, in truth and in fact, it is not an antilock braking system.

The complaint also alleges that the following representations were made in respondents' ads and promotional materials and that they were false and unsubstantiated:

(a) Brake Guard prevents or substantially reduces wheel lock-up, skidding, and loss of steering control in emergency stopping situations;

(b) Installation of Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(c) Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(d) Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(e) Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;

(f) Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(g) Testimonials from consumers appearing in the advertisements and promotional materials for Brake Guard reflect the typical or

ordinary experience of members of the public who have used the product.

The complaint also alleges that respondents have falsely represented, without substantiation, that:

- (a) In emergency stopping situations, a vehicle equipped with Brake Guard will stop in a shorter distance than a vehicle that is not equipped with the device; and
- (b) Installation of Brake Guard will make operation of a vehicle safer than a vehicle that is not equipped with the device.

On May 22, 1996, I entered a partial summary decision, later clarified on May 28, 1996, which found that respondents' trade names and logos, and the advertising and promotional materials attached to the complaint, made the alleged claims ("Partial Summary Decision (Ad Meaning)").

In a second partial summary decision on October 16, 1996, I held that respondents' representations that installation of their braking devices will qualify a vehicle for an automobile insurance discount in a significant proportion of cases is false and unsubstantiated ("Partial Summary Decision (Insurance Discounts)").

Trial in this proceeding was held between October 21, 1996 and February 13, 1997. The record was closed on February 14, 1997 and the parties filed their proposed findings on March 12, 1997. Replies were filed on March 27, 1997. With few exceptions, respondents have not supported their factual claims by detailed references to the record.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not substantiated by the record or because they are irrelevant.

II. FINDINGS OF FACT

*A. The Corporate Respondents' Business And
Mr. Jones' Connection Therewith*

1. Brake Guard Products, Inc. is a Washington corporation, with its offices and principal place of business located at 1047 W. Garland Avenue, Spokane, Washington (Ans. ¶ 1).¹

2. Ed F. Jones is President 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 the complaint. His office and principal place of business is at 1047 W. Garland Avenue, Spokane, Washington (Ans. ¶ 1; Tr. 2955-57).

3. The acts and practices of respondents alleged in the complaint have been in or affecting commerce (Ans. ¶ 1).

B. The Product And Its Promotion

4. Since approximately 1980, respondents have manufactured, advertised, offered for sale, sold and distributed an after-market automotive product under the trade names Brake Guard Safety System, the Advanced Braking System, or Brake Guard ABS (hereinafter collectively referred to as "Brake Guard"), a device that is installed on a vehicle ostensibly to improve its braking performance (Ans. ¶ 1; Tr. 2963). Brake Guard consists of a metal housing containing a resilient membrane. The devices are sold in sets of two, so that one may be attached to each of the two hydraulic brake lines of a motor vehicle. The device is a simple hydraulic accumulator, meaning that during heavy brake pedal application, the resilient membrane can expand to accept some brake fluid. When the pedal is released, the brake fluid is returned to the brake lines (Tr. 874; CX 32-M, -Z-24; see RX 91-M (depiction)).

5. BGPI sold the Brake Guard systems through a network of dealers and distributors, including new car dealers, vehicle service

¹ Abbreviations used in this decision are:
Ans. Respondents' answer to the complaint.
CPF: Complaint counsel's proposed finding.
Cplt Complaint.
CX: Commission exhibit.
F.: Finding number in this decision.
Tr.: Transcript of the hearing.
RX: Respondents' exhibit.

centers, and vehicle part catalog companies. (*See, e.g.*, RX 229-L; CX 234-B; CX 321-A, B; CX 233-A; CX 234-E, F.) BGPI's 1992 promotional material indicated that it had over 1200 U.S. dealers and marketed Brake Guard in 34 countries abroad. (Compare CX 234-Z-208 with CX 234-A (BGPI marketing material referring to 1992 events, submitted in deposition held November, 1992).) The wholesale cost to dealers and distributors of Brake Guard ranged from \$98 to \$240 per system (CX 231-G, H, W; *see also* CX 234-Z-53, -60). The price to consumers ranged from \$283 to \$349, installed (CX 231-Z-10, Z-14; CX 234-J, -Z-143). BGPI estimates that it has sold between 400,000 and 500,000 Brake Guard systems (Tr. 2615-16). BGPI's gross receipts for sales of Brake Guard from 1990 to 1994 amounted to \$10,412,792 (\$279,450 in 1990; \$1,426,404 in 1991; \$3,383,401 in 1992; \$3,003,667 in 1993; and \$2,319,870 in 1994) (CX 246-A, -D, -G, -K, -N).

6. BGPI promoted Brake Guard through ads in automotive magazines, and a variety of widely disseminated videos, brochures, posters, and other promotional materials.

7. Print ads for the Brake Guard device appeared in magazines such as "Brake and Front End" (Tr. 2722), "Northwest Motor" (CX 169), "Specialty Automotive Magazine" (CX 172), "Import Automotive Parts & Accessories" (CX 173), "Automotive Executive" (CX 174), "The New American" (CX 179), and "Undercar Digest" (CX 180), as well as "RV West," "Automotive News and Trailer Life" (Tr. 2722).

8. BGPI also used several different videos to promote its product. (*E.g.*, CX-25 (Cplt Ex. 3, *see* Ans. ¶ 1); CX 107, CX 109, CX 110, CX 111, CX 146, CX 149, CX 158, CX 159, CX 234-Z-199-202.) Many of the magazine ads instructed the reader to call for a "free video." (*E.g.*, CX 179, 180.) BGPI distributed videotapes extensively to dealers, to assist them in marketing the product to consumers. (*E.g.*, CX 114-A, CX 163-F, CX 226-H, CX 233-A (reflecting BGPI's shipment of videos to dealers); CX 140-A, B, D, F, G, I (reflecting dealer shipment of video to installers); Tr. 2969-70.) One reseller used the videotape to make presentations to car dealerships (CX 234-Z-7 (regarding CX-234-Z-199-202)); another stated that "selling the Brake Guard is easy after the customers are sat down to watch a demo tape of the performance of the Brake Guard" (CX 53-Z-47).

9. BGPI also promoted its product through numerous brochures (CX-21, CX 23, CX 28, CX 112, CX 113, CX 136, CX 160, CX 188,

CX 228; Tr. 2744) which were provided to dealers by the hundreds (CX 114-A-B, CX 145, CX 163-A, -B, -F, -G, -I, -J, CX 226-A, -E), and were designed to be given to customers as well as dealers and distributors (Tr. 2759). BGPI provided brochure display stands to dealers (e.g., CX 108, CX 113, CX 163-F), and BGPI marketing materials reminded dealers to take brochures to sales presentations (CX 130-B).

10. BGPI provided dealers with other printed materials to promote Brake Guard, including posters (CX-108, CX 117, CX 126, CX 142, CX 143, CX 148), stickers (CX 115, CX 118, CX 124), an "Engineering Summary" (CX 116), a Certificate of ABS Insurance Rate Discount (CX 120, 122, 134, 154), a marketing "Hot Sheet" (CX 130, 235), a Question and Answer Sheet (CX 22 (Cplt Ex. B, see Ans. ¶ 1), CX 132), a sheet describing Brake Guard's function (CX 24 (Cplt Ex. D, see Ans. ¶1), CX 133), and a sheet describing how Brake Guard complied with NHTSA and SAE standards (CX 137). Brake Guard also prepared material designed for a direct mail program (CX 224 A-B; Tr. 2751).

11. BGPI also provided dealers with "dealer kits" that contained reprints of positive magazine articles, brochures, posters, testimonial letters from dealers and consumers and, on occasion, training tapes (Tr. 2714-15, 2970). Magazine ads also urged interested persons to call for a free "dealer kit" (e.g., CX 179, 180). CX-53, which contained numerous testimonials and purported test results, was disseminated to distributors and dealers to assist in sales (Tr. 114, 2972).

12. Larry Jones, BGPI's national sales manager from 1990-94, testified that he personally represented BGPI at fifteen to twenty trade shows a year (Tr. 2622). One of these was the Specialty Equipment Manufacturing Association (SEMA) show (Tr. 2760; CX 14-C, CX 15-C, CX 16-A-E). SEMA is the association of automotive aftermarket manufacturers, distributors and outlets, and it holds the world's largest automotive aftermarket show, attended by 50,000 manufacturers, distributors and dealers, every November in Las Vegas, Nevada (Tr. 108-09, 166-67; CX 235). BGPI sponsored a booth at SEMA featuring the Brake Guard logos, displayed posters, and distributed celebrity brochures making claims for the Brake Guard dealer kits and videos (Tr. 2760; see CX 240). BGPI distributed a variety of these materials at other trade shows (Tr. 2763).

13. BGPI personnel made oral presentations of Brake Guard claims to potential customers, dealers and distributors (Tr. 2718-19).

14. Brake Guard dealers and distributors distributed ads that repeated claims made by BGPI. (E.g., CX 181, Tr. 2728-29; CX 242.) As of the date of the hearing in this matter, Brake Guard distributors continued to make claims contained in BGPI advertising materials (CX 242).

15. BGPI's advertising costs from 1990 to 1994 totaled \$433, 997, including \$6,196 for advertising and \$3,242 for trade shows in 1990 (CX 246-A, -C); \$105,077 for advertising in 1991 (CX 246-D); \$128,092 for advertising in 1992 (CX 246-G); \$66,329 for advertising and \$20,352 for trade shows in 1993 (CX 246-K, -M); and \$95,193 for advertising and \$9,516 for trade shows in 1994 (CX 246-N, -P).

*C. The Claims Made In Respondents' Ads
And Promotional Materials*

16. In my Partial Summary Decision (Ad Meaning), at 2, I found that respondents made claims that:

A) Brake Guard is an antilock brake system (Cplt ¶ 5) that complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration (Cplt ¶ 7d, "NHTSA compliance claim") and prevents or substantially reduces wheel lockup, skidding and loss of steering control in emergency stopping situations (Cplt ¶ 7a, "braking control benefits claim");

B) Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 (Cplt ¶ 7c, "SAE J46 claim");

C) Brake Guard provides antilock braking system benefits, including wheel lockup control benefits, at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems (Cplt ¶ 7f, "OEM ABS equivalence claim");

D) Brake Guard will, in an emergency stopping situation, stop a vehicle in a shorter distance than a vehicle that is not equipped with the device (Cplt ¶ 9a) ("general stopping distance claim"), and Brake Guard reduces stopping distances by 20% to 30% or by up to 30% (Cplt ¶ 7e) ("specific stopping distance claim");

E) Installation of Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases (Cplt ¶ 7b, "insurance discount claim");

F) Installation of Brake Guard will make operation of a vehicle safer than a vehicle that is not equipped with the device (Cplt ¶ 9b, "comparative safety claim");

G) Testimonials from consumers appearing in the advertisements and promotional materials reflect the typical or ordinary experience of members of the public who have used the product (Cplt ¶ 7g, "testimonial typicality claim"); and

H) At the time they made the representations set forth in complaint paragraphs five, seven, and nine, respondents possessed and relied upon a reasonable basis that substantiated such representations (Cplt ¶ 10).

17. Promotional materials admitted into evidence make some or all of the representations alleged in the complaint. CX 108, CX 130, CX 174, CX 177, CX 227, CX 228, and CX 235 identify the product by the trade name Advanced Braking System ABS; and CX 105, CX 106, CX 113, CX 115-118, CX 123, CX 124, CX 136 and CX 169 identify the product by the trade name Brake Guard Anti Lock Safety System. These exhibits thus make the claim that the product is an antilock brake system. Many ads reinforce this claim by expressly identifying the product as providing "anti lock benefits" (*e.g.*, CX 105, CX 106, CX 112, CX 136, CX 141, CX 160, CX 171, CX 174-177, CX 179, CX 180-182, CX 184, CX 224, CX 228), or as being an "ABS" or "anti-lock" system (CX 117, CX 132). CX 188 also makes this claim, since it identifies Brake Guard as the "anti-lock brake alternative" and states that it has "anti-lock" benefits and "inhibits premature individual wheel lock-up."

18. CX 133 expressly states that the Brake Guard device will stop a vehicle an average of "20% to 30% shorter," and CX 107-F expressly states that Brake Guard has "been found to reduce stopping distance up to 30%." CX 117 states that Brake Guard "delivers 20% to 30% shorter stopping distance." These statements are identical or substantially similar to statements previously found to have conveyed the specific stopping distance claim, and they also make this claim. Partial Summary Decision (Ad Meaning), at 19.

19. Many ads admitted into evidence make the general stopping distance claim. CX 112, CX 113, CX 125, CX 136, CX 141, and CX 160 state that Brake Guard "stops vehicles straighter and shorter" and

that it will provide "smoother, shortened and controlled stopping." This language is identical to that previously found to convey the general stopping distance claim. Partial Summary Decision (Ad Meaning), at 19. In addition, CX 104-106, CX 112, CX 113, CX 125, CX 136, CX 141, CX 160, CX 228 and CX 240 contain the "Safety Scoreboard" indicating that the Brake Guard device "Stops Vehicle in A Shorter Distance." This language is identical to that previously found to convey the general stopping distance claim. Partial Summary Decision (Ad Meaning), at 19. CX 108, CX 124, CX 148 and CX 188 generally promise "shorter stopping distances," or that a vehicle can "stop straighter in a shorter distance," and thus make the claim expressly.

20. CX 104-106, CX 112, CX 113, CX 125, CX 136, CX 141, CX 160 and CX 228 contain text identical to that previously found to convey the insurance discount claim, and thus, they too make this claim. Partial Summary Decision (Ad Meaning), at 15-16.

21. Many of BGPI's ads make the comparative safety claim. CX 104-107, CX 111-13, CX 125, CX 136, CX 141, CX 146, CX 149, CX 160, CX 188, CX 223, CX 228, and CX 240 refer to the product as a "four wheel safety system" or a "safety system" and promise that Brake Guard will improve braking capacity. The ads contain additional language that reinforces the comparative safety claim. CX 104, CX 105, CX 106, CX 112, CX 113, CX 125, CX 136, CX 141, CX 160, CX 228 and CX 240 do so by including a "safety scoreboard" highlighting the "life saving features" of Brake Guard. CX 117, CX 126, CX 142, CX 143, CX 169, CX 181, and CX 242 promise improved braking function, including shorter stopping distances and reduced wheel lockup. CX 171, CX 175, CX 176, CX 179 and CX 180 promise that Brake Guard will stop a vehicle in a "dramatically shorter distance" and CX 107, CX 109, CX 110, CX 111, CX 146 and CX 158 promise that Brake Guard helps prevent accidents before they happen.

22. Many BGPI ads convey the braking control benefits claim. For example, CX 104-107, CX 112, CX 113, CX 125, CX 132, CX 133, CX 136 and CX 188 contain text identical or substantially similar to that previously found to convey the braking control benefits claim. Partial Summary Decision (Ad Meaning), at 9-12.

23. Many ads admitted into evidence expressly make both the SAE J46 and the NHTSA compliance claims: CX 106, CX 112, CX 113, CX 125, CX 136, and CX 160 state that the Brake Guard device

"meets or exceeds the Society of Automotive Engineers (SAE) wheel slip brake control system road test code SAE J46. The Brake Guard Safety System is ABS 'Anti-Lock Braking System' and is in compliance with the National Highway Traffic Safety Administration, (NHTSA) a division of the Department of Transportation (DOT) as defined by their standard No. 105; Hydraulic Brake System. The (S4) definition 'Anti-Lock Systems' means a portion of the service brake system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking." This is the same language previously found to convey the J46 and NHTSA compliance claims. Partial Summary Decision (Ad Meaning), at 17. CX 104 and CX 105 use substantially similar language to that previously found to convey these claims. CX 141 and CX 228 contain language substantially similar to that previously found to convey the NHTSA compliance claim.

24. The OEM ABS equivalence claim also is made in numerous ads. CX 104-106, CX 112, CX 113, CX 125, CX 136, CX 141, CX 160 and CX 228 contain the "Safety Scoreboard" that was previously found to convey the OEM ABS claim. Partial Summary Decision (Ad Meaning), at 21-22. Other ads (CX 107, CX 111, CX 146, CX 149, CX 132 and CX 184) compare OEM ABS and Brake Guard and imply that because Brake Guard operates continuously, it offers superior benefits. This comparison previously was found to convey the OEM ABS equivalence claim. *Id.*

D. Substantiation For Respondents' Ad Claims

1. Complaint Counsel's Expert Witnesses

a. John W. Kourik

25. John W. Kourik is a licensed professional engineer in the State of Missouri (Tr. 1083). He obtained a B.S. in Mechanical Engineering from Washington University in 1948 and was employed with Wagner Electric, a manufacturer of brake systems, from 1948 until his retirement in 1988. Positions he held at Wagner included Supervisor, Hydraulics Brake Products; Chief Engineer, Brake Products, and Director, Brake Engineering and Aftermarket Services (CX 84-A; Tr. 1073-75).

26. During his 40 years at Wagner, Mr. Kourik was involved in the design, construction and testing of brake assemblies, including

construction of various types of hydraulic valves used in brake systems, and in the construction of air brake antilock systems (Tr. 1076, 1081-82). He was substantially involved in the development of test protocols for Wagner's brakes, supervision of road tests conducted at three facilities on a fleet of forty test vehicles, and the analysis of test results (Tr. 1076-1082, 1089). His experience included testing the effectiveness of antilock systems (Tr. 1082).

27. Mr. Kourik was a long-term member of the Society of Automotive Engineers ("SAE"), an internationally based membership of professionals who work on developing standards and recommended practices for the automotive and aircraft industries. Mr. Kourik was involved in the collection and analysis of test data as part of his involvement in SAE committees that developed a brake rating test procedure and a test protocol to evaluate brake linings, each of which was adopted by the SAE (Tr. 1087-88). In addition, Mr. Kourik was the first chairman of the Wheel Slip Brake Control Systems Subcommittee, which developed an SAE-approved test protocol, SAE-J46, designed to distinguish antilock systems from non-antilock systems and to enable an antilock manufacturer to fine-tune a system during the development process (Tr. 1090-91). Mr. Kourik also served as a member of the Brake Task Force of the Truck-Trailer Manufacturers Association (CX 84-A) in an effort to ensure compatibility of antilock systems on trailers with those on the tractors that hauled them. This twenty-year effort required the evaluation of antilock system test data (Tr. 1093).

28. During his career Mr. Kourik has reviewed hundreds of stopping distance tests and hundreds of wheel slip control tests, including wheel slip control tests on passenger cars (Tr. 1118-19). Mr. Kourik is an expert in the design and application of brake systems, their components, actuating systems and control systems, and in the analysis of brake system testing, including stopping distance and wheel slip control testing (Tr. 1094).

b. James G. Hague

29. James G. Hague is a project engineer working with NHTSA's Office of Defects Investigation ("ODI") at the Vehicle Research and Test Center ("VRTC"), which conducts investigatory testing to assist in ODI's vehicle safety investigations (CX 92-A; Tr. 33-37). While in the military, Mr. Hague received training and had several years of experience with aircraft mechanics, including aircraft hydraulic and

brake systems, which are similar to automotive hydraulic and brake systems. He continued to be responsible for aircraft maintenance in private employment for six years after leaving the military (Tr. 744-52). In 1979, Mr. Hague enrolled in Ohio State University ("OSU"). His university experience included course work in auto engineering and braking systems and extracurricular activities involving vehicle design and construction. In 1983, he received a B.S. in Mechanical Engineering from OSU (Tr. 752-56).

30. In 1983, Mr. Hague became a contract employee at NHTSA's VRTC in East Liberty, Ohio. VRTC conducts vehicle and vehicle component tests for NHTSA, including testing for ODI. Mr. Hague was a project or test engineer, providing technical expertise and support in the development of test protocols, test designs, the conduct and supervision of testing, and the deduction, analysis and presentation of the data (Tr. 761). His specific assignment included brake testing (Tr. 762). From 1984 through 1989, Mr. Hague held various positions, including service as a test engineer on hydraulic systems, as a test engineer on power industry equipment, and as president of a company that developed and marketed software for use by test engineers (CX 92-A; Tr. 764-68).

31. In 1989, Mr. Hague returned to VRTC as a contract employee. There, he provides technical expertise and support to VRTC in the development of test protocols, the conduct of testing, and the analysis and presentation of test data (Tr. 761, 769). His tests are investigatory, designed to determine whether there is a safety-related defect in an automotive system, and if so, what the consequences are. He is assigned most of the brake investigations that come to VRTC. In this position, he has conducted numerous tests of braking systems, and authored twenty-eight reports regarding the results of his investigations of vehicle systems (Tr. 771-83; CX 92-B, -C).

32. Mr. Hague's position requires expertise in passenger cars and light trucks, and extensive knowledge of testing. Mr. Hague is an expert in passenger car and light truck systems, particularly brake systems, and in passenger car and light truck testing, particularly brake testing (Tr. 784).

c. John Hinch

33. John Hinch is Lead Engineer in the Office of Defects Investigation of NHTSA. He obtained a B.S. degree from the College of Engineering at the University of Michigan. His course

work in that program involved numerous engineering courses. Subsequently, he took masters level classes in general and mechanical engineering (CX-94; Tr. 1868-72).

34. From 1975 to 1978, Mr. Hinch was employed by NHTSA as a mechanical engineer, designing tests to evaluate the traction generating potential of tires, specifying control procedures and test instrumentation, analyzing the test data and preparing the reports (Tr. 1872-81). From 1978 to 1989, he was employed as an engineer at ENSCO, Inc., a research and development company, where he was responsible for testing of automotive systems and the interaction of automobiles with other systems. While at ENSCO, he served as lead engineer designing and constructing a test facility for the Federal Highway Administration. During his career at ENSCO, Mr. Hinch conducted over two hundred full-scale crash tests, calibrating equipment, processing the data after the test, and preparing or conducting final review of the project reports (Tr. 1882-89).

35. In 1989, Mr. Hinch returned to NHTSA as an engineer assisting the Chief of its Crash Avoidance Division. While in this position he designed tests to analyze what vehicle properties are associated with rollover crashes, and analyzed the resulting data (Tr. 1891-93). In 1992, he moved to ODI as a defects engineer, where he investigated alleged safety defects in school bus and heavy truck fleets, critically analyzing test data submitted by the fleet vehicle manufacturers to determine whether their data was competent and reliable, directing the conduct of tests to evaluate the validity of defect complaints, and writing detailed scientific reports to document the conclusions of investigations (Tr. 1894-96).

36. In 1994, Mr. Hinch was promoted to the position of Technical Assistant to the Director of ODI, where he provides support to the director on the technical issues raised in each of the two to three hundred investigations performed by ODI each year, supervises junior engineers in the development of scientifically sound investigation techniques and test protocols, and critically reviews test data submitted by manufacturers. Since 1995, he has been in charge of all testing conducted at VRTC, ensuring that such work is performed in a competent manner; he also gives guidance to testing conducted at other locations (Tr. 1896-99).

37. Mr. Hinch has investigated and tested antilock brakes on school buses, has been involved in component testing on antilock

brake systems, and has studied the traction generating potential of ABS-type controllers (Tr. 1902-03).

38. Mr. Hinch has written more than twenty different technical reports and papers, some of which have been published by the SAE (Tr. 1881-82). He has been a member of the SAE and the National Safety Council, another professional society (Tr. 1882).

39. During his career, Mr. Hinch has been involved in the design and analysis of brake testing protocols. He has been responsible for the design of scientifically reliable protocols to test various aspects of automobile performance, including braking performance, and is also responsible for the evaluation of such testing. Mr. Hinch is an expert in vehicle testing, vehicle test procedures and the analysis of data obtained from vehicle testing (Tr. 1900).

2. The Function Of Automotive Brake Systems

40. The function of a motor vehicle's brake system is to slow or stop the vehicle. Hydraulic brake systems utilize an incompressible fluid to create pressure within a closed system of brake lines. When the driver pushes on the brake pedal, the brake lines transmit this pressure through the master cylinder to wheel cylinders or brake caliper pistons, which, in turn, apply force to the brake linings or pads (CX 102-Z-18; Tr. 786-89). This produces a brake torque at the axle which is transmitted to the tire/pavement interface (Tr. 789).

41. When the wheels slow down relative to the ground, slip is caused, generating horizontal tire-road forces. Wheel slip refers to the difference between the angular velocity of the free rolling wheel and the angular velocity of the braked wheel, divided by the angular velocity of the free rolling wheel, expressed as a percentage (CX 103-B; Tr. 789-90, 1119-20). Stated more simply, wheel slip refers to the proportional amount of wheel/tire skidding relative to vehicle forward motion (CX 102-J n.27).

42. The amount of brake force developed at the tire/road interface is a function of the amount of wheel slip (CX 103-C; Tr. 789-90). As brake application is increased, the slip at each wheel increases, thus increasing the braking forces on the vehicle. When slip proceeds beyond 20%, however, brake force starts to fall off subtly. More important, after 20% slippage, the ability of the tire/road contact spot to produce lateral force generation--necessary to make turns--falls precipitously (Tr. 790-91). An example of this is when a driver

attempts to turn on clear ice: the vehicle will not turn, because there is severely limited lateral force generation capability (Tr. 791, 1907).

43. At 100% wheel slip, the wheels are locked and no longer rotating (Tr. 791). Wheel lockup occurs whenever the brake force generated at the road/tire interface exceeds the capacity of the pavement and the tire interface to produce that force. The friction or "mu" of a road surface, referring to the ability of a given surface to produce a frictional force, is a factor in wheel lockup. Dry concrete is a high friction surface; ice is a very low friction surface. Vehicle speed is also a factor in lockup. However, wheel lockup can occur at any speed, and on a surface of any level of friction, if the driver applies sufficient force (Tr. 791-94; CX 103-D, -E).

44. Certain risks are associated with wheel lockup. If front wheels lock first, braking force is diminished and the stopping distance is extended. Additionally, when the front wheels lock, there is no lateral force generation capability, and the driver is unable to steer. If rear wheels lock first, the vehicle typically spins out of control (Tr. 796).

3. The Operation Of Antilock Brake Systems

45. Antilock brake systems are designed to maintain maneuverability and controllability during braking, under all operating conditions, by controlling wheel slip (CX 103-C, -D; CX 102-Z-22). NHTSA defines an antilock system as "a portion of a service brake system that automatically controls the degree of rotational wheel slip at one or more road wheels of the vehicle during braking" (CX-37-A; Tr. 1120, 2506).

46. The SAE publication "Antilock Brake System Review--SAE J2246" ("SAE J2246") defines an antilock brake system as "[a] device which automatically controls the level of slip in the direction of rotation of the wheel on one or more wheels during braking" (CX-103-A). SAE J2246 sets forth the fundamentals of ABS and the development of ABS systems (CX 103-A-C) and the SAE J2246 definition of an antilock brake system is applicable to all ABS systems, including after-market systems (Tr. 2533). SAE publications are regarded as authoritative by experts in the braking field (Tr. 1125, 1909; *see* Tr. 2532).

47. In order to control the "degree" or "level" of wheel slip as set forth in the NHTSA and SAE definitions, an ABS system must have components to detect what the rotational wheel slip is, even before it needs to be controlled. Thus, it needs sensors at the road wheels or

the drive train that measure the rate of rotation of the road wheels. It also needs a computational device that can measure any change in the rotation of the wheel over time and compute the wheel slip, so as to evaluate whether lockup is approaching. If so, the system must be able to send signals to an actuator or control device to reduce the line pressure at the wheel, reducing brake force so the wheel can continue rolling at a more appropriate speed (Tr. 800-01, 1120-21, 1750-51). These components are necessary because the only way to control a system is to know whether the system is generating error (*i.e.*, to know what level of slip exists, and whether it is excessive) and to be able to affect the processes to correct the system back to the desired point (*i.e.*, to be able to return slip to the required level) (Tr. 802). A system that can sense the rotation of a wheel at a given point in time but cannot sense the vehicle's speed and does not know the wheel's immediate past history of wheel rotation cannot function as an antilock system, because it will not be able to calculate changes in wheel slip and thus control the degree to which wheel slip is allowed (Tr. 1121-22).

48. Brake engineers generally understand ABS to mean a portion of a service brake system that automatically controls the degree of rotational wheel slip during braking by: (1) sensing the rate of angular rotation of the wheels; (2) transmitting signals regarding the rate of wheel angular rotation to one or more devices which interpret those signals and generate responsive controlling output signals; and (3) transmitting those controlling signals to one or more devices which adjust brake actuating forces in response to those signals (CX 102-G, -I). This definition reflects the meaning of ABS as it has been generally understood among brake engineers since at least 1990 (Tr. 1123-25).

49. In 1995, NHTSA amended its definition of an antilock brake system to adopt the definition set forth in Finding 48 (CX 102, CX 38-A-B). The new regulation clarifies the definition (Tr. 1122, 157), but does not substantively change it (Tr. 156-58; compare F. 47 with F. 48 (elements of this new definition are consistent with elements required to comply with the prior definition)).

50. SAE expects that antilock brake systems will contain the components set forth in F. 47, and operate in the manner set forth in F. 48. In SAE J2246, SAE identifies the components of an antilock brake system as: (a) sensors to determine the wheel speed and the vehicle speed; (b) control logic to process the sensors' signals and

determine the desired regulation of the brake pressure; (c) a means to implement the control logic; and (d) a means to regulate the brake pressure as dictated by the control logic (CX 103-L; Tr. 1126). SAE states that,

"in a typical application, variable reluctance sensors are used for wheel speed sensing. The vehicle speed is estimated from the wheel speeds, eliminating the need for a separate vehicle speed sensor. The control logic is implemented via microprocessor software in an electronic controller. . . . A wiring harness links the various sensors, the displays, the controller, the vehicle electrical system, and the modulator. The brake pressure regulation is typically done with the modulator employing solenoids that close or open different fluid paths to build or decay the brake pressure at the wheels."

(CX 103-L; Tr. 1126).

51. The factory-installed ABS systems widely advertised to consumers consist of the components set forth in F. 47 and control the degree of rotational wheel slip in the manner set forth in F. 48 (BGPI Admissions 7, 9 and 11 (per Order Ruling on Complaint Counsel's Motion to Deem Admitted Certain Requests for Admission, July 8, 1996 (hereinafter, Admissions Order))).

52. The Brake Guard device is an accumulator (Tr. 873; CX 34-Z-6). It does not consist of wheel sensors, electronic signaling mechanisms, an ABS computer and hydraulic modulators, and it does not work in the way factory-installed ABS systems work (BGPI Admissions 10, 12 (per Admissions Order, *supra*); RX 191-M (depiction of device)). Accumulators are not ABS, because they do not have the capacity to measure wheel speeds, make error determinations, and issue control signals to adjust the brake torques and braking response to actively and automatically control the degree of rotation of wheel slip of one or more of the wheels during the braking maneuver (Tr. 876). Mr. Brinton, BGPI's expert, admitted that Brake Guard cannot measure the rate of rotation of the wheels and cannot compute the difference between the speed of the braked wheel and the free rolling wheel (Tr. 2575), as is needed to compute wheel slip. The resilient unit in Brake Guard can absorb some pressures but it cannot actually measure, read or comprehend them (Tr. 2575).

53. Accumulators are a part of some ABS systems, but are not ABS themselves. In ABS systems that include accumulators, if the wheel sensors send signals that tell the computer that the wheel is beginning to slip, the computer sends a control signal to the

modulator to close an isolation valve that prevents the driver from pushing further fluid from the master cylinder out to the caliper. In addition, the computer issues control signals to the controller to open a dump valve, which allows the brake fluid to be released from the brake line and to be stored in a low-pressure accumulator. When sufficient fluid has been dumped so that the wheel begins to spin again at about 10% slip, the computer signals to the modulator to increase pressure. A high-pressure electrical pump then restores fluid from the accumulator to the brake line, as needed, to increase wheel slip, until slip again reaches about 30%, at which point the cycle begins again. The accumulator in such an ABS system is simply a storage device that supplies fluid to the pump, which in turn supplies the fluid to the brake lines. This is unlike respondents' accumulators, which are plumbed directly into the brake lines to provide a supply of energy for braking force (Tr. 876-80).

54. The Brake Guard device does not have the components necessary to operate as an ABS system, as that term is defined by NHTSA, understood by experts in the field, used in the industry, and understood by consumers (F. 45-53).

4. Testing Antilock Brake Systems

55. To demonstrate that a product controls the degree or level of rotational wheel slip (and thus prevents or substantially reduces wheel lockup, skidding and loss of control), as called for by the NHTSA and SAE definitions, adequate, competent and reliable scientific testing is needed that compares the performance of a vehicle equipped with the purported ABS system, to the performance of the same vehicle not equipped with the system, under controlled conditions, during a variety of driving maneuvers where controllability during braking is at issue. The driving maneuvers should include stops on a variety of road surfaces, such as changing friction surfaces (*e.g.*, where the road changes from dry to slick, or vice versa), split friction surfaces (where one side of the road is high friction and the other side of the road is low friction), a low friction lane change, or a low friction curve maneuver (Tr. 1127-31, 802-12, 1907-08, 2579). Some testing involving curves or turns is important because the lateral force generation capability of a vehicle--that is, its ability to maintain maneuverability during a stop--is an important aspect of wheel slip control (Tr. 806-09, 1907-09). During the testing, sufficient pedal

force should be applied so that lockup would occur, but for the operation of the device (Tr. 803-04, 1909-10, *see* Tr. 1128).

56. Conditions that should be controlled include the condition of the tires and the brakes, the road surface, the velocity at the onset of braking and the brake application (Tr. 804-05, 1129-30). One way to ensure that the tire, brake and road surface conditions are as similar as possible is to run the tests with and without the device on the same vehicle as contemporaneously as possible (Tr. 804-05).

57. Additionally, proper instrumentation to record the parameters of interest is needed, including the velocity of the vehicle at the commencement of the stop, the brake pedal force applied, the line pressures developed in the brake system during the stop (measured, for example, by a brake force transducer), the wheel slip (calculated, for example, from data derived from wheel sensors), and whether the wheel lockup had occurred or was being modulated (Tr. 1129-31, 802-12). A visual display of conditions to ensure that the driver can repeat the pedal force he used in the prior test is also needed (Tr. 810, 1132).

58. Results of an antilock brake test should be adequately documented (Tr. 1287). If a test shows that a braking product shortens stopping distance, that alone does not demonstrate that the product is an antilock brake system, because it does not show that the device eliminates or controls wheel lockup (Tr. 1132, 812). However, if a stopping distance test shows that a vehicle experiences lockup, it demonstrates that wheel slip has not been controlled (Tr. 1132, 813, 2576). Anecdotal consumer reports that a device reduced lockup or prevented accidents do not provide competent and reliable evidence that a device is an antilock brake system, because consumers do not have the expertise required to evaluate an antilock system, and because they cannot tell whether or not specific wheels experienced lockup (Tr. 813, 1132, 1912). Consumers cannot provide consistent information and do not know whether wheel slip is, for example, 10%, as opposed to 15% (Tr. 2580).

59. The SAE has published a test procedure for evaluating antilock brake systems that is widely recognized throughout the automotive testing industry (Tr. 829). SAE J46, originally adopted in July 1973 and re-approved without change in 1993, sets forth a test code for evaluating whether or not a product controls wheel slip (CX 39, 40; Tr. 1133-34, 2518). The objectives of the test procedure are to separate antilock systems from non-antilock systems and to

enable antilock manufacturers to evaluate alternatives in systems under development (Tr. 1091). SAE J46 identifies appropriate instrumentation, test facilities, and vehicle preparation, and sets forth four series of recommended road test maneuvers, including: (a) constant friction surface tests at various speeds; (b) split friction surface tests, (c) changing (high to low) friction surface tests; and (d) lane change tests (CX 40-A, -D; Tr. 1134-35). SAE does not set forth a required pedal force, but assumes that sufficient force would be applied to cause lock-up, but for the operation of the device (Tr. 1136). SAE J46 does not set forth exact parameters of testing, but was designed to permit each test facility to select road conditions and test conditions that were appropriate to it, considering that road surfaces varied among test facilities, and to develop comparative data (Tr. 1135).

5. Testing Comparative Stopping Distance

60. Scientifically sound evidence that one braking system provides shorter stopping distances than another braking system (that is, a comparative stopping distance test) requires competent and reliable testing that compares the performance of a vehicle with the device engaged to the performance of the same vehicle with the device disengaged. Braking a vehicle is an energy conversion process in which the vehicle's kinetic energy is changed into heat energy. Because the kinetic energy of the vehicle is proportional to the square of the velocity, even minor variations in speed can result in significant differences in the distance traveled. Accordingly, the speed that the vehicle is traveling at the point the brakes are applied must be known and carefully controlled. When there are minor variations in speed, the stopping distance may be corrected by following an SAE-approved procedure which requires that the vehicle be equipped with instrumentation, such as a fifth wheel data acquisition system, that captures and records (a) the actual speed of the vehicle at the point of braking, and (b) the actual distance traveled from the point the brake was applied until the point the vehicle comes to a rest (Tr. 814-19, 1160-66, 1916-18, 2524-29, 2561-64).

61. All other elements of the testing, *i.e.*, the tires, brakes, and road surfaces must be controlled. With regard to brakes, if they are old, they should be checked and replaced if necessary; if they are new, they should be burnished, because burnishing is a good way to standardize brakes (Tr. 1913, 2526). Tests with and without the

device should be conducted sufficiently close in time to avoid the possibility of an independent variable causing any apparent difference in results (Tr. 822, 1160-66, 1913-16, 2008, 2525-27).

62. Brake application must also be controlled, because brake pedal apply time and force will affect the stopping distance. Increasing brake pedal force results in a proportionally shorter stopping distance, up to a certain limit. Accordingly, the driver must be provided with a protocol for applying force to the pedal. One appropriate protocol is to tell the driver, under each condition, to use whatever brake pedal force is necessary to bring the vehicle to a stop in the shortest distance possible; such a stop is called a "best efforts" stop. Another type of stop is a "panic stop" where the driver is told to press on the brake pedal as hard as he can and hold it until the vehicle stops. Finally, a driver can be told to conduct a stop at a certain pedal pressure level (such as 100 pounds), in which case he needs instrumentation that measures the brake application force and provides a readout so the driver is aware of the pressure he is applying (Tr. 822, 1160-63, 1910-16, 2008, 2526). A minimum of three stops should be conducted to determine whether the results produced are consistent (Tr. 822).

63. A report regarding stopping distance tests should reflect the recording equipment used, show some evidence that information was taken from recorded data, and demonstrate that appropriate controls were used. It should show what the test protocol was, and what instructions were given to the driver. Comprehensive documentation of results is necessary so that another tester can duplicate the test results (Tr. 1165, 1986-87, 2010, 2530).

64. Reports of consumer experiences do not provide competent and reliable evidence that a device provides comparative stopping distance benefits (Tr. 823-24). Test reports reflecting use of a tape measure to measure stopping distance are not reliable because an onlooker cannot reliably tell at what point the driver first applied the brake, and a driver cannot reliably brake at a predetermined point on the road. Use of a tape measure suggests that: (a) there was no certainty regarding the point at which braking commenced and (b) the tester was not aware of the vehicle's precise speed at entry, and thus was not able to correct for differences in kinetic energy (Tr. 824, 1164-65, 1918, 2530). Even minor errors regarding the point that braking commenced are significant as a vehicle traveling at 60 miles per hour is moving at 88 feet per second; thus, an error time of as

little as a tenth of a second can result in an 8.8 foot error in measured distance (Tr. 1163-64, 1919).

65. Brake engineers can use certain mathematical equations, derived from Newton's laws of physics, to evaluate the accuracy of stopping distance data. The velocity and stopping distance can be used to yield an estimated acceleration/deceleration in feet per second squared, and converted to gravities. This data can then be evaluated in light of the coefficient of friction of the purported test surface. If calculated decelerations are in excess of what can be achieved on the reported road surface, it suggests error in the stopping distance measurement, or the estimated speed, or both (Tr. 1273, 1638-46, 1955-58).

66. Competent and reliable scientific test data, evaluating performance under controlled conditions with proper instrumentation, also is required to demonstrate that a product makes a vehicle safer (Tr. 2531; *see* Tr. 1287 ("when you get into talking about safety and whether its improved safety or shorter stopping distances, comparative data requires documentation that's without dispute")).

67. A competent and reliable test designed to measure stopping distances and wheel slip control would cost approximately \$50,000. (*See* Tr. 2202, 901.)

6. The Performance Of The Brake Guard Device

a. Evidence Relied Upon By Respondents

68. BGPI relies on a number of test reports to support its claims. They are set forth below, in chronological order. BGPI also relies upon several testimonial letters, discussed after the test data.

1) 1987 Ambulance Testing

69. BGPI relies upon an anonymous, one page report of April, 1987 testing on two ambulances, purporting to show that installation of the Brake Guard device shortened stopping distances by 14% on the first vehicle and 11% on the second (RX 3).

70. RX 3 indicates that the purpose of the testing was to determine average stopping distances. It provides no evidence that the Brake Guard device is an antilock system because the test methodology did not provide for an evaluation of the controllability or maneuverability of the vehicles in situations where wheel slip control is at issue (Tr. 1204-05, 1958-59).

71. RX 3 provides no information about instructions given to the driver on how to apply the brakes; thus, it cannot be determined what kind of stops are being reported, or whether the brake application was controlled (Tr. 1954-55). The road conditions changed during the test (from dry to wet), providing affirmative evidence that the conditions were not properly controlled (Tr. 1953). Finally, there is no evidence that the vehicles were properly instrumented to ensure that velocity was kept constant, that the stopping distances were reliably measured, or that the stopping distances were corrected to accommodate differences between the target speed and the actual speed. Thus, the data contained in RX 3 is not reliable (Tr. 1204-07, 1708, 1954).

72. Mr. Hinch conducted additional calculations on the RX 3 data to confirm his analysis. Application of the formulas discussed above to the data reported in RX 3 reveals that the friction between the tire and the road (that is, the traction coefficient) on the wet "after" surface would be higher than the traction coefficient on the dry "before" surface, a result that is contrary to the laws of physics. Traction coefficients are always higher on dry roads than on wet roads. This information confirms that there was error in the conduct of the test or the reporting of the results (Tr. 1955-58).

2) Gerard Testing

73. BGPI next relies upon RX 232, consisting of a two page letter and one page report from Thomas J. Gerard & Associates, dated September 7, 1990. These documents report on the results of stopping distance tests conducted on a 15-year old pickup truck, and purport to show that during panic stops on dry asphalt from "25 mph \pm 2 mph" the stopping distance improved from 46.4 feet without Brake Guard to 38.7 feet with Brake Guard (a 16.5% improvement) (RX 232 (same as RX 190-Z-220)). The report cautions that the results are preliminary, and Mr. Jones admitted that in a subsequent telephone conversation, Mr. Gerard emphasized this point and stated that BGPI should do further testing (RX 232; Tr. 2983).

74. RX 232 contains no data regarding wheel slip control testing, and provides no evidence that the Brake Guard device controls the degree of wheel slip (Tr. 2005-06).

75. RX 232 contains no indication that the tester used appropriate equipment to measure stopping distances. Mr. Jones testified that a tape measure was used for this purpose, thus establishing that the measurements were unreliable. Moreover, there was insufficient

control of the vehicle speed. Because distance varies by the square of the speed, the apparently minor variation permitted in entry speed (± 2 mph) could result in a 38% variation in distance traveled, if all other factors were perfectly controlled. Also, there is no indication what instructions were provided to the driver with regard to brake application, or that stopping distances were corrected to account for variations in speed (Tr. 2000-03).

76. Mr. Hinch conducted additional calculations in connection with his review of the Gerard data. These calculations revealed that, given the level of scatter in the data, there was no statistical significance to the apparent differences in the stopping distances without and with Brake Guard, a result due probably to the lack of controls in the test. Thus, the September, 1990 Gerard data does not provide competent and reliable evidence that the Brake Guard device shortens stopping distances (Tr. 2004-06).

3) 1992 Cunningham Testing

77. BGPI relies on March, 1992 testing performed by the Cunningham Engineering firm, offered as RX 188 H-L (typewritten reports) and supplemented as RX 206 A-M (typewritten reports plus handwritten data logs). The original typewritten materials consist of three single page reports of stopping distance tests conducted on a pickup truck, a motor home and a passenger car, plus a summary of these three reports. These documents purport to show that installation of the Brake Guard device shortened stopping distances by 4% on the passenger car, 8% on the pickup truck and 13% on the motor home. The summary report indicates that in each case "skidding stops" were made without the Brake Guard device; that after installation of the device "controlled nonskidding stops" were made; that the distances were measured with a measuring tape; and that "average distances were calculated by summing the selected stopping distances and dividing by the correct number of runs" (RX 188-K). Brake Guard disseminated the typewritten results of the 1992 Cunningham tests in its ads (CX 53-Z-12-14).

78. The 1992 Cunningham reports do not support the wheel slip control claims. The methodology used did not evaluate whether or not the device provided antilock brake system benefits. Moreover, the pickup truck had rear wheel ABS. Had a valid wheel slip control test been conducted on this vehicle, it would have been difficult to evaluate whether any observed control of wheel slip was due to the

Brake Guard device or to the factory-installed ABS (Tr. 1209, 1936-41; *see* RX 206-F).

79. A facial analysis of the stopping distance data reveals that they are unreliable. There is no evidence that the vehicles tested were properly instrumented; no indication how the tester measured the speed at which the brake stop was initiated; and no evidence that stopping distances were corrected. The stopping distances are inherently unreliable because a tape measure was used to measure them (Tr. 1209-10, 1935-37). Also, the fact that the stops without Brake Guard (that is, the "before" stops) were described as "panic stops" and that the stops with Brake Guard (that is, the "after" stops) were described as "controlled nonskid stops" suggests that two dissimilar stops were being compared to each other and, therefore, that the testing was not properly controlled (Tr. 1938). Thus, the typewritten Cunningham 1992 reports do not provide competent and reliable scientific evidence in support of the wheel slip control or stopping distance claims (Tr. 1951, 1209).

80. Handwritten data logs prepared during the 1992 Cunningham testing reveal that the typewritten reports do not describe various testing errors that render the results unreliable, and that they present the results in a seriously biased manner by consistently omitting unfavorable data generated during the testing:

a). Motor home tests. The data logs indicate that during the before phase of the motor home testing, the driver let up on the brake pedal during one run, thus extending the average before stopping distance. Additionally, one of the longest of the five after stops was not included in the data, thus shortening the average after distance. The data log also shows that the before and after stops were conducted using different braking methods--the before stops were "panic" stops, the after stops (except for the long one excluded from the average) were "best effort" stops (described in the typewritten report as "controlled nonskid stops"). A best effort stop will generally achieve a shorter stopping distance, and BGPI is aware of this (Tr. 2787). Moreover, the test vehicle had one tire that was nearly flat. Thus, the motor home tests were conducted in an unscientific and biased manner. Although he considers all of this data inherently unreliable, Mr. Hinch analyzed it and determined that, because of the large amount of scatter, any apparent difference between the before and after stops was not statistically significant (Tr. 1942-47; compare RX 206-E (same as RX 188-I) with 206-J).

b). The pickup truck tests. The typewritten report of these tests, RX 206-F (same as RX 188-H), does not accurately reflect the information shown on the data log, RX 206-K. The shortest (132 feet) of the before "panic" stops was left out of the average before calculation (reported as 169 feet). Moreover, all of the five runs conducted after Brake Guard was installed on the pickup--some panic stops and some best effort stops--yielded stopping distances that were longer than the before tests (the average of these five stops was 177.1 feet), yet that data is not reflected in the typewritten report. Instead, that report reflects data reported on a second data page, from a second set of five runs, where the method of brake application was not revealed and where the driver for three of the runs was Ed Jones, Jr., the son of BGPI's president and a company employee (Tr. 3000). The original driver did not sign this second data sheet (he had signed the others). Additionally, while the data log, RX 206-K, contains the handwritten note that the driver's last comment was "not much difference," the typewritten summary report, RX 206-C-D, states that the driver's comments were "lots of control" and "dramatic difference." No explanation is provided for why the unfavorable data and comments are left out of the typewritten reports. Analysis of all of the pickup truck data reveals that the stopping distances with and without Brake Guard were almost identical and that there is no statistically significant difference between them (Tr. 1947-50; compare RX 206-K with RX 206-F).

c). Passenger car tests. The data log for the passenger car tests, RX 206-M, reveals the same pattern. The average of the two before stops, identified as panic stops, was 180 feet. The first and last of the after stops, at distances of 179 (panic stop) and 184.5 feet (method of brake application not indicated), respectively, were not included in the reported average of the after stops. Instead, the typewritten report reflects the average (173 feet) of three shorter stops, where the method of brake application is described as "controlled," a term the author elsewhere used to describe best effort stops (compare the motor home log, RX 206-J, with the motor home report, RX 206-E). If all of the before and after stops are compared, there is no statistically significant difference between the two data sets (Tr. 1950; compare RX 206-M with RX 206-G (same as RX 188-J)).

Thus, the handwritten logs reinforce the conclusion that the March, 1992 Cunningham tests do not support BGPI's claims (Tr. 1950-51). They also support the conclusions that the 1992 Cunningham test

reports knowingly misrepresented the results of the tests, and that because of Ed Jones, Jr.'s participation in the testing BGPI was aware of this fact.

4) Turkey Testing

81. BGPI relies on a letter reporting results of purported March, 1993 testing in Turkey (RX 230 (same as RX 190-Z-324-327)). The English language letter reporting the results contains eleven lines of text, and states that in road tests with no specified protocol, on an unidentified vehicle, stopping distances were reduced by 12.7, 14.8 and 18.8 % while braking from 50, 70 and 90 km/h, respectively. It states also that during panic braking "at the beginning" there was no locking and that during braking there was no skidding. The accompanying "test report," apparently in Turkish, consists of a cover page containing 8 lines of text and a second page containing 22 lines of text (RX 230). No one from BGPI attended the testing and BGPI is unaware of the circumstances of the test, the equipment used, or the underlying data used to generate the stated conclusions (Tr. 3007-08).

82. This document does not constitute competent and reliable evidence in support of BGPI's claims. There is no evidence to indicate that the test organization used a methodology that would evaluate wheel slip control, that they controlled the test parameters, or that they used appropriate instrumentation to measure ABS performance. Moreover, although the document states that during braking "at the beginning" there was no lockup, it does not say what happened after the beginning. Because the document is so incomplete, it does not constitute competent and reliable evidence in support of the antilock brake system claims (Tr. 1229-30 (re: RX 190-Z-324, which is the same document as RX 230)).

83. Also, these March, 1993 documents from Turkey do not provide evidence in support of the stopping distance claims. There is no evidence that the vehicle was properly instrumented, that the parameters were controlled, that the stopping distances were reliably measured, or that they were corrected (Tr. 1228-29).

5) Slovenia Testing

84. BGPI also submitted results of testing conducted in Slovenia in October, 1993 (RX 2). The report is in a foreign language, accompanied by an English translation. It purports to show stopping

distance improvements of 17 to 35%, and states that in split mu testing, the car "remained in the driving line with no intention to turn right" (RX 2, 2-A).

85. With regard to wheel slip control, the split mu testing was uncontrolled, *i.e.*, it was conducted only with the Brake Guard device engaged. Therefore, there is no way to tell whether lockup was prevented by the device. There is no report of the pedal force used, and the result reported could have been achieved by using a pedal force too low to cause lockup. Furthermore, there is no indication that the test company controlled parameters needed for proper wheel slip control testing. Thus, this report does not provide competent evidence that the Brake Guard device controls wheel slip (Tr. 1984, 1195-97, 1200).

86. With regard to the stopping distance claims, the report does not provide sufficient evidence that the vehicle was appropriately instrumented to measure stopping distance, or that the stopping distances that were measured were corrected to reflect variations from the target speed (Tr. 1201-03, Tr. 1979).

87. The report and data contain a number of troubling inconsistencies. According to the written report, the test was conducted by placing a limiter on the brake pedal, to limit brake application to a point just under the skidding limit, although there is no indication of just where it was set (*e.g.*, at what pedal force). However, RX 2-J, a photograph of the brake pedal, does not show a limiter attached to it. If a limiter had been used, its effect would be to limit the decelerations that can be achieved during braking. Calculations on the reported data showed an inconsistency between the reported after stopping distances and the decelerations that could reasonably be achieved on the test surface. This indicates some error in the reported data, possibly due to problems with the limiter (Tr. 1975-79, 2130; CX 100). In addition, RX 2-P, which BGPI asserted was a part of the Slovenian testing (although it bore a July, 1993 date, fully three months earlier than the date of the test report), indicates that the pedal forces during the testing varied significantly, confirming poor control of this aspect of the testing (Tr. 1982). Thus, the report does not provide competent and reliable scientific evidence in support of the stopping distance claim (Tr. 1985, 1201-04).

88. In any event, Mr. Ed Jones testified unequivocally that he did not rely on the Slovenian testing as substantiation for his claims (Tr. 2012-13).

6) 1994 Cunningham Testing

89. BGPI also relies on a report provided by the Cunningham organization in June, 1994. This report purports to reflect the results of testing on two passenger cars equipped with factory antilock braking systems, where stopping distances were measured with a measuring tape and average distances were calculated by summing the "selected" stopping distances. According to the report, stopping distances were shortened 21% on one vehicle, and 14% on the other vehicle, after the Brake Guard device was installed (RX 206-P). A BGPI employee drove the test vehicles, and other BGPI personnel attended the testing (Tr. 3014, 2772-73).

90. This data does not substantiate BGPI's antilock brake claims, because no methodology was used that would actually evaluate whether or not the Brake Guard device provided wheel slip control (Tr. 1209, 1934).

91. The stopping distance data contained in the 1994 Cunningham report is unreliable since a measuring tape was used to measure stopping distances, a methodology that is inherently unreliable. The vehicles' cruise control was apparently used to control for speed, but cruise controls have poor speed control and should not be relied upon for scientific accuracy. In any event, the cruise control on one of the vehicles broke midway through the testing, and after that point there is no indication of how speed was measured. There also is no evidence that the stopping distances were corrected to accommodate differences in the entry speed (Tr. 1207-11, 1929-33; *see* RX 206-N to -T (same as RX 188 A-F)).

92. Moreover, calculations pursuant to the formula contained in F. 65 reveal a rate of deceleration much higher than the reported road surface (dry asphalt) would permit, confirming that either the speed or stopping distances are in error (Tr. 1635-41).

93. In any case, no credence can be given to this report, since Cunningham previously prepared, for BGPI, test reports that misrepresented the actual results of the testing. *See* F. 77-80, *supra*. In the earlier 1992 test reports, Cunningham stated that it had summed "selected" test results to achieve its conclusions (RX 188-K) when it had left out negative data. In the June, 1994 test report, Cunningham used the same expression to describe the treatment of the data, and no raw data were provided for analysis. Therefore, it cannot be assumed that the data omitted was consistent with that

which was reported (Tr. 2141). Thus, this report does not substantiate BGPI's claims.

7) Australia Testing

94. BGPI also relies upon a February, 1995 report of testing conducted in Australia (RX 8) which was designed to verify that two test vehicles (passenger cars) complied with the Australian Design Standard when equipped with the Brake Guard device (RX 8-C). The report reflects the speeds, decelerations, and pedal force achieved during a variety of test runs, and concludes that the Brake Guard device "improved the braking performance" of the tested vehicles. It does not state, however, what criteria (improved deceleration levels, or some other factor) were used to measure the "improved" performance, it contains no stopping distance data, and it reflects no testing under SAE J46-type road conditions (*see* RX 8).

95. RX 8 does not reflect any test methodology that would show whether or not the device provided wheel slip control, and contains no data regarding wheel slip control testing. Thus, it cannot substantiate BGPI's wheel slip control claims (Tr. 1999, 1219).

96. With regard to the stopping distance claims, the cover letter to RX 8 states that the test organization compared the performance of the vehicle fitted with the Brake Guard device to "that of a standard vehicle which we have previously tested." It is not clear when the prior testing was done, and there is no indication of an attempt to compare or control the test conditions (such as the conditions of the road surface). This is not surprising, because compliance testing is simply designed to show that a vehicle meets some minimum standard, and is not calculated to generate valid comparative results. In any case, stopping distances were not even reported. Thus, the February, 1995 data provided in RX 8 does not substantiate BGPI's stopping distance claims (Tr. 1991-99, 1219-22).

8) Brinton Testing

97. BGPI also relies on test data generated by Robert S. Brinton on January 21, 1997, fifteen months after the complaint was issued in this proceeding, and two days before his deposition. The testing consisted of stopping distance tests conducted on a motor home that was hauling a pickup truck. This combination had a weight of approximately 17,000 pounds and a length of approximately 34 feet.

The length and weight of this test vehicle far exceeds the average passenger car, which weighs 2,500 to 4,400 pounds, with a length of less than 14 feet (Tr. 2556-57). Larry Jones, formerly a BGPI employee and now a Brake Guard distributor, drove the test vehicle. Four runs were conducted without the Brake Guard device, followed by four runs with it. The test report consists of one page of data, showing the speed at the onset of braking and the stopping distance for each of the eight runs. No two of the stops were conducted at the same speed, and the report does not provide distances corrected to any particular speed (RX 216; Tr. 2556-57, 2571).

98. Even assuming the data were reliable, they would not support BGPI's stopping distance claims, because each run was at a different speed, and the before and after distances cannot be compared to one another. *See* F. 60. At trial, BGPI stipulated that a comparison of stops 1 and 5, when corrected for differences in speed, would reveal only a one percent change (Tr. 2570) which was not shown to be statistically significant. BGPI has previously asserted that the heavier the vehicle, the more dramatic the effect of the Brake Guard device (Tr. 2866; CX 188-B). Prior testing by Mr. Brinton showed that when Brake Guard was installed on a pickup truck, it did not shorten its stopping distance (Tr. 2541). Thus, there is no certainty that the results of this test (on a motor home hauling a pickup) could be projected to any other vehicle (whether to a motor home alone or to a passenger vehicle).

99. Moreover, the Brinton data does not constitute competent and reliable evidence. Brake pressure was not controlled between the before and after testing, because Larry Jones applied much higher brake pressure during the runs with the Brake Guard device than he did during the runs without the Brake Guard device (Tr. 2573; RX 239). Because higher pedal force shortens stopping distance, F. 62, this would have biased the results in favor of Brake Guard. Moreover, the equipment that was used to measure speed and distance (known as a Bowmonk) does so by means of an internal motion sensor, and has an error rate of 2% (Tr. 2558-62; RX 210). By contrast, SAE's recommended practice for the conduct of stopping distance tests sets forth that speed and distance should be actually measured (not estimated) by a fifth wheel type device (which attaches to the back of the vehicle and counts wheel revolutions per minute to measure speed and distance) with an error rate of less than .5 % for speed, 1% for distance (Tr. 2558-64). Mr. Brinton's insistence that

the Bowmonk is reliable is questionable because he is a distributor of this equipment (Tr. 2552).

100. The data also does not support the antilock brake claims. Mr. Brinton's testing did not evaluate the performance of Brake Guard under SAE J46-type conditions, or measure wheel lockup frequency (Tr. 2566, 2573). Moreover, Mr. Brinton conceded that the Brake Guard device does not control the degree of wheel slip or prevent lockup (Tr. 2574).

9) Testimonial Letters

101. BGPI also relies upon information recounted in testimonial letters that it has solicited from dealers and consumers (Tr. 2711). Although BGPI states that it has sold more than 400,000 systems, a total of only 81 testimonials were admitted into evidence, representing very few of its customers. In any event, consumer satisfaction (or lack thereof) does not provide competent and reliable evidence of stopping distance, wheel slip control and safety claims (F. 58, 64, 66).

102. The complaint against BGPI specifically cites two testimonials that were reprinted on the BGPI promotional circular known as the "Hot Sheet," under the heading "Here's What Brake Guard Customers Are Saying." The first of the reprinted letters, from Alan Smith of Tulsa Enterprises, claims better stopping distances or reduced wheel lockup after installing Brake Guard on three vehicles (BGPI Cplt ¶ 4 (g), Cplt Ex. G p.2). Tulsa Enterprises, however, was a dealer/distributor of the Brake Guard device (Tr. 2970), not an unbiased consumer. This relationship was not disclosed on the Hot Sheet.

103. The second of the reprinted letters is from Mr. Bob DeSaussure. When reprinted in the Hot Sheet, it read as follows:

Dear Sir:

*** My GMC Motor Home braking has improved both as to feel and ability to stop from any speed far beyond my expectations. Since the installation in mid 1991 I have convinced many of my fellow R.V.ers, mostly GMCs but some others 20' to 36', to install your units and all have found under actual tests that our panic stops require one-third less feet (i.e. 200' instead of 300'). ***

Cplt Ex. G, p.2 (emphasis added). The original testimonial from Bob DeSaussure, however, stated as follows:

Dear Sir:

*** My GMC Motor Home braking has improved both as to feel and ability to stop from any speed far beyond my expectations. Since the installation in mid 1991 I have convinced many of my fellow R.V.ers, mostly GMCs but some others 20' to 36', to install your units and all agree that their braking has been dramatically improved. We have found under actual test that our panic stops require one-third less feet (i.e. 200' instead of 300'). ***

P.S. Apparently it works fine on my 1983 sedan altho I feel no difference except the wheels do not lock up.

CX 243 (emphasis added). The testimonial reprinted in the Hot Sheet states that many consumers conducted "actual tests" (plural) and achieved a one-third stopping distance reduction, whereas DeSaussure's actual letter reported only a single test, on DeSaussure's own vehicle. Moreover, the Hot Sheet omitted the DeSaussure post-script, which suggested no stopping distance improvement in his passenger car.

104. Thus, the two testimonials reprinted in the Hot Sheet, which were cited in the complaint, did not accurately represent typical consumer experience with the Brake Guard device.

b. Other Tests Of The Brake Guard Device

105. Several organizations have conducted testing on the Brake Guard device and obtained results contrary to BGPI's claims. Only the NHTSA testing was competent and reliable, and put BGPI on notice that its claims were false. The remaining test data, however, were known to BGPI and put BGPI on notice that its claims were, at best, unsubstantiated and possibly false.

1) NHTSA Investigation and Testing

106. In 1991, NHTSA's VRTC became aware of aftermarket devices advertised as antilock brake systems which would shorten stopping distances. To evaluate the performance of these devices, VRTC conducted tests on an aftermarket braking device supplied by an entity, Marketex, that is not a party to this proceeding. Subsequently, ODI opened a new defects investigation to assess the safety performance of devices sold by BGPI and two other entities (CX-32-K). As part of ODI's investigation, VRTC conducted carefully controlled road testing designed to evaluate the capacity of respondents' devices to prevent wheel lock-up, skidding and loss of control under a variety of road conditions where, in real life, a vehicle

without antilock brakes will experience wheel lock-up, resulting in loss of vehicular control (CX-32-Z-21; CX-34). These tests demonstrated that respondents' devices did not prevent lock-up in those circumstances, that the test vehicle performed no better with the devices turned on than it did when they were turned off, and that the performance of the devices marketed by BGPI and the other entities under investigation was extremely similar. (*See generally*, CX-34.) By contrast, the nearly identical vehicle equipped with factory-installed ABS and subjected to the same road tests did not experience lockup, and did maintain control. *Id.* In addition, NHTSA conducted two further stopping distance tests on the Brake Guard device. Each of these tests demonstrated that it did not shorten stopping distances (CX 35, 36). NHTSA concluded that further allocation of resources to its investigation was unlikely to lead to an order to recall the devices and closed the defect investigation. However, because the testing and investigation indicated that the devices did not perform as claimed in advertising, the matter was referred to the Federal Trade Commission (CX-32-G).

2) 1991 Report of Stopping Distance Tests on Device from Marketex

107. In 1991, VRTC contacted Marketex, a company that had advertised Brake Guard, and asked for the device. The device that was provided to VRTC was labeled "Brake Guard," but was accompanied by literature that said its name had been changed to "AccuBrake" (Tr. 47; CX 35-F, -Z-6). CX 35, discussed below, reports the results of testing on the device identified, for purposes of convenience, as "AccuBrake." In 1991, after learning that CX 35 contained negative results, BGPI informed VRTC through its attorney that the AccuBrake device was not a genuine Brake Guard device, but an inferior counterfeit (Tr. 46-48). At trial, however, BGPI asserted that the AccuBrake device performed in the same manner as the Brake Guard device and that the CX 35 results applied to Brake Guard (Tr. 1388-89). Subsequent testing demonstrated that the AccuBrake and Brake Guard devices are substantially similar and offer substantially similar stopping distance performance (F. 116).

108. CX 35 reports the results of straight line stopping distance tests, as well as stopping distance tests during a lane change and on a 500-foot radius curve, on a variety of surfaces (CX 35-L; Tr. 1172). The test vehicle was properly instrumented for stopping distance

tests, including a fifth wheel performance monitor to provide distance and velocity measurements, and a lockup box designed to permit visual indication of individual wheel lockup (CX 35-H; Tr. 1171-72). Stopping distances were corrected to account for any difference between the target speed and the actual speed (Tr. 1173; CX 35-K). Tests with and without the device were conducted on the same vehicle, a Toyota pickup truck. An adequate number of runs were made, and the parameters of the test were carefully controlled (Tr. 1173-74, 1177; CX 35-S). CX 35 was performed in a competent manner and the results are reliable (Tr. 1177).

109. The AccuBrake device did not reduce stopping distances; indeed, stopping distances were somewhat longer, on average, when it was installed (CX 35-Z-3). In 69 different tests conducted when the vehicle contained no cargo, the average stopping distance without the device was 152 feet, whereas the average stopping distance of the same number of runs with the device installed was 165 feet (CX 35-Z-2; CX 35-S, -T). An additional series of tests was conducted with the vehicle loaded with cargo. Two drivers conducted these tests, with each driver conducting a complete set of tests with and without the device (*i.e.*, each made 66 runs with the device, 66 without). The first driver's average stopping distance without the device was 172 feet, whereas his average with the device was 181 feet. The second driver's average stopping distance without the device was 161 feet, and his average with the device was 162 feet (CX 35-Z-2; CX 35-Z-19-21). The results of CX 35 provide competent and reliable evidence that the device tested does not shorten stopping distances (Tr. 1177; CX 35-Z-3).

110. The device tested failed to prevent lockup in 26 of 30 panic stop tests (CX 35-S ("full dump" tests), -U). Thus, it did not perform as an antilock device (CX 35-U; Tr. 1132, 813). Indeed, in some instances rear wheel lockup occurred with the device engaged, where it had not occurred with the device disengaged (CX 35-U).

3) 1991 Report of Stopping Distance Tests on the Brake Guard Device

111. After being informed by BGPI's attorney that the AccuBrake tests were not applicable to the Brake Guard device, the NHTSA investigator asked him to supply some for testing on the same vehicle as the CX 35 testing, a pickup truck. BGPI's attorney responded by

sending a set of devices that he identified as "genuine Brake Guard products" (CX 32-E, K; Tr. 47-48).

112. CX 36 reports on the results of these follow-up stopping distance tests conducted on the Brake Guard device. These tests used the same test vehicle, instrumentation and protocol as the CX 35 testing (CX 36-I (including photo of test vehicle with fifth wheel attached to rear, and referring to CX 35 instrumentation, which included a fifth wheel), CX 35-H; Tr. 1171). The instrumentation was appropriate, the test parameters were carefully controlled, and the stopping distances were corrected (Tr. 895-97, 1167).

113. Stopping distance tests were conducted under ten different configurations, including five sets where the vehicle contained no cargo, and five sets where the vehicle was loaded to its maximum weight. Within each loading category, tests included 3 sets of best efforts stops at various speeds and on various surfaces, and 2 sets of "spike" (panic) stops at two speeds on two surfaces. A sufficient number of runs were made under each condition (during the best efforts stops, six runs were made for each of the dry concrete stops, and three runs on the wet asphalt stops; during the spike or panic stops, three runs were made on each condition) to ensure reliable results (Tr. 896).

114. Stopping distances increased after installation of the Brake Guard device in 9 of the 10 configurations. In the last configuration, stopping distance decreased by about 1%. On average, stopping distances increased when the Brake Guard device was installed by 6.2% in the lightly loaded configurations, and by 1.3% in the maximum load configurations (CX 36-S, -T; Tr. 897). Thus, the Brake Guard device did not shorten stopping distances (CX 36-V).

115. During each of the panic stop tests, for all configurations, both without and with the Brake Guard device, all four wheels locked. Thus, the Brake Guard device did not prevent wheel lockup in these tests. Indeed, during one configuration of testing (maximum load 50 mph panic stops) the consequences of lockup were exacerbated after installing Brake Guard. During these tests, when the Brake Guard device was disengaged, the front wheels locked first, permitting the vehicle to stop within the designated lane. When the Brake Guard device was installed, the vehicle's rear wheels locked first, causing the vehicle to swerve and leave the designated lane (CX 36-T, -V).

116. The testing reported in CX 36 was competent and reliable (Tr. 1166-70, 900). It demonstrates that the Brake Guard device does not shorten stopping distances, and that it does not shorten stopping distances by up to 20% or by 20 to 30% (Tr. 1170). This testing also demonstrated that the internal design of the AccuBrake and Brake Guard devices was essentially identical, and that the Brake Guard device's performance was not significantly different from that of the AccuBrake device (CX 36-V).

4) 1993 Report of Wheel Slip Control Testing

117. CX 34 reports the results of another set of VRTC tests performed in 1992 and 1993 on two versions of the Brake Guard device: one purchased in July 1992 (BG I), and a second that BGPI provided, identifying it as an "improved" product (BG II) whose performance would be superior to that of the old version (CX 32-L).

118. Four different road braking tests were conducted to determine if the two Brake Guards and three other aftermarket devices could control the degree of road-wheel slippage when subjected to panic braking on medium to very low friction surfaces (CX 34-K; Tr. 826-27, 1137). The performance of the test vehicle with each device engaged was compared to that of the same vehicle with the device disengaged (Tr. 1138). The same tests were also performed on a nearly identical vehicle with factory installed antilock brakes, again tested with the ABS on and off, to determine the performance of factory-installed ABS and make the results more understandable to the consumer (CX 34-F; Tr. 883, 1138).

119. The aftermarket device tests were conducted on a low mileage (three to five thousand miles) 1992 vehicle without factory installed antilock brakes ("aftermarket vehicle"). Prior to the beginning of testing, new tires, front brake pads and rear brake shoes were installed on the vehicle, and the brakes were burnished to control their condition (Tr. 833-36). The devices tested were installed so they could be engaged and disengaged (CX 32-I, -L; Tr. 831-32, 80).

120. The factory-installed ABS tests were conducted on a new 1992 vehicle ("OEM vehicle"), with just a few hundred miles on the odometer, also equipped with new tires and brakes, which were appropriately burnished prior to the testing. A switch was installed so that the ABS could be turned on and off (Tr. 832-36; CX 34-H-K).

121. The only difference between the two vehicles was that the aftermarket vehicle had rear drum brakes, whereas the OEM vehicle had rear disc brakes; there is no reason to believe that the rear brakes on the two vehicles would have affected the test results (Tr. 833, 871). The fact that the tests demonstrated that the two vehicles performed in the same manner when the after-market devices and factory-installed ABS were disengaged supports the conclusion that the differing rear brakes did not substantively affect the results. (See F. 126-129.)

122. The test protocol included test maneuvers set forth in SAE J46, including the lane change test, a changing friction surface test, and a split friction surface test (Tr. 827). The test was based upon SAE J46, because it is a test procedure that is widely recognized throughout the automotive testing industry as appropriate for evaluating whether or not a device controls wheel slip (Tr. 829-30; see CX 39). In addition, the vehicles were tested on a five hundred-foot radius curve surface which evaluated the ability of a vehicle to come to a stop on a wet curve, without leaving the road and without hitting a barrier in front of it (Tr. 855).

123. The same driver was used for all tests. The surfaces where the tests were conducted were used exclusively for vehicle tests and regularly checked for friction levels. On the surfaces that are used wet, the facility uses a water truck to keep it uniformly wet. Application of brakes was controlled by instructing the driver to apply the same level of pedal force (112 pounds) during each driving maneuver, an appropriate level of pedal force (Tr. 833-41, 845; CX 34-H). The test parameters were appropriately controlled (Tr. 1148).

124. The OEM vehicle was run through the test procedure three times with its antilock brakes disengaged, and three times with that system turned on. Then, the aftermarket vehicle, installed with the BG I device pursuant to the manufacturer's instructions, was run through the test procedures three times with the device off and then three times with the device on. These tests were conducted within minutes of each other. This procedure was calculated to ensure that the various parameters of the tests with and without the device were controlled. The BG II device tests on the aftermarket vehicle, and comparison testing on the OEM vehicle, were conducted in the same manner, immediately thereafter (Tr. 834, 841-42). Three runs were conducted under each condition because the results of the testing

were strongly consistent; this number of test runs was appropriate (Tr. 841, 1147).

125. The aftermarket device test vehicle was instrumented to provide the test driver with a visual readout of vehicle speed, applied pedal force (obtained from the brake force transducer), deceleration, stopping distance, and elapsed time of maneuver. An onboard computer data acquisition system was also used to record the time history of vehicle speed, pedal force, vehicle acceleration, brake line pressure at four wheels, and wheel speed at four wheels (CX 34-I, -J; Tr. 833-36). Baseline tests on the OEM vehicle had been conducted using this same equipment. For the comparison tests to the BG I and II testing, the OEM vehicle was instrumented with the same visual readout (vehicle speed, applied pedal force, deceleration, stopping distances and elapsed time of maneuver) although the only data automatically recorded was the time history of pedal force and a marker for the time of braking (CX 34-J). The instrumentation was appropriate and comprehensive (Tr. 1147-48).

126. The first test, the low-friction surface lane change test, simulates a situation where a driver traveling at 35 mph on a wet, two lane highway encounters a stopped vehicle (represented in the test by cones in the road) approximately 90 feet ahead, applies the brakes with 112 lbs. of pedal force, and attempts to switch to an adjacent lane and stop before hitting a second vehicle somewhat further ahead (CX 34-L, -M; Tr. 846-48). This test procedure is one of the primary procedures within SAE J46 and is conducted so frequently that there is a permanently marked course for it at the VRTC test facility (Tr. 847). The aftermarket test vehicle failed to negotiate successfully the course regardless of whether the BG I or BG II was engaged or disengaged. In every attempt, when the brakes were applied all four wheels locked and the driver lost control of the vehicle, hitting the cones in the first lane and traveling uncontrolled until gradually coming to rest off the road (CX 34-S -U; Tr. 851-53, 1140). The results of the tests on the OEM vehicle when the factory-installed ABS was disengaged were the same (CX 34-S, -U, -Z-14; Tr. 850-53, 1139-40). By contrast, when the factory ABS was engaged on the OEM vehicle, the road wheels were observed to slow down and spin back up, avoiding lock up, so that the driver was able, on every attempt, to avoid the obstacle in lane 1 by steering into lane 2, and bringing the vehicle to a controlled stop well short of the obstacle in lane 2 (CX 34-S, Z-14; Tr. 853, 1139).

127. The second test, the low friction surface curve test, simulates a situation on a wet two lane curve, where the driver proceeding at 35 mph encounters a vehicle stopped ahead of him, but cannot change lanes because of obstacles in the second lane. He must apply 112 lbs. of pedal force and attempt to stop before striking the vehicle ahead of him, without leaving the road (CX 34-N). Although not a part of SAE J46, this procedure is utilized so frequently that a course for conducting the test is permanently marked at the VRTC test facility (Tr. 854). On each occasion when equipped with the BG I or BG II devices, whether the devices were engaged or disengaged, the test vehicle experienced four wheel lockup, and the driver lost control of the vehicle which proceeded along in a straight line, leaving the curved road (Tr. 857-58; CX 34-U-W, -Z-19; Tr. 1140-41). Had there been obstacles off the road, such as trees, the vehicle would have struck them (Tr. 857). Similarly, when the OEM vehicle's ABS was disengaged, it experienced four wheel lockup, leaving the road (Tr. 856; CX 34-U-W, Z-19). When the factory-installed ABS was engaged, however, lockup was avoided and the driver was able to steer safely around the course, coming to a stop prior to colliding with the obstacle placed in the road (Tr. 856-57, 1141; CX 34-V-W,-Z-19).

128. The third test, the changing-friction surface test, requires a vehicle to brake while experiencing a large change in surface friction, simulating the experience of a driver traveling on a wet highway at 40 mph who hits the brakes with 112 lbs. of pedal force and then encounters a patch of ice (CX 34-O, -P). This test procedure is described in SAE J46 and there is a preexisting test surface for such tests at the VRTC facility (Tr. 860). CX 34, the report of the VRTC testing, contains graphs depicting the history of wheel slip during the changing friction surface test, based upon data obtained from the instrumentation installed in the vehicles (Tr. 863). The graphs show that whether the BG I or II was engaged or disengaged, as the front and rear axles proceeded onto the very low friction surface, the wheels proceeded almost immediately to 100% wheel slip, where they remained throughout the remainder of the maneuver (CX 34-W, CX 34-Z-27-29; Tr. 865-66). When the factory-installed ABS was disengaged, the OEM vehicle's performance mimicked that of the aftermarket test vehicle (CX 34-Z-34). When its ABS was engaged, the graphs show that as the wheels transitioned onto the very low friction patch, the wheels commenced toward lockup. As the OEM ABS system detected the lockup, however, it adjusted the level of

braking downward, and allowed the wheels to spin again. A controlled, optimal level of braking was established at each wheel, and slippage was held to between 10 and 20% throughout the remainder of the maneuver. On graphs appended to the test report, short duration spikes at approximately one-half second intervals show the ABS system continually assessing wheel speed and adjusting braking action as appropriate (Tr. 864; CX 34-X; CX 34-Z-2; Tr. 1142-43).

129. The fourth test was a split-friction surface test, also recommended in SAE J46 and also conducted on a track permanently dedicated for such testing at VRTC. In this test, a twelve-foot lane is marked so that the wheels on one side of a vehicle will be on a surface similar to a wet highway, and the other side's wheels will be on a surface similar to an ice-covered highway. The driver was instructed to approach the course at 40 mph, apply 112 lbs. of brake pedal force, and try to steer a straight path. In such a test, if wheel slippage is not controlled, the subsequent loss of steering control generally will cause the vehicle to spin toward the higher friction surface (CX 34-Q, -R). VRTC believes, however, that the pedal force applied in this test was not fully adequate, because even when the OEM vehicle's ABS was disengaged, spin out did not always occur. Spin was kept to 10° or less when the OEM ABS was engaged. When the BG I device was disengaged, the test vehicle spun from 20° to 150°. When this same device was engaged, spin was kept to 10° in one attempt, but was substantially more (as high as 330°) in the other three runs. Thus, the BG I did not effectively prevent loss of control. When the aftermarket vehicle was tested with the BG II device disengaged, the vehicle spun more than 10° on 2 of 4 attempts; the same frequency of spin occurred when the BG II device was engaged. Thus, the BG II did not prevent loss of control (CX 34-Z-3-4; Tr. 868-70).

130. VRTC disassembled and inspected respondents' devices and concluded that they were simple small-volume hydraulic accumulators, that is, hydraulic energy storage devices. Other devices tested by VRTC, which were subject to the same road tests as the Brake Guard devices and performed in the same manner, varied in the volume, hardness, and weight of the rubber insert. One of these other devices also had a screw which permitted the volume and stiffness of the insert to be adjusted. There is no reason to believe

that redesigning the devices would have any effect on the outcome of the tests (CX 34-Z-5, -6; Tr. 872-73).

131 The testing reported in CX 34 was competent and reliable (Tr. 1149, 2577). It demonstrates that the Brake Guard device does not control the degree of rotational slip at one or more road wheels, as set forth in the NHTSA definition of ABS (CX 37-A; Tr. 880-81, 1150) and that the device does not control the level of rotational slip in the direction of rotation of the wheel on one or more wheels during braking, as set forth in the SAE J2246 definition (CX 103; Tr. 880-81, 1151). Nor is respondents' device an antilock brake system as braking engineers define that term (CX 102-G, -I): It does not sense the rate of angular rotation of the wheels, does not transmit signals regarding the rate of wheel angular rotation to one or more controlling devices, and does not transmit controlling signals to modulators that adjust brake actuating forces in response to those signals (Tr. 880-81, 1151).

132. The testing on the aftermarket vehicle reported in CX 34 demonstrates that the Brake Guard device does not prevent or substantially reduce wheel lockup, skidding, and loss of control. In that testing, there was no indication that the device had any capacity to control the degree of wheel slip (Tr. 881, 1151).

133. The testing reported in CX 34 demonstrates that respondents' device provides no wheel lockup control benefits (Tr. 881). By contrast, the factory-installed system tested in CX 34 demonstrated effective wheel lockup control (CX 34-Z-7; Tr. 104).

5) 1993 Report of Stopping Distance Testing

134. After the conclusion of the Wheel Slip controls tests on the aftermarket vehicle, while it was still equipped with the BG II device, VRTC conducted stopping distance tests on that vehicle. Qualitative comparison testing was performed on the OEM vehicle (Tr. 885-86).

135. Conditions of the testing were controlled. A controlled calibrated surface was employed for testing. The vehicles had only recently been equipped with new tires and brakes and both vehicles had undergone a similar brake burnish and the same test experiences. The protocol was for the driver to conduct five stops with the device engaged, then five stops with the device disengaged, then to switch to the second vehicle and repeat the procedure. This procedure was followed over a few days until each vehicle had accumulated a total of 70 stops (35 engaged, 35 disengaged). This procedure ensured that

tire, brake and road conditions remained controlled (Tr. 885-89, 892; CX 33-L, M; Tr. 1162).

136. The vehicles were instrumented appropriately for stopping distance testing, including fifth wheel performance monitors to measure vehicle speed and distance, and performance monitors to provide the test driver with a visual readout of conditions (Tr. 886-88, 892, 1161). Stopping distances were corrected to accommodate differences between target speed and actual speed (CX 33-L).

137. With regard to pedal application, the driver was instructed to conduct best effort stops (CX 33-L). This was a reliable procedure (Tr. 892).

138. CX 33 reports the results of this testing, and includes analysis of the standard deviation of the data. The data establish that the Brake Guard device did not shorten the stopping distance of the vehicle; whether engaged or disengaged, the minimum stopping distance of the vehicle remained the same (170 feet). Moreover, the average and maximum stopping distances of the vehicle were longer when the Brake Guard device was engaged. The installation of the Brake Guard device increased the standard deviation of the test sample, meaning that the driver was less able to keep the stopping distances consistent when it was installed (CX 33-N; Tr. 891).

139. Testing on the OEM vehicle was designed to see what effect each device (aftermarket device or OEM ABS) had on the vehicle being tested, and to provide a protocol, the results of which could easily be understood by a non-technical person. It was not to provide a head-to-head comparison of the stopping distances of the two vehicles. This aspect of the testing showed that engaging the OEM ABS shortened the vehicle's minimum, maximum and average stopping distances by 13% (CX 33-N, M; Tr. 902).

140. The results of this testing were consistent with the results of CX 36 (Tr. 893-94).

6) Southwest Research Testing

141. In 1992, BGPI hoped to obtain test results that demonstrated (a) that a vehicle equipped with Brake Guard complied with the Department of Transportation's Federal Motor Vehicle Safety Standards (F.M.V.S.S.), which contain minimum stopping distance standards (*see* CX 56-O), and (b) that the Brake Guard device provided shorter stopping distances. Toward this end, it hired an independent test company, Southwest Research Institute (SWRI), to

conduct testing of the Brake Guard device (Tr. 2775). SWRI prepared a proposal outlining the test procedure, which among other things provided for repeated burnishing of the brakes during testing, and which BGPI approved (CX 55; Tr. 2167, 2775). The test report (CX 56) is dated September, 1992.

142. The test protocol called for testing on three vehicles, including a pre-inspection for vehicle safety and brake condition; installation of instrumentation and a data recorder; burnishing brakes between each major series of test stops; measuring stopping distances without and then with Brake Guard device installed from 30 and 60 mph under both lightly loaded and fully loaded conditions (*e.g.*, without and with cargo); and removal of Brake Guard and repeat testing to verify test reproducibility (referred to as step 5 reverification tests) (CX 55; CX 56-K, L). The testing was conducted on a four door passenger car, a single unit truck, and a 15-passenger van (CX 56-I).

143. The vehicle instrumentation included a data acquisition system, fifth wheels (to permit accurate measurement of speed at the point of brake application and of stopping distances), brake pedal pressure transducers (to permit control of the brake application force) and decelerometers (to permit the driver to determine what amount of deceleration could be permitted before wheel lockup would occur). Lockup was determined by external observation and was taped with a video camera (Tr. 2170-80; CX 56-I-J). Burnishing was consistent with F.M.V.S.S. requirements (Tr. 2178-79). Stopping distances were corrected pursuant to an SAE formula (Tr. 2184-86; CX 56-P). The test protocol provided for best efforts stops. For each vehicle, stops were conducted in both the lightly loaded condition, known as "LVWR," and when loaded to its gross vehicle weight rating, known as "GVWR" (CX 56-O).

144. In these tests, stopping distances were observed to decrease as the number of severe stops accumulated, and the reverification stops (that is, the stops after Brake Guard was removed) were always shorter than any of the stops that came previously (CX 56-P; Tr. 2188). For vehicle 1, the average of the lowest 3 stops (hereinafter "low 3" average) during step 5 (these are the reverification stops, at LVWR) are each lower than the same average for the step 2 stops (with Brake Guard, at LVWR). Similarly, for vehicles 2 and 3, the averages for the step 5 stops (reverification stops at GVWR) are all lower than the step 4 stops (with Brake Guard at GVWR) (CX 56-Q).

SWRI observed that this was normal during stopping distance testing and is not considered to be related to the presence or absence of the Brake Guard device (CX 56-P). F.M.V.S.S. stopping distance requirements anticipate that stops after the brakes are burnished will be shorter than stops before burnish. (*See* CX 46-P (chart; compare, e.g., pre- and post-burnish requirements for cars, trucks and vans).)

145. SWRI compared various sets of stops. It determined that if one compared only the stops before Brake Guard installation to the stops after Brake Guard installation, at the same vehicle weight, stops with Brake Guard were shorter in 10 of 12 comparisons. By contrast, if stops with Brake Guard were compared to reverification stops at the same vehicle weight, that is, the stops after removal of Brake Guard, the Brake Guard stops were longer in 5 out of 6 cases (*i.e.*, the same frequency) (CX 56-R).

146. Considering this data, SWRI determined that it could not state that the differences in stopping distances were due to the Brake Guard device, or simply to the position of each stop in the test sequence (CX 56-R; Tr. 2188-89). Moreover, stopping differences ranged from 10.9 percent longer to 15.6 percent shorter with the Brake Guard device. Even assuming the Brake Guard device did cause the observed shortening of stops, the net improvement was less than 3% over all, which SWRI concluded was not meaningful. SWRI did not conduct a statistical analysis of this data (CX 56-H, -R; Tr. 2193); thus, it is not established that the 3% difference was statistically significant.

147. The SWRI testing showed that with Brake Guard, wheel lockup occurred 27.6% of the time, whereas without Brake Guard, it occurred 7.7% of the time (CX 56-R). The Brake Guard device neither prevented nor decreased lockup incidence, but instead increased it (CX 56-R; Tr. 2194). SWRI concluded that the increased incidence of wheel lockup with Brake Guard installed demonstrated a real difference in braking controllability in the car and the truck (CX 4-R).

7) Canadian Testing

148. BGPI was also aware of, and had seen, the adverse results of 1992 testing by Transport Canada (Canada's equivalent to the U.S. Department of Transportation) on the Brake Guard device. (*See* CX 54-B; Tr. 2778-81.) Transport Canada was concerned with advertising claims by BGPI, and sought to evaluate whether the

device shortened stopping distances or reduced wheel lockup frequency. Accordingly, it equipped a pickup truck with the Brake Guard device so that it could be engaged and disengaged, instrumented the vehicle with a performance computer, and conducted two types of stopping distance tests--panic stops and best effort stops (CX 54-G). The pickup truck was equipped with OEM ABS on the rear axle only (CX 54-F).

149. Graphs plotting the slopes of the results of the stopping distance versus speed data consistently demonstrated that the stopping distances with Brake Guard operating were longer than the stopping distances without Brake Guard (CX 54-M-Q). In particular, a comparison of 9 cases where the speed of the vehicles was quite similar ($\pm .1$ mph) showed that braking distance was increased by 7.3% with the Brake Guard device installed (CX 54-Q, R, -Z-5) and Transport Canada concluded that the Brake Guard device did not shorten stopping distances (CX 54-R).

150. Transport Canada also observed that during the braking tests, whether the Brake Guard device was engaged or disengaged, the front wheels (which were not equipped with OEM ABS) locked up every time the brakes were rapidly applied. Transport Canada concluded that the Brake Guard device did not prevent wheel lockup and could not be considered an antilock device (CX 54-Q, R).

151. No expert testimony was available with regard to this test, and its reliability is not established. BGPI ignored the results of this test, although it did not offer any testimony to critique the test protocol or conclusions (Tr. 2778-80).

8) Korea Testing

152. BGPI also was aware of a 1991 report of testing conducted in Korea, which it relied on and marked as an exhibit, but ultimately did not introduce into evidence (RX-4; Tr. 2984). This testing indicated that during wet asphalt testing, at 50, 60, 70 and 80 km/h, whether the Brake Guard device was turned on or off, complete four-wheel lockup occurred (Tr. 2986-88). This same testing indicated that installing the Brake Guard device did not shorten stopping distances (Tr. 2990-91).

III. CONCLUSIONS OF LAW

A. Respondents Made The Alleged Claims

Through the use of their trade names and logos, and their ads and promotions, respondents made the claims alleged in the complaint (F. 16-24).

Each of the ads described in the findings make the challenged claims expressly (*see, e.g.*, F. 18), or convey their meaning so clearly that I can confidently find that they make one or more of the claims alleged in the complaint (*see, e.g.*, F. 24). *See Kraft, Inc.*, 114 FTC 40, 121 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

B. The Level Of Substantiation Required To Support Respondents' Claims

An ad is likely to mislead if the message it conveys is false, or if claims which are made are unsubstantiated, and advertisers must possess a reasonable basis for substantiation of claims which are made. Respondents' ads do not, with two exceptions,² reveal the level of support which they had for their claims. Thus, one must consider, for these claims, the six "Pfizer factors" which determine the type and amount of substantiation respondents should have possessed when they were made. *Thompson Medical Co.*, 104 FTC at 648, 820-21.

These factors include the type of claim, the product involved, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation which experts in the field believe is reasonable. *Thompson Medical*, 104 FTC at 821; *Pfizer, Inc.*, 81 FTC 23, 64 (1972).

Where, as here, a product and its ads involve health or safety, the Commission requires a relatively high level of substantiation for such claims--usually scientific tests. *Thompson Medical*, 104 FTC at 822.

The benefits of a truthful claim are obvious and the costs of reliable testing to support ad claims are not excessive (F. 67). Requiring such testing would not, therefore, deter the development or advertising of a new brake device.

² As to these claims which stated that tests proved the wheel lockup prevention and stopping distance claims (CPF 57), respondents must, as a matter of law, possess adequate tests to substantiate them. *Thompson Medical Co.*, 104 FTC 648, 821 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1984).

The consequences of false claims are significant, for respondents' devices sell for \$283 to \$349 per system (F. 5), and there is a possibility of significant injury to consumers who rely on the Brake Guard device to shorten stopping distance or avoid brake lockup.

Finally, experts in the field agree that claims of the sort made by Brake Guard require competent and reliable scientific testing (F. 55, 60, 66).

Consideration of the facts of this case under the Pfizer decision leads to the conclusion that the proper level of substantiation for claims that the Brake Guard device is an antilock brake system and complies with the NHTSA ABS definition, for the braking benefits and stopping distance claims, and for the comparative safety claims, is competent and reliable scientific testing. *See Thompson Medical*, 104 FTC at 826; *Firestone Tire & Rubber Co.*, 81 FTC 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

C. Respondents' Claims Are False And Unsubstantiated

1. ABS and Related Claims

The Brake Guard systems advertised and promoted by respondents are not antilock brake systems since they do not have the components needed to control the level or degree of rotational wheel slip (compare F. 51 with F. 52-54). Competent and reliable wheel slip testing conducted by VRTC on the Brake Guard device confirms this conclusion (F. 131) as do stopping distance tests showing lockup during hard stops (F. 115). Respondents have submitted no competent and reliable evidence that supports their claim that the Brake Guard device controls wheel slip (F. 68-100). In fact, their own expert testified that the Brake Guard device does not control the degree of wheel slip (Tr. 2574). Thus, the claims that it is an antilock brake system and complies with the NHTSA ABS definition (Cplt ¶¶ 5 and 7d) are false and unsubstantiated.

The results of the testing set forth in CX 34 demonstrate that respondents' device does not prevent or substantially reduce wheel lockup, skidding, or loss of steering control (F. 132). This conclusion is confirmed by the results of CX 36, which showed that wheel lockup was not prevented by the Brake Guard device (F. 115). Respondents have submitted no competent and reliable evidence to support this claim (F. 68-101). Their own expert witness testified

that the Brake Guard device does not prevent wheel lockup (Tr. 2574). Thus, the claim that the Brake Guard device prevents or substantially reduces wheel lockup, skidding and loss of steering control in emergency stopping situations (Cplt ¶ 7a) is false and unsubstantiated.

CX 34 provides substantial evidence that factory-installed antilock brake systems do provide meaningful wheel lockup control (F. 133). Since respondents' devices do not provide antilock brake system benefits, including wheel lockup control benefits, that are at least equivalent to those provided by OEM ABS, the claim that the Brake Guard device does provide those benefits (Cplt ¶ 7f), is false and unsubstantiated.

SAE J46 does not contain any performance standards or goals to be met in order to pass (Tr. 1136-37, 2582). Thus, a claim that a product complies with a performance standard set forth in SAE J46 is false (Tr. 1136-37). Moreover, as of 1992 (at least three years after it first started disseminating the SAE J46 claim, *see* CX 104 and CX 105, each of which bears a 1990 copyright) BGPI admitted that it had never conducted any testing pursuant to SAE J46 on the Brake Guard device, CX 32-U, and BGPI performed no such testing after that date (F. 68-100). When tested by NHTSA pursuant to a protocol consistent with SAE J46, respondents' device did not perform as antilock brakes (CX 34). Accordingly, the claim that the Brake Guard device complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46 (Cplt ¶ 7c) is false and unsubstantiated.

2. Insurance Discount Claim

Respondents' claim that installation of the Brake Guard device will qualify a vehicle for an automobile insurance discount in a significant proportion of cases, (Cplt ¶ 7b), is false and unsubstantiated. Partial Summary Decision (Insurance Discounts), Oct. 13, 1996.

3. Stopping Distance Claims

The complaint alleges that respondents' specific improved stopping distance claims (20% to 30%, or up to 30%) are both false and unsubstantiated, and that their general improved stopping distance claims are unsubstantiated (Cplt ¶ 7e, 9a). The evidence establishes that both the general and specific stopping distance

representations are false, as well as unsubstantiated. Competent and reliable testing performed by VRTC on two separate occasions on the Brake Guard device, and on a substantially similar device (the AccuBrake), consistently demonstrated that no stopping distance enhancement results from installation of the Brake Guard device. Indeed, this evidence shows that the Brake Guard (like the AccuBrake) increases the average stopping distance of a vehicle (F. 109, 114, 138).

The tests introduced by respondents to substantiate these claims are not competent and reliable (F. 68-100), and statistical analysis of respondent's data is consistent with the conclusion that the Brake Guard device provides no stopping distance enhancement (F. 76, 80).

SWRI was unable to reach the conclusion that its stopping distance data supported this claim (F. 146). It further concluded that, if a stopping distance enhancement occurred, it was insignificant. Thus, SWRI's data could not substantiate any improved stopping distance claim. Guides for Use of Environmental Marketing Claims, 16 CFR 260.6 and Example 2 (deceptive to claim environmental benefit where benefit is in fact not significant or meaningful); *P. Lorrillard Co. v. FTC*, 186 F.2d 52, 57 (4th Cir. 1950) (advertising claiming that cigarette was lowest in nicotine, tar and resins challenged in part because the difference was, in fact, insignificant); *see* Enforcement Policy Statement on Food Advertising, 59 Fed. Reg 28388 (June 1, 1994)(cautioning against claims that deceptively imply a significant difference). The conclusion that Brake Guard provides no stopping distance improvement is consistent with the conclusions of other testing, although that testing has not been shown to be reliable (*i.e.*, that of Transport Canada, F. 149, and that conducted in Korea, F. 152). Accordingly, respondents' specific and general stopping distance improvement claims (Cplt ¶¶ 7e, 9a) are both false and unsubstantiated.

4. Testimonial Typicality Claim

The testimonials included in respondents' advertising conveyed the impression that reduced stopping distances and reduced wheel lockup were typically experienced by consumers. (*See* F. 101-102.) Competent and reliable testing conducted by VRTC demonstrates that these experiences are not typical (F. 114-115, 132, 138). Furthermore, where scientific evidence is required to substantiate claims, consumer testimonials cannot provide support for them. *See FTC v.*

Pantron Corp., 33 F.3d 1088, 1098 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1794 (1995). There is substantial evidence that the experiences recounted in respondents' testimonials do not accurately reflect consumer experience (F. 101, 102). Finally, there is no proof that the experiences recounted in any of respondents' consumer testimonials are accurate, since consumers do not have the competence to evaluate whether stopping distance improvements or wheel lockup control have occurred (F. 58, 64). In conclusion, respondents' testimonial typicality claim (Cplt ¶ 7g) is false and unsubstantiated.

5. Safer Claim

Respondents introduced no competent and reliable evidence showing that their device will make a vehicle safer (F. 66, 68-100; Tr. 1255). By contrast, competent and reliable testing performed by VRTC found that the device did not shorten stopping distances, and did not control wheel slip (F. 114-115, 132, 138). Thus, respondents' claim that the Brake Guard device will make a vehicle safer than a vehicle not equipped with the device (Cplt ¶ 9b) is unsubstantiated.

D. The Deceptive Claims Are Material

Advertising misrepresentations are deceptive under Section 5 of the FTC Act only if they are "material." FTC Policy Statement on Deception ("Deception Statement"), 103 FTC 174, 182 (1984). A material misrepresentation is one that is likely to affect a consumer's choice of or conduct regarding a product; *i.e.*, reasonable consumers would consider the information in the claims important. *Id.*

Many of the claims alleged in the complaint were made expressly and the materiality of these claims is presumed. *Id.* These include the claim that the product is an antilock brake system (Ad Meaning at 6); the braking control benefits claim (*Id.* at 9-12); the insurance discount claim (*Id.* at 15-16); the SAE J46 and NHTSA compliance claims (*Id.* at 16-17; claims virtually express); the general and specific stopping distance claims (*Id.* at 18-19); the testimonial typicality claim (*Id.* at 23); and the comparative safety claim (*Id.* at 24). Materiality also is presumed for claims that the respondents intended to make. Respondents admit they intended the term "ABS" in their advertisement to mean antilock braking system (Tr. 2926).

The Commission also presumes claims to be material if they pertain to the "central characteristics of a product . . . such as those

relating to its purpose . . . [or] efficacy," or to safety. *Thompson Medical Co.*, 104 FTC at 816-17; Deception Statement, 103 FTC at 182. The majority of the challenged claims made for the product directly involved its purpose, efficacy and safety. The central theme of respondents' ads was that the Brake Guard device was an antilock brake system that provided certain braking and stopping distance improvements, and that installing an antilock brake system like Brake Guard would make the vehicle safer. (E.g., CX 104-106, CX 112, CX 113, CX 125, CX 136, CX 223, CX 228.) The SAE J46 and NHTSA ABS claims served to reinforce the impression that the device was an antilock brake system, and thus drove home this "safety" message.

Finally, claims regarding cost are presumed material. Deception Statement, 103 FTC at 182. The insurance discount availability claim made by respondents pertained to the overall cost of using the Brake Guard device, and hence it was material. In sum, all of the claims alleged in the complaint are material.

E. Analysis Of Respondents' Defenses

Although their arguments do not adequately cite the record or authorities upon which they rely, Rules of Practice, Section 3.46(a), I will deal with respondents' defenses.

1. This Proceeding Is In The Public Interest

Respondents have had few complaints about the Brake Guard device, but this is not surprising since consumers cannot evaluate its effectiveness (F. 58, 64). Furthermore, the public interest is served by prohibiting respondents from advertising and selling an expensive device which does not operate as claimed. *See Automotive Breakthrough Sciences, Inc.*, D. 9275 at 46 (Initial Decision, March 3, 1997).

2. Respondents Made The Alleged Claims

I reject respondents' argument that they did not make the alleged claims, for my Partial Summary Decision (Ad Meaning) analyzed in detail respondents' ads and promotional material before finding that the claims alleged in the complaint were made.

3. Respondents' Claims Are False And Unsubstantiated

Respondents point to extensive testing they have conducted which supports the claims they have made, but complaint counsel have established beyond any doubt that all of the testing submitted by respondents, including those done in foreign countries, were flawed and do not substantiate the claims (F. 69-100). The Brake Guard device is patented but this does not mean that it operates as claimed. *See Thompson Medical Co.*, 104 FTC 648, 750 (Initial Decision), *aff'd as modified*, 104 FTC 786, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

4. NHTSA Testing Is Competent And Reliable

Respondents criticize NHTSA's testing of the Brake Guard device, but cite no record evidence supporting this argument. In contrast, complaint counsel have cited detailed documentary evidence and testimony which justify the conclusion that NHTSA's stopping distance and wheel slip control tests are competent and reliable (F. 106-140). The Brake Guard device is not, as respondents claim, "new technology" (Tr. 2963) and NHTSA's testing using widely recognized techniques was appropriate. These tests reveal that the Brake Guard device is not equivalent to OEM ABS and does not reduce stopping distance or control wheel slip.

F. The Appropriate Order

1. Terms Of The Proposed Order

The relief complaint counsel seek in this proceeding is that contained in the notice order with the addition of: 1) a ban on all stopping distance claims for the Brake Guard or any substantially similar device; and 2) the reseller and consumer notification provisions ordered against the two other sets of respondents in this action.³

2. Broad Fencing-In Relief Is Justified

The requested relief is appropriate given the serious and deliberate nature of respondents' violations, and their transferability to other products or claims. *See, e.g., Thompson Medical*, 104 FTC

³ See *BST Enters., Inc.*, D. 9276 (Default Judgment and Initial Decision, Oct. 16, 1996); *Automotive Breakthrough Sciences, Inc.*, D. 9275 (Initial Decision, Mar. 3, 1997).

at 833-38; *Kraft, Inc.*, 114 FTC 40, 139-142 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Stouffer Foods Corp.*, D. 9250, 1994 FTC LEXIS 196, at *40-44 (Sept. 26, 1994).

Through nine separate deceptive claims, respondents have misrepresented the fundamental purpose and every relevant aspect of their product.

Most of the challenged claims whose truth or falsity cannot be judged by consumers (F. 58) involve safety and performance. *See Thompson Medical*, 104 FTC at 834; *Stouffer*, 1994 FTC LEXIS 196, at *39-40. Another indication of the seriousness of respondents' violations is the size and scope of their advertising. For more than a decade, respondents have engaged in a nationwide, multi-media effort to market their product as an antilock system that shortens stopping distances. From 1990 to 1994 alone, BGPI spent more than \$430,000 on advertising for the Brake Guard device and promoted it at 10 to 15 national trade shows each year (F. 5, 12, 15). Respondents disseminated their claims through more than 1200 dealers in the United States as well as in 34 countries abroad (F. 5). Thus, the challenged advertising claims were widely disseminated. *See Litton Indus.*, 676 F.2d at 364, 372 (9th Cir. 1982); *Thompson Medical*, 104 FTC at 833-34.

The record also reveals respondents' continuous, knowing dissemination of claims designed to sell their product regardless of whether they had sufficient information to support the truth of these claims, and despite substantial information that they were false (F. 52-54), including the Korea test, which indicated on its face that in stopping distance tests on a wet surface, the Brake Guard device did not shorten stopping distances or prevent wheel lockup (F. 152), and NHTSA's 1991 report of its initial tests of the Brake Guard device, which concluded that it did not shorten stopping distances (F. 114).

In 1992, respondents sought additional test evidence. They selected a local engineering firm, Cunningham Engineers, and sent Ed Jones, Jr., a BGPI employee and the BGPI president's son, to attend the tests. In initial testing, with "panic stops" before and after the installation of Brake Guard, no stopping distance improvement occurred. Faced with this result, BGPI apparently attempted to manipulate the test. Some of the subsequent Brake Guard test runs utilized "best effort" stops, which respondents knew would produce

shorter stops than "panic stops." Even then, all of the Brake Guard stops in the test came out longer than the non-Brake Guard stops. At that point, Ed Jones, Jr. got in the vehicle and did the driving himself, ensuring a set of data to show shorter stopping distances after installing Brake Guard (F. 77-80). Thereafter, although Ed Jones Sr. admitted that these tests failed to reach "any real conclusion that means anything," (Tr. 3005-06), the test results were disseminated by BGPI as advertising (CX 53-Z-12-14).

Later in 1992, respondents attempted to secure more reputable substantiation in support of their claims by hiring SWRI. Although SWRI's results failed to show any stopping distance improvement attributable to the Brake Guard device, respondents disseminated advertising stating that the SWRI results proved that it met the stopping distance requirements of FMVSS 105 (CX 235), and even disseminated as advertising the specific pages of the SWRI test where it made this conclusion (CX 53-Z-26-28).

Thus, I conclude that faced with substantial credible evidence that its product did not reduce wheel lockup frequency, and indeed may increase it, and that in carefully controlled testing a reputable entity had been unable to demonstrate reduced stopping instances, respondents chose to ignore these facts. In 1993, respondents continued to disseminate ads proclaiming shorter stopping distances and reduction in wheel lockup from installation of the Brake Guard device. (*See, e.g.*, CX 240.)

When Transport Canada's results turned out adversely, respondents took a similar approach: They dismissed them because a BGPI employee had been rude to the Canadian test company (Tr. 2778). On another occasion, the company stated that the Canadian test was flawed because the vehicle tested had a faulty master cylinder (Tr. 2815). No evidence of this "flaw" was introduced into the record.

Respondents have offered no credible reason for dismissing the results of NHTSA's 1993 wheel slip and stopping distance tests. Indeed, their own expert acknowledged that the 1993 NHTSA wheel slip test report (CX 34) is competent and reliable (Tr. 2577) and neither their expert nor any other witness offered any criticism of the 1993 NHTSA stopping distance test report (CX 33). Nevertheless, respondents continued, long after the 1993 publication of these reports, and after they were clearly aware of the results of NHTSA's

investigation,⁴ to disseminate ads making claims disproved by those tests (CX 188).

Thus, I conclude that respondents' violations were knowing and deliberate and that they continued to make them in the face of convincing evidence that the claims were false, *see Thompson Medical*, 104 FTC at 834; *Kraft, Inc.*, 114 FTC at 140; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994); furthermore, I conclude that respondents are likely to repeat the violations, and that the proposed fencing-in relief is warranted. *See Litton Indus., Inc.*, 97 FTC 1, 79 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982).

3. The Stopping Distance Claims Should Be Barred

The complaint in this proceeding alleged that respondents' general stopping distance claims were unsubstantiated, but did not allege falsity. The notice order required that respondents have competent and reliable scientific evidence before making any future general stopping distance claims. However, substantial evidence adduced at trial supports the conclusion that the claims are false as well as unsubstantiated. Two competent and reliable stopping distance tests conducted by NHTSA on the Brake Guard device, and a competent and reliable test on a substantially similar device, establish that it will not provide shorter stopping distances (F. 114, 109, 138). The NHTSA results are consistent with other adverse data known to BGPI (F. 145, 149, 152), and even the testing offered by respondents' expert witness failed to support respondents' claims (F. 98). None of the evidence respondents presented to support their stopping distance claims meets the most basic standards of competent and reliable substantiation. Thus, a bar on stopping distance improvement claims for this or any substantially similar device is the most appropriate means of protecting consumers from future deception. *See Stouffer*, 1994 FTC LEXIS 196.

4. Reseller And Consumer Notification Is Appropriate

The proposed reseller and consumer notification provisions are identical to those ordered against the two other sets of respondents in Dockets 9275 and 9276. These provisions are designed to alert

⁴ Respondents were aware of the results of NHTSA's investigation as late as July 21, 1994. On that date, a distributor/dealer faxed BGPI a copy of NHTSA's report (CX 32), which contained the results reported in CX 33 and CX 34. *See* RX 205.

distributors and end purchasers that they should not expect the device to provide the ABS benefits and stopping distance enhancements promised by respondents' advertising. These notifications will help eliminate further deception by inducing distributors to stop using the deceptive sales materials already in their possession and will mitigate continuing injury to purchasers who were deceived by respondents' past advertising. *Removatron*, 111 FTC 206, 311 (1988) (notification of device operators); *Figgie Int'l, Inc.*, 107 FTC 313, 395 (1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987) (respondent ordered to notify past purchasers of safety concerns); *Southwest Sunsites, Inc.*, 105 FTC 7, 176-78 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986) (notification of agents/brokers and consumers); *AMREP Corp.*, 102 FTC 1362, 1678-80 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986) (notification of buyers under contract).

5. Trade Name Excision Is Warranted

As has previously been found, respondents' trade names and product logos that employ the "ABS" acronym falsely convey to reasonable consumers that their products are antilock braking systems. Partial Summary Decision (Ad Meaning), at 6. Indeed, this claim is inherent in the trade names "Brake Guard ABS" and "Advanced Braking System ABS." The "ABS" acronym has become widely used to refer to the genuine antilock systems that are commonly installed on new cars. The association with the acronym "ABS" is sufficiently established that consumers are likely to assume mistakenly that the Brake Guard device is equivalent to and provides the same benefits advertised for genuine ABS. In such circumstances, it is appropriate to order that the "ABS" term be excised.

Trade name excision is appropriate when it conveys a deceptive claim, and when a less severe remedy, such as affirmative disclosures, could not correct the misimpression. *Thompson Medical*, 104 FTC at 837-38. Here, any qualifying phrase that could be appended to respondents' trade name would lead to a "confusing contradiction in terms." *Continental Wax*, 330 F.2d 475, 480 (2d Cir. 1964).

Given the strong association of the acronym "ABS" with antilock brakes and their performance attributes, adding a qualifying phrase contradicting that assertion would simply confuse consumers, for

respondents intended the term "ABS" to convey "antilock brake system," (Tr. 2926) and it can have only that meaning. Trademark registration of respondents' trade names and logos does not protect them from this remedy, because the entire point of excision is to address deception arising from a registered name or mark. Additionally, the proposed excision provision will render this order consistent with the order issued against competitors BST and ABSI.

G. Summary

1. The Federal Trade Commission has jurisdiction over respondents and over their acts and practices that are the subject of this proceeding under Section 5 of the Federal Trade Commission Act.

2. The acts and practices of respondents described above constitute unfair or deceptive acts and practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

3. The following order is necessary and appropriate under applicable legal principles and the facts of this case.

ORDER

DEFINITIONS

For the purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based upon 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. "*Purchasers for resale*" shall mean all purchasers of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS for resale to the public, including but not limited to franchisees, wholesalers, distributors, retailers, installers, and jobbers.

I.

It is ordered, That respondents, Brake Guard Products Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS 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 employing the initials or term ABS in conjunction with or as part of the name for such product or the product logo.

II.

It is further ordered, That respondents, Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS 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 representing, in any manner, directly or by implication, that such product:

- A. Is an antilock braking system;
- B. Prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
- C. Will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
- D. Complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
- E. Complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
- F. Reduces stopping distances by 20 to 30% or by up to 30%;
- G. Provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; or

H. Will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product, in emergency stopping situations.

III.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any braking system, accessory, or device, 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 installation of the system, accessory, or device will make operation of a vehicle safer than a vehicle that is not equipped with the system, accessory or device, 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 Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any product 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 compliance of any such product with any standard, definition, regulation, or any other provision of any governmental entity or unit, or of any other organization;

B. The availability of insurance benefits or discounts arising from the use of such product; or

C. 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:

(1) Such representation is true, or
(2) Respondent discloses clearly, prominently, and in close proximity to the endorsement or testimonial either:

(a) What the generally expected results would be for users of such 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.

V.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the absolute or comparative attributes, efficacy, performance, safety, or benefits of such system, accessory, or device, unless such representation is true and, 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 the representation.

VI.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and Ed F. Jones shall:

A. Within forty-five (45) days after the date of service of this order, compile a current mailing list containing the names and last

known addresses of all purchasers of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS since January 1, 1990. Respondents shall compile the 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 service of this order, to all of the purchasers for resale with which respondents have done business since January 1, 1990, an exact copy of the notice attached hereto as Appendix 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, respondent 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 service of this order.

3. 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 sixty (60) days after the date of service of this order, send by first class mail, postage prepaid, to the last address known to respondents of each purchaser of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS identified on the mailing list compiled pursuant to subparagraph A of this Part, an exact copy of the notice attached hereto as Appendix B. The mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a prominent fashion the phrases "FORWARDING AND RETURN POSTAGE GUARANTEED" and "IMPORTANT NOTICE--U.S. GOVERNMENT ORDER ABOUT BRAKE GUARD OR ADVANCED BRAKING SYSTEM DEVICE."

C. Send 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 Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS, and to any purchaser whose notification letter is returned by the U.S. Postal Service as undeliverable and for whom respondents thereafter obtain a corrected address. The mailing required by this subpart shall be made within

ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event respondents receive any information that, subsequent to its receipt of Appendix A, any purchaser for resale is using or disseminating any advertisement 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 advertisement or promotional material.

E. Terminate within ten (10) days the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph A of this Part.

VII.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, and Ed F. Jones shall for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. The list compiled pursuant to subparagraph A of Part VI of this order;

B. Copies of notification letters sent to purchasers pursuant to subparagraphs B and C of Part VI of this order; and

C. Copies of notification letters sent to purchasers for resale pursuant to subparagraphs A and D of Part VI of this order, and all other communications with purchasers for resale relating to the notices required by Part VI of this order.

VIII.

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 or 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 relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

IX.

It is further ordered, That respondent Brake Guard Products, 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.

X.

It is further ordered, That respondent Brake Guard Products, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

XI.

It is further ordered, That respondent Ed F. Jones shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new

business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XII.

It is further ordered, That 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.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, 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.

APPENDIX A

[Brake Guard Products, Inc. letterhead]

Dear Brake Guard Reseller:

Our records indicate that you are or have been a distributor or retailer of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS (hereinafter "Brake Guard"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an order against Brake Guard Products, Inc. regarding certain claims made for the Brake Guard device. Under that order, we are required to notify our distributors, wholesalers and others who have sold the Brake Guard to stop using or distributing advertisements or promotional materials containing these claims. We are also asking for your assistance in compiling a list of Brake Guard purchasers, so that we may contact them directly. Please read this letter in its entirety and comply with all parts.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the Brake Guard device in Brake Guard Products, Inc.'s advertisements, logos and promotional material are FALSE and MISLEADING:

- (a) The Brake Guard is an antilock braking system;
- (b) The Brake Guard prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
- (c) The Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
- (d) The Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
- (e) The Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
- (f) The Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;
- (g) The Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and
- (h) The Brake Guard will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product, in emergency stopping situations.

The FTC order requires Brake Guard Products, Inc. to cease and desist from making these false claims for the Brake Guard device.

In addition, the FTC order requires Brake Guard Products, Inc. to cease and desist from making claims that the Brake Guard will make a vehicle safer, unless at the time of making such representation it possess competent and reliable scientific evidence substantiating the representation.

We need your assistance in complying with this order.

Please immediately send us the names and last known addresses of all persons or businesses, including other resellers, to whom you have sold a Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS since January 1, 1990. We need this information in order to provide the notification required by the

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FTC order. If you do not provide this information, we are required to provide your name and address to the FTC.

Please stop using the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS promotional materials currently in your possession. These materials may contain claims that the FTC has determined to be false or unsubstantiated. You also should avoid making any of the representations as described in this letter. Under the FTC order, we must stop doing business with you if you continue to use the prohibited materials or make the prohibited representations.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Ed F. Jones
President
Brake Guard Products, Inc.

APPENDIX B

[Brake Guard Products, Inc. letterhead]

Dear Brake Guard customer:

Our records indicate that you previously purchased a Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS (hereinafter "Brake Guard"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Brake Guard Products, Inc. regarding certain claims made for the Brake Guard device. Please read this letter in its entirety.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the Brake Guard device in Brake Guard Products, Inc.'s advertisements, logos and promotional material are FALSE and MISLEADING:

- (a) The Brake Guard is an antilock braking system;
- (b) The Brake Guard prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
- (c) The Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
- (d) The Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
- (e) The Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
- (f) The Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;
- (g) The Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and
- (h) The Brake Guard will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product in emergency stopping situations.

The FTC Order requires Brake Guard Products, Inc. to cease and desist from making these false claims for the Brake Guard device.

In addition, the FTC order requires Brake Guard Products, Inc. to cease and desist from making claims that the Brake Guard will make a vehicle safer, unless at the time of making such representation it possess competent and reliable scientific evidence substantiating the representation.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Ed F. Jones
President
Brake Guard Products, Inc.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

This case is before the Commission on appeal from an initial decision and order by Administrative Law Judge Lewis F. Parker finding that the respondents, Brake Guard Products, Inc., and its president, Ed Jones,¹ have engaged in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 ("Section 5"), in connection with the sale and promotion of their aftermarket braking device. For many years, the respondents have advertised that their device provides the benefits of antilock brakes, and improves stopping distances. The respondents do not contest on appeal that they made these claims, and the record shows that they knew or should have known that the claims were false. The substantiation they have offered in their defense consists of lay testimonials and reports that are methodologically unsound or inconclusive.

Because of the potential implications of this case for motor vehicle safety, the Commission takes this case particularly seriously. For the reasons stated below, the Commission concludes that there are no competent and reliable scientific data to support the respondents' advertising claims. We affirm.²

I. BACKGROUND

The respondent, Brake Guard Products, Inc. ("Brake Guard"), is a closely-held corporation, owned and controlled by the respondent Ed Jones and his family. I.D.F. 2; Tr. 2955-57.³ Its offices and

¹ Mr. Jones' given name is Ellsworth Forest Jones, Sr., but he is more commonly known as "Ed Jones." Transcript of Testimony 2825.

² We agree with the findings and conclusions of the Administrative Law Judge and adopt them as our own to the extent they are consistent with this opinion.

The respondents were represented by counsel for portions of the trial before the Administrative Law Judge. Respondent Jones represented himself *pro se* on appeal before the Commission, although at oral argument of the appeal, the respondent corporation was represented by its Vice President-Operations/R&D, Linden A. Burzell, Ph.D. In this instance, the Commission has tried to afford the respondents all possible assistance within the adjudicative framework of its Rules and the Administrative Procedure Act, 5 U.S.C. 554, to ensure that they had "the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 CFR 3.41(c) (1997).

³ References to the record are abbreviated as follows:

I.D.	Initial Decision	Tr.	Transcript of Testimony
I.D.F.	Initial Decision Finding	CX	Complaint Counsel's Exhibit
R.A.B.	Respondents' Appeal Brief	RX	Respondents' Exhibit.

principal place of business are located in Spokane, Washington. I.D.F. 1. Since at least 1980, the respondents have been involved in the manufacture, sale, and distribution of an after-market braking device under the trade names "Brake Guard Safety System," "Advanced Braking System," and "Brake Guard ABS." I.D.F. 4. The device consists of a small metal housing containing a resilient membrane. I.D.F. 4; Tr. 873. The devices are sold in sets of two, one for the front braking system and one for the rear system. I.D.F. 4; Tr. 873.

The respondents sold their braking device through a large network of dealers in the United States and in 34 countries abroad. I.D.F. 5. Consumers paid from \$283 to \$349 for purchase and installation of the Brake Guard device. *Id.* From 1990 to 1994, cumulative sales of the Brake Guard device exceeded \$10 million. *Id.*

For at least four years, the respondents made false and unsubstantiated claims for their aftermarket braking device. The respondents promoted their device as an antilock braking system, with all the performance and safety characteristics of manufacturers' original equipment (hereafter referred to as "OEM"). I.D.F. 16. The respondents advertised their device directly to consumers through print advertisements in specialty magazines such as "Automotive News," "Specialty Automotive Magazine," and "Brake and Front End." I.D.F. 7. The respondents also promoted their product extensively through dealers, using "dealer kits" containing magazine articles, brochures, posters, testimonials, and training tapes, as well as other materials designed to help dealers promote their product to consumers I.D.F. 8-11. Brake Guard participates in approximately 15 to 20 trade shows a year and has sponsored a booth at the giant SEMA⁴

On September 27, 1995, the Commission issued a complaint against the respondents alleging that they had violated Section 5 by making a number of false or unsubstantiated performance claims about the Brake Guard device.⁵ I.D. at 2-3. Specifically, the complaint

⁴ The Specialty Equipment Manufacturing Association ("SEMA") is the association of automotive aftermarket manufacturers, distributors and outlets. Its annual show, attended by over 50,000 people, is the largest in the world.

⁵ On the same date, the Commission issued substantially similar complaints in BST Enterprises, Inc., Docket No. 9276, and Automotive Breakthrough Sciences, Inc., Docket No. 9275. On October 16, 1996, the Administrative Law Judge entered a default judgment in Docket No. 9276. On May 30, 1997, the Commission issued an order adopting the Initial Decision and the appended order as the Final Order and Opinion of the Commission. On March 3, 1997, the Administrative Law Judge issued his Initial Decision and Order in Docket No. 9275. An appeal from the Initial Decision and Order in No. 9275 is pending before the Commission.

alleges that the respondents have represented that: (1) the Brake Guard device constitutes an antilock brake system (complaint ¶ 5); (2) the Brake Guard device prevents or reduces lockup, skidding, and loss of steering control (complaint ¶ 7(a)); (3) the Brake Guard device provides antilock braking benefits that are as good as those provided by OEM electronic antilock braking systems (complaint ¶ 7(f)); (4) in emergency stopping situations, the Brake Guard device stops a vehicle in a shorter distance than a vehicle that is not equipped with the device (hereafter "general stopping distance claim") (complaint ¶ 9(a)); (5) the Brake Guard device reduces stopping distances by 20 percent or up to 30 percent (hereafter "specific stopping distance claim") (complaint ¶ 7(e)); (6) the Brake Guard device makes a vehicle safer than a vehicle that is not equipped with Brake Guard (complaint ¶ 9(b)); (7) the Brake Guard device complies with standards adopted by the National Highway Traffic Safety Administration ("NHTSA") for antilock brakes (complaint ¶ 7(d)); (8) the Brake Guard device complies with performance standards set forth in the Society of Automotive Engineers' ("SAE") Wheel Slip Brake Control System Road Test Code SAE J46 (complaint ¶ 7(c)); (9) installation of the Brake Guard device qualifies a vehicle for an insurance discount in a significant proportion of cases (complaint ¶ 7(b)); and (10) testimonials from consumers appearing in advertisements and promotional materials reflect the typical experience of those who have used the Brake Guard device (complaint ¶ 7(g)).

The complaint alleges that the respondents' general stopping distance claim and their comparative safety claim are unsubstantiated and that the remaining claims are both unsubstantiated and false. Complaint ¶¶ 6, 8, 11.

On May 22, 1996, the Administrative Law Judge granted complaint counsel's motion for partial summary decision on the question whether Brake Guard's trade names, logos, and promotional materials made the claims alleged in the complaint (hereafter "Partial Summary Dec. (Ad Meaning)").⁶ I.D. at 3. Specifically, the Administrative Law Judge found that the respondents made each and every claim alleged in the complaint. Partial Summary Dec. (Ad

⁶ By order of May 28, 1996, the Administrative Law Judge clarified that in his order of May 22 granting partial summary decision, he had concluded that the respondents' advertisements and promotional materials made a claim that the Brake Guard device complies with a standard set forth by NHTSA.

Meaning) at 27-28. On October 16, 1996, by a second partial summary decision (hereafter "Partial Summary Dec. (Ins. Discount)"), the Administrative Law Judge concluded that the respondents' claim that installation of their device qualifies a vehicle for an insurance discount in a significant proportion of cases was both false and unsubstantiated. Partial Summary Dec. (Ins. Discount) at 9-10. A trial was held on the remaining issues. The record closed on February 14, 1997.

On May 2, 1997, the Administrative Law Judge issued his Initial Decision and Order. The Administrative Law Judge found that the respondents made all of the claims alleged in the complaint (I.D.F. 16-24), and that each of these claims was false or unsubstantiated. I.D. at 39-41.⁷ The order of the Administrative Law Judge prohibits the respondents from using the acronym "ABS" in connection with their device or a similar product, making any of the claims that were found to be false, making any of the unsubstantiated claims without proper substantiation, or making certain claims in connection with products other than the Brake Guard device. Order ¶¶ I - V.

On appeal, the respondents "concur * * * that the claims alleged in the complaint were made" but contend that the claims are true and substantiated.⁸ R.A.B. at 18. Although the respondents do not address directly the scope of the order, they deny that test results put them on notice that their claims were false or unsubstantiated. R.A.B. at 16. Finally, the respondents contend that the proceeding is not in the public interest (*id.* at 21) and seek an investigation of the relationship between the staff of the Commission and the Administrative Law Judge, including any private communications between them, and a "recommendation from the Commission to Congress to investigate the facts surrounding this case." R.A.B. at 22.

II. APPLICABLE LAW

As already noted, the respondents have not challenged on appeal that they made the claims alleged in the complaint. The only issue before us in deciding liability is whether the claims are unfair or

⁷ The Administrative Law Judge concluded that Brake Guard's claim that its device would make a vehicle safer was unsubstantiated, and that the remaining claims were both false and unsubstantiated. I.D. at 39-41.

⁸ The respondents concede having made the insurance discount availability claim from 1990 through 1992, but they deny having made this claim after that date. R.A.B. at 5-7. Discontinuance of a practice does not obviate the possibility of a violation or the need for an order. *See, e.g., Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 672 (7th Cir. 1967).

deceptive and thereby violate Section 5. An advertisement is deceptive if it is "likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."⁹ The Commission long has held that "a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5."¹⁰ As the Commission held in Pfizer, Inc.:

[W]hat constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made -- e.g., safety, efficacy * * * ; (2) the type of product -- e.g., * * * potentially hazardous consumer product * * * ; (3) the possible consequences of a false claim -- e.g., personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims.¹¹

Also relevant is "the amount of substantiation experts in the field believe is reasonable."¹² The Commission has observed that, "in fairness and in the expectations of consumers," the only reasonable basis for some types of claims for some types of products would be competent and reliable scientific evidence.¹³ The Commission concludes that the claims in this case, which potentially involve consumer safety, require competent and reliable scientific evidence. A false, material¹⁴ claim is inherently misleading to reasonable consumers and, therefore, is deceptive.

As discussed further below, the Commission concludes, as did the Administrative Law Judge, that Brake Guard's claim that its device would make a vehicle safer was unsubstantiated and that the other claims challenged in this case are both unsubstantiated and false. Therefore, as a matter of law, they are deceptive and violate Section 5.

⁹ Federal Trade Commission Policy Statement on Deception ("Deception Statement"), Appendix to *Cliffdale Associates, Inc.*, 103 FTC 110, 174-84 (1984); *accord, Kraft, Inc.*, 114 FTC 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Removatron Internat'l Corp.*, 111 FTC 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

¹⁰ FTC Policy Statement Regarding Advertising Substantiation ("Advertising Substantiation Statement"), Appendix to *Thompson Medical Co.*, 104 FTC 648, 839 (1984).

¹¹ 81 FTC 23, 64 (1972); *see also* Advertising Substantiation Statement, 104 FTC 648, 840 (1984).

¹² Advertising Substantiation Statement, 104 FTC at 840.

¹³ *Id.*; *see, e.g., Removatron International Corp.*, 111 FTC 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Firestone Tire & Rubber Co.*, 81 FTC 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

¹⁴ To be material, a claim must be "likely to affect a consumer's choice of conduct regarding a product. * * * If inaccurate or omitted information is material, injury is likely." Deception Statement, 103 FTC at 182.

III. PERFORMANCE-RELATED CLAIMS

Our own review of the record leads us to agree with the Administrative Law Judge that the respondents made false and unsubstantiated performance claims for their braking device.¹⁵ Specifically, we find that the Brake Guard device is not an antilock brake device, does not comply with NHTSA's definition of an antilock brake, and does not reduce wheel lockup, skidding, or loss of steering control, as claimed in the respondents' advertising. I.D. at 39. Because the respondents' device does not provide antilock braking benefits at all, it follows that the claim that it provides antilock benefits that are at least equivalent to those provided by OEM ABS is also false. *Id.* We also agree with the finding of the Administrative Law Judge that the device does not shorten stopping distances. I.D. at 40-41. The respondents' claim that their product complies with performance standards set forth in SAE J46¹⁶ is false because SAE J46 does not state any performance standards. I.D. at 40. Finally, we find that the tests and other materials submitted by the respondents do not substantiate the claims listed above, or the claim that the Brake Guard device improves vehicle safety.

A. Antilock Brake and Related Claims

Antilock brake systems are designed to improve maneuverability and controllability during braking. I.D.F. 45. Three expert witnesses with solid credentials and experience in testing and evaluating automotive braking systems testified as to the elements of an antilock system. James Hague works at NHTSA's Office of Defects Investigation and is an expert in passenger car and light truck brake systems and testing. I.D.F. 29-32; Tr. 742-1065, 1804-57. John Hinch is lead engineer in NHTSA's Office of Defects Investigation and is an expert in vehicle testing and test-data analysis. I.D.F. 33-39; 1866-2149. John Kourik, an engineer with a long history of designing and testing brake assemblies, participated in the development of the SAE J46 antilock brake test protocol. I.D.F. 25-28; Tr. 1071-1782.

¹⁵ On appeal, the Commission conducts a *de novo* review. 16 CFR 3.54(a) ("Upon appeal from or review of an initial decision, the Commission * * * will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."); *The Coca Cola Bottling Co. of the Southwest*, 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23405 (FTC 1994) ("Our review of this matter is *de novo*.").

¹⁶ SAE J46 is a road test protocol widely recognized by automotive engineers. I.D.F. 59.

According to their expert testimony,¹⁷ the essential features of such systems are reflected in well-established and widely-accepted industry and governmental standards and definitions.¹⁸

In brief, an antilock braking system must automatically control the level or degree of rotational wheel slip -- that is, the proportional amount of wheel skidding relative to vehicle forward motion.¹⁹ I.D.F. 41, 45-46. To control wheel slip, the system must have components that will detect the rate of rotation of the wheel relative to vehicle speed and transmit signals regarding the rotation rate to a device that will interpret the signals and generate controlling signals to a device that will adjust brake pressure to reduce or prevent wheel slip. I.D.F. 47-50; CX 102; Tr. 801-02, 1120-21. Generally, the more brake pressure on the wheels, the more wheel slip is generated. I.D.F. 42.

The respondents' braking device does not satisfy these standards. It is a simple "accumulator," meaning that in a hard stop, a membrane in the device expands to accept, or accumulate, some brake fluid, thereby reducing brake pressure on the wheels; when the brake pedal is released somewhat, brake fluid returns to the brake lines. I.D.F. 52-54; Tr. 873. The respondents' device does not have the capacity to measure wheel speed, make error determinations, or issue control signals to adjust the braking response so as to control automatically the degree of rotational wheel slip. I.D.F. 52; Tr. 876, 880-81, 2575. Indeed, the respondents' expert, Robert Brinton, conceded that the Brake Guard device is incapable of measuring the rotation rate of the

¹⁷ The respondents cite no evidence, nor are we aware of any, in support of their assertion (R.A.B. at 6) that these experts have "vested interests" relative to electronic braking systems. The respondents' contention that the Administrative Law Judge "uncritically" accepted the credentials of complaint counsel's experts without regard to their "extensive connection with the government" (*id.*) is also without merit. An expert's association with, or employment by, the government by itself does not constitute adequate grounds for discrediting his or her testimony. *Cf. Strickland v. Francis*, 738 F.2d 1542, 1553 (11th Cir. 1984) (state employees able to offer impartial evaluations); *Proctor v. Harris*, 413 F.2d 383, 387-88 (D.C. Cir. 1969) (noting impartiality of government psychiatric experts). The Administrative Law Judge had the opportunity to view the demeanor of all the witnesses as well as to hear their testimony. In relying on the testimony of complaint counsel's experts, the Administrative Law Judge implicitly found that these experts were not biased or otherwise unqualified.

¹⁸ NHTSA has promulgated regulations that set forth the components of an antilock brake system. I.D.F. 45; CX 102; Tr. 1120. The fundamentals of an antilock system are also set forth in an SAE publication, "Antilock Brake System Review--SAE J2246." CX 103. Though SAE J2246 does not expressly cover aftermarket devices such as the Brake Guard device, the respondents' expert, Robert Brinton, testified that the same fundamentals apply to the Brake Guard device. Tr. 2532-33. SAE publications are regarded as authoritative by experts in the field. I.D.F. 46; Tr. 1125, 1909.

¹⁹ Skidding occurs when a wheel is not turning at the rate at which it should be turning, given the vehicle's speed. Skidding is a type of wheel slip. Tr. 2600, 2703. Although skidding generates sideways forces, the term does not necessarily imply sideways motion. Tr. 2600. A certain degree of wheel slip is necessary for braking, but when it reaches a certain point, braking ability and control begin to fall off. I.D.F. 41-42. At 100 percent wheel slip, wheel lockup occurs. I.D.F. 43.

wheels and of computing the difference between the speed of the braked and free-rolling wheels, functions that are essential to computing wheel slip. I.D.F. 52; Tr. 2574-75.

Besides lacking the components of an antilock system, the Brake Guard device does not provide the benefits of an antilock system. I.D.F. 106, 111-40. The 1993 NHTSA report of wheel slip testing on the Brake Guard product (CX 34)²⁰ provides competent and reliable evidence that the respondents' device does not control wheel slip, wheel lockup, or skidding, and does not give steering control benefits. The testing also demonstrates that the device is not an antilock braking system, and does not provide antilock benefits equivalent to an OEM antilock brake system.

To demonstrate control of wheel slip, competent and reliable scientific testing is necessary. Such testing must compare the performance of a vehicle equipped with the Brake Guard device to the performance of the same vehicle not equipped with the device, under controlled conditions, in driving tests where controllability during braking is at issue. I.D.F. 55; Tr. 802-812, 1127-31. The condition of the tires, brakes, and road surface, the velocity at the onset of braking, and the manner of brake application, all must be controlled. I.D.F. 56; Tr. 804-05, 1129-30. "[S]ufficient pedal force should be applied so that lockup would occur, but for the operation of the device." I.D.F. 55; Tr. 803-04, 1909-10. Proper instrumentation is required to measure variables such as velocity, brake pedal force, wheel slip, and wheel slip modulation, and the results of testing must be adequately documented to ensure proper methodology and application. I.D.F. 57-58.

The 1993 NHTSA test, a twenty-nine page report with thirty-one pages of charts and photographs,²¹ meets the testing requirements set forth above. NHTSA conducted four different road braking tests on the respondents' device: Low-friction Surface Lane Change, Changing Friction Surface, Split Friction Surface, and Low-friction Surface Curve. I.D.F. 118; CX 34-K to -L; Tr. 1137. The first three

²⁰ The respondents seem to argue that the Administrative Law Judge should not have considered CX 35, a report of NHTSA's 1991 testing of a device similar to the Brake Guard device. R.A.B. at 16. At trial, however, the respondents asserted that the tested device performed in the same manner as their product and that the CX 35 results applied to the Brake Guard device. I.D.F. 107; Tr. 1388-89. Still, because complaint counsel stated at trial that they were "not relying on the results of the * * * testing [of the similar product] with regard to the Brake Guard product," (Tr. 1388) we have not considered CX 35 in evaluating the ABS-related claims.

²¹ Quantity assuredly does not establish quality, but there is a bare minimum of information that must be conveyed if a test is to be deemed competent and reliable. As will be seen below, the respondents' test reports are deficient in this regard.

types of tests are based on SAE recommended practices. I.D.F. 122; CX 34-L. All the tests used panic stops²² with the same amount of brake pedal force, on medium to very-low-friction surfaces. I.D.F. 123; CX 34-K to -L. The vehicle was run through each test six times: three with the respondents' device installed and three without. I.D.F. 124; Tr. 1147. Each test of the respondents' device was compared to an identical test on the same vehicle, but without the device. I.D.F. 118; CX 34-G; Tr. 1138. A second vehicle, with OEM antilock brakes, was subjected to the same set of tests, to evaluate how an OEM antilock brake system would respond. *Id.* Before the tests, new tires and brakes were installed in the vehicle and the brakes were burnished. CX 34-J to -K; Tr. 834. Burnishing is an SAE-recommended procedure for standardizing the condition of brakes.²³ CX 40-C at ¶ 7.1; Tr. 834-35. Instruments were attached to the vehicles to measure and provide data on vehicle speed, applied brake pedal force, deceleration, stopping distance, and elapsed time of maneuver. I.D.F. 125; CX 34-I. The measuring instrumentation was appropriate and comprehensive. I.D.F. 125; Tr. 1147-48.

The NHTSA testing revealed that the Brake Guard device was not an ABS system because it does not detect wheel rotation or adjust brake force in response to wheel rotation. Tr. 880-81; 1149-51. The testing revealed that the respondents' device did not control wheel slip. I.D.F. 126-31; CX 34-Z-3 to -5, -7, -14 to -30.²⁴ The device therefore does not control lockup or skidding. *See* n.19, *supra*. The test driver lost control of the car during braking when the respondents' device was employed. The test did not establish any steering control benefits. CX 34-B. The competent and reliable NHTSA testing showed that the respondents' device does not meet the definition of ABS and does not provide ABS benefits.

There is no merit to the respondents' contention (R.A.B. at 17) that the NHTSA tests are not methodologically sound. Specifically,

²² Three methods of controlling brake application are to tell the driver to use: (1) a "best efforts stop," in which the driver uses whatever pedal force is necessary to bring the vehicle to a stop in the shortest possible distance; (2) a "panic stop," in which the driver is told to press on the pedal as hard as possible until the vehicle stops; or (3) a stop with a pre-determined pedal pressure, e.g., 100 pounds. I.D.F. 62; Tr. 822, 1910-11.

²³ SAE J46 describes the burnishing procedure for passenger cars: "[B]urnish brakes by making at least 200 stops from 40 mph (64 km/h) at 12 ft/s² (3.7 m/s²). Stop interval shall be as required to achieve 250°F (121° C) initial brake temperature or a maximum of 1 mile (1.6 km)." CX 40-C at ¶ 7.1.1.

²⁴ In I.D.F. 126, the ALJ failed to note the page of CX 34 on which the test data for the Brake Guard device appear. Because CX 34 contains testing on devices other than the Brake Guard device, Finding 126 should refer to CX 34-Z-14 to -15.

the fact that the tests of the Brake Guard device and OEM ABS were conducted on two different vehicles did not bias the outcome. The record shows that the only difference between the two vehicles (the OEM vehicle had rear disc brakes and the Brake Guard device vehicle had rear drum brakes) would not have affected the results. Tr. 833, 871. Indeed, the two vehicles performed in the same manner when the Brake Guard and OEM devices were disengaged. I.D.F. 121, 126-29. In addition, the vehicle with the Brake Guard device was tested with the device both engaged and disengaged, which provided a built-in control to test wheel lockup, skidding, or steering control benefits. I.D.F. 132; Tr. 881-82. Even without the comparison to the vehicle with the OEM ABS, the tests showed that the Brake Guard device had no effect on wheel slip.

The respondents' objection (R.A.B. at 17) to NHTSA's use of burnishing is also groundless. According to the respondents, NHTSA biased the results against Brake Guard when it burnished the brakes, thus eliminating any inconsistencies in the braking surfaces. R.A.B. at 17. Even the respondents' expert, Mr. Brinton, acknowledged that burnishing is simply a method of standardizing brake surfaces so that the tester can be sure that variations in the brake surfaces of the vehicles being tested are not responsible for differences in test data. Tr. 2526. There is no evidence in the record that burnishing has any impact on wheel slip. I.D.F. 41. As for the respondents' contention that the brake pressures applied in NHTSA's tests were "far in excess of those normally characteristic of panic stops" (R.A.B. at 17), the 112- and 200-pound brake pressures NHTSA used are within the levels permitted by the Federal Motor Vehicle Safety Standards, and were chosen with those standards in mind. CX 34-L; Tr. 838-40; 49 CFR 571.105 S4, S5.1.6.

In contrast to NHTSA's carefully controlled tests, the tests submitted by the respondents to substantiate their ABS-related claims were marred by numerous testing errors, including insufficient controls and bias in the presentation of data. I.D. at 40-41; I.D.F. 60-100. The Administrative Law Judge reviewed each of the respondents' tests in detail and correctly found that not one comes close to providing reliable data to support the respondents' claims. The deficiencies in the respondents' tests are even more conspicuous in light of the high level of substantiation the Commission requires when there are safety issues and given that the truth or falsity of the claims would be difficult for consumers to evaluate by themselves.

See *Thompson Medical Co.*, 104 FTC 648, 822 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

Only four of the respondents' test reports even purport to show that the Brake Guard device controls wheel slip or provides steering control. The first, a one page report and two-page letter prepared by mechanical engineering consultants Gerard & Associates, characterizes the reported results as "preliminary." RX 232-A; I.D.F. 73. Even the respondents do not rely on this test to substantiate their ABS-related claims, because, they explain, it was not designed to evaluate wheel slip control. R.A.B. at 11.

The second document, a one-page, eleven-line letter and a two page attachment from a company in Turkey purporting to find reduced lockup "at the beginning" and no skidding (RX 230), also fails to provide competent and reliable evidence in support of the respondents' claims. I.D.F. 82. The one page letter describing the test "findings" contains no information about the manner in which the testing was conducted, the qualifications of the testing organization, or a description of the vehicle tested. RX 230. The accompanying "test report," written in a foreign language (presumably Turkish),²⁵ contains only thirty lines of text, including the text of the cover page. RX 230-A to -B. Mr. Jones was not able to translate the document and did not have any information concerning the testing or the data used to generate the stated conclusions. I.D.F. 81; Tr. 3007-08. The document contains no evidence concerning the reliability of the testing and provides nothing on which the respondents legitimately can rely.

A third test report, describing tests performed by Cunningham Engineering in 1992 (RX 206-A to -M), states that with the respondents' device installed, the test driver experienced "non-skid stops," but without the device he experienced "skidding stops." RX 206-C. The report does not provide competent substantiation, however, because the underlying tests are inherently unreliable. Specifically, the driver used two different stopping techniques: "controlled" stops for testing the respondents' device, and "panic stops" for testing without the device. RX 206-E to -G; Tr. 1937. At trial, John Hinch, lead engineer in NHTSA's Office of Defects Investigation, explained that "[t]he basic difference between those two is * * * how hard you press on the brake pedal. * * * And that would generate a different type of stopping scenario and would not

²⁵ No translation was submitted for the record.

be proper [testing] procedure." Tr. 1938. *See also* I.D.F. 55, 79. The test report also failed to describe how the skidding was measured. I.D.F. 57-58.

The fourth test, an English language description of a report prepared by a technical institute in Slovenia (RX 2), similarly fails to provide competent and reliable evidence that the respondents' device improves a vehicle's braking abilities. Tr. 1983. The report states that there was no steering control loss with the Brake Guard device installed, but no comparison test was conducted with the device disengaged, so there is no evidence that there would have been loss of steering control without the device. I.D.F. 85; Tr. 1984, 1195-97, 1201. There was no indication of the brake pedal force that was applied during the test, which means that low pedal force, rather than the respondents' device, could have been responsible for allowing the driver to maintain steering control. *Id.* Because the test procedures used were seriously deficient, the reported steering control benefits are not reliable. Finally, respondent Jones testified that he did not rely on this test. Tr. 3012-13.

We conclude that the respondents' device does not satisfy NHTSA standards and that NHTSA's testing was competent and reliable and demonstrated that the respondents' device did not reduce wheel slip, lockup, skidding or loss of steering control. I.D. at 39; I.D.F. 106. The NHTSA testing and expert testimony also demonstrated that the respondents' device is not an ABS system because it does not detect wheel slip and adjust brake pressure accordingly. I.D. at 39; Tr. 880-81, 1149-51. We also conclude that the respondents did not have reliable tests or other evidence demonstrating that their device reduces wheel slip or provides steering control benefits. I.D. at 39. These claims are false and unsubstantiated. Also false and unsubstantiated is the claim that the device meets SAE performance standards. SAE J46 is a testing protocol and does not contain any performance standards or goals, so a claim that the respondents' device meets SAE J46 standards is false and unsubstantiated. I.D. at 40; Tr. 1136-37, 2582. Finally, because the claim that the device provides antilock benefits is false and unsubstantiated, the claim that it provides antilock benefits that are at least equivalent to those provided by OEM ABS is also false and unsubstantiated. I.D. at 39.

B. Stopping Distance and Safety Claims

A valid stopping distance test "requires competent and reliable testing that compares the performance of a vehicle with the device engaged to the performance of the same vehicle with the device disengaged." I.D.F. 60; Tr. 815-16. As the Administrative Law Judge found, "even minor variations in speed can result in significant differences in the distance traveled," so the speed at braking must be precisely measured. I.D.F. 60; Tr. 816. One technique approved by the SAE for measuring speed and stopping distance is the use of a "fifth wheel data acquisition system."²⁶ I.D.F. 60; Tr. 817-19, 2561-62. The tires, brakes, road surfaces, and brake application must be controlled, and tests with and without the device must be conducted at a point sufficiently close in time to eliminate or reduce impact from an independent variable. I.D.F. 61-62. As always, proper documentation of the testing is required. I.D.F. 63. Certain mathematical equations can be used to verify the accuracy of stopping distance data. I.D.F. 65; Tr. 1640-42, 1955-58. Competent and reliable testing, with appropriate controls, is also necessary to evaluate vehicle safety. I.D.F. 66; Tr. 1287, 2531.

We agree with the Administrative Law Judge that NHTSA's testing showed conclusively that the respondents' stopping distance and safety claims were false. I.D. at 40-41. NHTSA's stopping distance tests of 1991 (CX 36) and 1993 (CX 33) were competent, clear, and reliable. I.D.F. 116, 135-37; Tr. 890-92, 1166-70. The tests showed that the respondents' device did not shorten stopping distances, either generally or by 20 to 30 percent. CX 33-B, 36-B; I.D.F. 114, 116, 138.²⁷

In contrast, the respondents' stopping distance tests are seriously flawed.²⁸ The first test on which the respondents rely is the so-called ambulance test, reflected in an anonymous one-page report. RX 3. The report provides no information on the test's methodology, the

²⁶ A "fifth wheel data acquisition system" is an independent measuring device. It consists of a wheel, equipped with sensors, that is mounted on the rear of the testing vehicle. The sensors measure the speed of the vehicle and the distance from any point in time to any other point in time. Tr. 810-11.

²⁷ The 1991 testing of the respondents' device actually showed that "[s]topping distances were somewhat increased by the device." CX 36-B (emphasis added).

²⁸ The respondents submitted the following evidence: (1) an anonymous, one-page report of testing on two ambulances from 1987 (RX 3); (2) the Gerard & Associates tests, discussed above; (3) the 1992 Cunningham tests, discussed above; (4) the Turkey tests, discussed above; (5) the Slovenia tests, discussed above; (6) a 1994 report from Cunningham (RX 206-N to -T); (7) a 1995 report of testing conducted in Australia (RX 8); and (8) tests conducted by the respondents' expert, Mr. Brinton, after the Commission issued the complaint (RX 216).

controls employed, or how the vehicles' speeds and braking distances were measured. *Id.*; Tr. 1954-55. Mr. Hinch, lead engineer in NHTSA's Office of Defects Investigation, calculated that based on the test data from the report, the friction of a wet surface would be higher than that of a dry surface, "which * * * does not make * * * physical sense." Tr. 1958; I.D.F. 72. The Administrative Law Judge properly concluded that the data reported in RX 3 are not reliable. I.D.F. 71.

The Gerard test report stated that the results were "preliminary." RX 232. There were insufficient controls of vehicle speed, which was reported as "25 MPH \pm 2 MPH," and stopping distances were not corrected to account for variations in speed. I.D.F. 75. There is no indication in the report that the type of brake application was controlled or that appropriate measuring equipment was used. *Id.*; Tr. 2000-03. Testimony established that a tape measure was used to measure stopping distances. I.D.F. 75; Tr. 2982. This is an inadequate way to measure stopping distance because neither the point at which the brakes are applied nor the vehicle's speed at braking can be determined precisely with a tape measure. Tr. 824, 1164-65, 1918-19, 2530. Since the speed and point of braking are indeterminate, the stopping distance is indeterminate. Tr. 814-19, 1160-66, 1916-18, 2526. For example, as the Administrative Law Judge noted, if the brakes are applied just one-tenth of a second too late in a stopping distance test of a vehicle traveling 60 miles per hour, the stopping distance will be 8.8 feet longer. I.D.F. 64.

The respondents' reliance on the 1992 testing performed by Cunningham Engineering is likewise misplaced. I.D.F. 79-80. The reported stopping distances were inherently unreliable because of numerous deficiencies in the testing protocol, including the use of a tape measure to measure stopping distances. Tr. 1208-09, 1935-37. As discussed above in Part III.A, the braking technique used with the Brake Guard device employed differed from that used without the Brake Guard device. I.D.F. 79; RX 206-E to -G. Also, there is no indication how the tester measured the speed at which the brakes were applied. I.D.F. 79.

Most revealing, however, are the inconsistencies between the test data and the test reports, which show a strong bias in respondents' favor. For example, the report on tests conducted on a motor home equipped with the respondents' device failed to include the longest stopping distance in computing the average stopping distance. I.D.F.

80(a); compare RX 206-E with 206-J. Conversely, the report on tests conducted on a pickup truck without the device failed to include the shortest stopping distance in computing the average stopping distance. I.D.F. 80(b); compare RX 206-F with 206-K. The pickup truck report failed to include the results of five test runs with the device installed that resulted in longer stopping distances. I.D.F. 80(b); RX 206-K to -L. The pickup truck report also did not reveal that the son of respondent Jones was the driver on three out of the five stops using the respondents' device. I.D.F. 80(b); RX 206-L; Tr. 3000. As a final example of the inconsistencies, the report on tests conducted on a passenger car equipped with the respondents' device failed to include two longer stops in computing the average stopping distance. I.D.F. 80(c); compare RX 206-G with 206-M.

The deficiencies in the Turkey test are set forth above, in Part III.A and make the stopping distance data unreliable. I.D.F. 83; Tr. 1228-29. We agree with the Administrative Law Judge that the Slovenia test also cannot provide substantiation for the respondents' stopping distance claims. I.D.F. 86-87. The report does not identify the instrumentation used or the control procedures. RX 2; Tr. 1201-03, 1979. In any event, as noted earlier, Mr. Jones testified that he did not rely on the Slovenia test as substantiation. Tr. 3012-13.

The Administrative Law Judge properly rejected the 1994 Cunningham testing as substantiation for the respondents' claims. I.D.F. 89-93. First, stopping distance was measured by use of a measuring tape (Tr. 1209-10), an unreliable technique. I.D.F. 91. Neither was a reliable method used to control for speed.²⁹ Calculations by complaint counsel's expert, John Kourik, showed data discrepancies that were not explained by any evidence in the record. Tr. 1636-41. Finally, the Administrative Law Judge properly noted concerns about the impartiality of the testing because only selected data were provided and unfavorable information had been omitted from the reports of the 1992 Cunningham testing. *See* discussion at pp. 28-29, *supra*; I.D.F. 93; I.D.F. 80.

As for the Administrative Law Judge's refusal to credit the Australia test, the respondents are incorrect in asserting (R.A.B. at 14) that the Administrative Law Judge failed to understand that the test was intended to substantiate stopping distance claims. The Administrative Law Judge specifically noted that the report did not

²⁹ The vehicles' cruise controls were used to control speed, but cruise controls do not precisely control speed. Tr. 1210, 1932-33. In addition, the cruise control on one of the vehicles broke during the testing, leaving open how speed was measured. Tr. 1210-11, 1932-33.

indicate "what criteria * * * were used to measure the 'improved' [braking] performance," did not contain the underlying stopping distance data, and did not reflect testing under SAE J46 road conditions. I.D.F. 94. The testing organization stated that it was comparing the performance of a vehicle fitted with the Brake Guard device to that of a "standard vehicle" which had been tested "previously." RX 8. The Administrative Law Judge properly noted that "it is not clear when the prior testing was done, and there is no indication of an attempt to compare or control the test conditions (such as the conditions of the road surface)." I.D.F. 96. Although the Administrative Law Judge also noted the absence of wheel slip data from the test report, *see* I.D.F. 95, he clearly and correctly premised his rejection of the results on flaws that cast doubt on the reported stopping distance results.

Finally, there is no merit to the respondents' claim (R.A.B. at 14-15) that the Administrative Law Judge improperly failed to credit post-complaint test data generated by Mr. Brinton.³⁰ RX 216. Those tests had several testing deficiencies that may have biased the results in favor of Brake Guard: the length and weight of the tested vehicle, a motor home hauling a pickup truck, far exceeds the length and weight of the average passenger car (I.D.F. 97; RX 216; Tr. 2541); the respondent's son, a former Brake Guard employee and current distributor of the Brake Guard device, was the driver during the tests (I.D.F. 97; Tr. 2571); no two tests were conducted at the same speeds, and the report does not correct the stopping distances to a particular speed (I.D.F. 97-98; RX 216); brake pedal pressure was not controlled (I.D.F. 99; Tr. 2573); and the equipment used to measure speed and distance has an error rate that far exceeds that recommended by the SAE. I.D.F. 97-100. Under these circumstances, the decision of the Administrative Law Judge not to credit the data generated by Mr. Brinton was eminently reasonable.³¹

Additional testing of which Brake Guard was aware also shows that Brake Guard has no substantiation for its stopping distance claims. The Administrative Law Judge properly noted that a report

³⁰ Similarly, the Administrative Law Judge did not err in refusing to credit Mr. Brinton's testimony. Although on direct examination Mr. Brinton testified that the Brake Guard device controls rotational wheel slip and complies with the generally accepted industry definition of an antilock braking system, he testified to the contrary on cross-examination. Compare Tr. 2505-07 with Tr. 2574.

³¹ In any event, because the respondents did not actually use or rely on these tests at the time they made the disputed claims for their braking device, they may not rely on them in defending against charges that the claims were unsubstantiated. *See, e. g., Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302 n.6 (7th Cir. 1979); *Pfizer, Inc.*, 81 FTC 23, 67 (1972).

prepared by Southwest Research Institute ("SWRI"), CX 56, an independent test company hired by the respondents, "could not state that the [observed decrease in stopping distance was] due to the Brake Guard device, or simply to the position of each stop in the test sequence." I.D.F. 146. *See also* CX 56-R; Tr. 2188- 89. Even assuming that the Brake Guard device had the purported effect, SWRI did not determine whether the observed differences in stopping distances were statistically significant. I.D.F. 146; CX 56-H to -R; Tr. 2192-93.

The Administrative Law Judge correctly concluded that "competent and reliable testing performed by [NHTSA] on two separate occasions on the Brake Guard device * * * consistently demonstrated that no stopping distance enhancement results from installation of the Brake Guard device." I.D. at 40. The respondents' tests in support of the stopping distance claims were "not competent and reliable." *Id.* An additional test, commissioned by the respondents themselves, also failed adequately to substantiate either stopping distance claim. We find that both the general and specific stopping distance claims are false and unsubstantiated. Since the respondents can point to no competent and reliable testing that shows that their device improves either steering control (*see* Part III.A, *supra*) or stopping distances, the claim that their device makes vehicles safer is unsubstantiated. *See* I.D. at 41.

IV. TESTIMONIAL TYPICALITY CLAIM

We agree with the Administrative Law Judge that the testimonials included in the respondents' advertising made unsubstantiated claims that reduced stopping distances and wheel lockup were typically experienced by consumers. For substantiation, the respondents appear to rely on 81 or 82 submitted testimonials as well as testimony by Mr. Jones that he and his company received "hundreds and hundreds" of letters from satisfied customers.³² Tr. 2941-42. There is no evidence, however, that these testimonials represent a scientific sample of Brake Guard consumers sufficient to substantiate the testimonials' typicality. In any event, as the Administrative Law Judge found, "consumers do not have the competence to evaluate whether stopping distance improvements or wheel lockup control have occurred" (I.D. at 41, citing I.D.F. 58, 64), so consumers' perceptions of improved

³² The respondent do not clearly identify their substantiation for the testimonial typicality claim.

braking performance cannot substantiate the respondents' claim. We find that the reports of consumer experiences are not adequate to substantiate the respondents' claim that the testimonials reflect the typical experience of a Brake Guard consumer.

We also agree with the Administrative Law Judge that the experiences related in the respondents' testimonials cannot accurately reflect typical consumer experience with the Brake Guard device. I.D. at 41. We find that the respondents' typicality claim is false as well as unsubstantiated. Carefully controlled road testing conducted by NHTSA demonstrates that, contrary to what is claimed in the respondents' testimonials, the Brake Guard device does not reduce stopping distances and wheel lockup. *See* discussion at pp. 15-19, 26, *supra*. The favorable experiences related in the respondents' testimonials are inconsistent with reliable test results and cannot reflect the typical experiences of consumers. I.D. at 41. Even if the individual experiences of the consumers whose letters were used in the respondents' advertising were accurate, they cannot be typical experiences and are at best statistical outliers. *See Cliffdale Associates, Inc.*, 103 FTC 110, 173 (1984).

V. INSURANCE DISCOUNT CLAIM

We next consider whether the respondents made false and unsubstantiated representations that installation of their braking device qualifies a vehicle for an insurance discount in a significant proportion of cases. The Administrative Law Judge concluded that affidavits submitted with complaint counsel's motion for summary decision established that installation of the respondents' braking device will not qualify a vehicle for a discount in a significant proportion of cases, and that at the times the respondents disseminated their advertisements, they had no reasonable basis for their claim. Partial Summary Dec. (Ins. Discount) at 10-12. We agree.

Sworn affidavits from representatives of five large auto insurance companies (including State Farm, the largest in the United States) and others thoroughly familiar with industry practice, such as representatives of Insurance Services Office, Inc. ("ISO"),³³ a major insurance industry rating organization, and the National Association

³³ ISO develops multi-state manuals for insurance companies regarding calculation of discounts for safety equipment on cars and makes state filings of the manuals on their behalf when it has been authorized to do so. ISO Aff., Attach. C, ¶¶ 2, 3-4.

of Insurance Commissioners ("NAIC"),³⁴ establish beyond question that not all companies provide a discount for antilock brakes. *Id.* To the extent any discount is available, it is industry practice to limit the discount to factory-installed systems. *Id.* F.2-7. These affidavits establish that it is highly unlikely that a vehicle could obtain a discount for after-market ABS in more than an insignificant proportion of cases, and the respondents' claim that installation of their braking device "will qualify a vehicle for an automobile insurance discount in a significant proportion of cases" (complaint ¶ 7(b)) is false and misleading.

In contrast to complaint counsel's sworn affidavits from industry and government officials, the respondents produced an unsworn, handwritten letter, dated November 3, 1995, from an insurance broker in Spokane, Washington. *Id.* F.9. The broker's letter stated that three insurance companies offered discounts for cars equipped with antilock brakes and accepted Brake Guard-equipped vehicles for the allowable discount. *Id.* F.15-16. We agree with the Administrative Law Judge that the post-claim evidence is not "significantly probative." Partial Summary Dec. (Ins. Discount) at 11, citing *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). At best, the respondents' letter demonstrated that three insurance companies out of 1456 in the United States may have offered discounts for some period of time for vehicles equipped with the Brake Guard device. *Id.* at 10. Even at the time the claim was made, the letter does not substantiate the respondents' claim that a discount was available in a significant proportion of cases.

Even disregarding the limited scope of the document, a letter written in 1995, two years after the respondents disseminated their insurance discount claims (*id.* F.9), is not sufficient to substantiate the respondents' insurance discount claims. A firm's failure to possess and rely on a reasonable basis for an objective claim at the time the claim is made is an unfair or deceptive act or practice in violation of Section 5. *See, e.g., Pfizer, Inc.*, 81 FTC at 64; Advertising Substantiation Statement, 104 FTC at 840-41.

³⁴ NAIC is an association of the chief insurance supervisory officials in all 50 states, the District of Columbia, and territories of the United States. NAIC members, or their staff, review or approve insurance company rate filings. NAIC Aff., Attach. G, ¶ 1.

VI. OTHER ISSUES

The respondents assert that this proceeding is not in the public interest because they "have had few complaints" about their device. R.A.B. at 21. The number of consumer complaints has no bearing on whether the public is being harmed by the respondents' false or unsubstantiated claims. Expert testimony established that consumers are unable to determine by themselves whether the Brake Guard device performs as the respondents claimed in their promotional materials. I.D.F. 58, 64; Tr. 813, 823-24, 1132. The respondents have offered no other support for their implicit request that the Commission revisit its determination that this proceeding is in the public interest.³⁵ The Commission will revisit such a determination only in the most extraordinary circumstances. See *American Aluminum Corp.*, 84 FTC 21, 51 (1974); *Pepsico, Inc.*, 83 FTC 1716 (1974); *Exxon Corp.*, 83 FTC 1759, 1760 (1974). No such circumstances have been demonstrated here.

In addition to seeking dismissal of the case, the respondents seek other relief. See R.A.B. at 22. The respondents seek "acknowledgment and recognition of all of [their] claims by the Commission." *Id.* This opinion fully addresses the Commission's findings with respect to the respondents' claims. The respondents also seek an acknowledgment "that the NHTSA found Brake Guard to be free of safety-related defects." *Id.* This case does not present the issue whether the Brake Guard device has defects related to safety or otherwise. The case involves particular advertising claims, one of which is that the Brake Guard device makes a vehicle safer than a vehicle that is not equipped with the device. On that issue, discussed above,³⁶ the Commission has found that the respondents lacked substantiation for the claim. Even assuming that NHTSA found no safety defects in the Brake Guard device, that fact is irrelevant to evaluating the comparative safety claim at issue here.

The respondents also request that the Commission recommend that Congress investigate: (1) the "initial impetus for the investigation by NHTSA"; (2) the purported role of automobile manufacturers and respondents' competitors in instigating the case; (3) the relationship between NHTSA and FTC staff and the Southwest Research Institute; and (4) the relationship between FTC staff and the Administrative

³⁵ The Commission made a public interest determination at the time the complaint issued. See complaint; FTC Act Section 5(b).

³⁶ See discussion at p. 34, *supra*.

Law Judge. *Id.* The respondents cite no factual basis for these requests and for that reason alone, the respondents' request is properly denied.³⁷ *Cf. Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (rejecting argument raised in "off-hand * * * manner").

For the reasons stated below, we deny the respondents' request of July 11, 1997, for permission to add two items to the record.³⁸ The first is an incomplete copy of a FAA Advisory Circular dated October 1991. The second is a report summarizing consumer complaints to NHTSA through March 1996.

The FAA Circular relates, *inter alia*, to procedures for reporting field conditions at airports during winter operations. In Appendix 4 to the Circular, an instrument known as the "Bowmonk Decelerometer" is listed as one of two FAA-approved decelerometers. According to Brake Guard, the fact that the Bowmonk Decelerometer is one of the decelerometers approved by the FAA is significant because it "refutes the ALJ's decision * * * dismissing the Bowmonk Decelerometer as non-acceptable."³⁹

The respondents do not attempt to explain their failure to come forward with this document earlier. There is no question that the respondents were on notice that the reliability of instrumentation used in testing braking devices would be at issue. In October and November 1996, two of complaint counsel's experts testified regarding the importance of appropriate instrumentation in stopping distance tests (Tr. 887-88 (Mr. Hague); Tr. 1201-04, 1225-27 (Mr. Kourik)), and on cross-examination, Mr. Kourik stated that it is not

³⁷ To the extent that the request for an investigation can be read to suggest that automobile manufacturers would have engaged in an impropriety in contacting the Commission with respect to the respondents' practices, it is important to note that in issuing the complaint the Commission made its own determinations of public interest and reason to believe the law had been violated. Whether automobile manufacturers or others contacted the Commission to complain about the respondents' claims has no bearing either on the public interest of the proceeding or on the merits of the case.

³⁸ In deciding whether to reopen the record to receive supplemental evidence, the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party. *See, e.g., Chrysler Corp. v. FTC*, 561 F.2d 357, 361-63 (D.C. Cir. 1977) (affirming admission of supplemental evidence by Commission in *Chrysler Corp.*, 87 FTC 719, 750 n.38 (1976)). *See also* 16 CFR 3.51(e)(1), 3.54(a) (Commission may reopen record to receive additional evidence).

³⁹ The respondents' expert, Mr. Brinton, used the Bowmonk Mark VI to measure deceleration in his stopping distance tests. RX216. The Administrative Law Judge found that the Bowmonk Mark VI had too large an error rate to be reliable for the respondents' purposes and that "Mr. Brinton's insistence that the Bowmonk is reliable is questionable because he is a distributor of this equipment." I.D.F. 99.

appropriate to convert deceleration data into stopping distances. Tr. 1279. The respondents' inquiry as to Mr. Kourik's familiarity with the Bowmonk VI decelerometer (Tr. 1279-81) demonstrates conclusively that the respondents knew that the reliability of the instrument would be at issue. Nonetheless, they did not attempt to introduce the FAA Circular when their own expert, Mr. Brinton, testified in February 1997 concerning his use of the Bowmonk VI in his post-complaint stopping distance tests. RX 216. The respondents have failed to demonstrate due diligence with respect to this document.

The FAA Circular also would have little, if any, probative value. Nothing in the FAA Circular undercuts the finding of the Administrative Law Judge that the Bowmonk Mark VI has an error rate of 2 percent, which does not satisfy SAE's recommendation that equipment used to measure stopping distances have an error rate of less than 0.5 percent for speed and 1 percent for distance. I.D.F. 99. In addition, the reliability of the measuring equipment was only one of many reasons for rejecting the stopping-distance data generated by the respondents' expert. *See* discussion at pp. 31-32, *supra*; I.D.F. 97-99.

The second item is a March 6, 1996, report summarizing consumer complaints to NHTSA regarding antilock brake problems. The respondents do not explain their delay in coming forward with the complaint summaries, except to refer to the "high cost of obtaining and copying the data" and "the time required for the Department of Transportation to provide the data." Although the respondents apparently were not aware of the existence of the complaint summaries until October 21, 1996, when they were offered in a companion case, Automotive Breakthrough Sciences, Inc., Docket No. 9275 (*see* Tr. 199), a NHTSA official, Robert Young, testified that the complaint summaries are publicly available and may be obtained easily at any time. *See* Tr. 226.

In any event, we find that the report lacks probative value. It consists of hearsay statements and does not refer to consumer experiences with the Brake Guard device. As stated by NHTSA on each page of the report: "The summaries are extracted from statements made by customers in letters and/or vehicle owner questionnaires which were forwarded to the agency. The statements allege problems that have not been verified by the agency." The summaries simply do not demonstrate either that Brake Guard is an ABS device, or that, as the respondents assert, the Administrative

Law Judge erred in concluding that consumers cannot accurately measure wheel slip or stopping distance.

We also deny the respondents' request by letter of November 18, 1997, that six items be added to the record.⁴⁰ The respondents state that the six items are submitted in "respon[se] to a request for information" by Chairman Pitofsky at oral argument. The Chairman asked the respondents to identify which tests "demonstrate no slippage, no sliding" of a vehicle when the Brake Guard device was installed. Oral Argument Tr. 34. Brake Guard's representative at oral argument stated that he could not identify these tests "at this moment" but that he would be able to do so "later on." *Id.* The Chairman said that would be "[f]ine." *Id.* at 35.

The Chairman's question referred to tests already in the record, not new evidence.⁴¹ Nonetheless, five of the six items are new.⁴² The respondents do not explain why these items were not offered in a timely fashion, or if duly proffered, whether or why the Administrative Law Judge declined to admit them into evidence. In any event, we have considered the new materials and conclude that they are not probative and otherwise do not satisfy the test for reopening the record for the purpose of receiving supplemental information. *See* discussion at n.38, *supra*.

One of the proffered items, a videotape of stopping distance tests conducted by Southwest Research Institute ("SWRI") in July 1992, shows SWRI conducting its tests, with occasional commentary on purported stopping distances by an off-camera, unidentified speaker. The report reflecting the results of these tests (CX 56) is already in evidence, and the videotape does not provide any additional probative evidence.

The videotapes, "1991 Caprice Classic" and "92 Caddy/Brooks A.F.B.," suffer from numerous deficiencies and omissions. They show road tests with commentary on stopping distances by an

⁴⁰ The items are: (1) a video tape entitled "Demo Q & A/Install"; (2) a video tape entitled "Brakeguard Test Texas SW Research"; (3) a video tape entitled "1991 Caprice Classic"; (4) a video tape entitled "92 Caddy/Brooks A.F.B."; (5) a document entitled "Slovenija Test Report"; and (6) a notebook with approximately 800 testimonials about the respondents' device.

⁴¹ Following the question raised by Chairman Pitofsky, Commissioner Azcuenaga stated: I'd like my colleagues to correct me if I'm wrong. In response to Chairman Pitofsky's questions, Dr. Burzell said that he would follow up later on, and I'd simply like to mention because the respondents are appearing *pro se* that as I understand it that was a question seeking information with reference to the record, to the existing record, and that follow-up should be provided very expeditiously. Oral Argument Tr. 44.

⁴² The first item, a videotape with the caption "Demo Q & A/Install," is identical to CX 146.

unidentified speaker. The videotapes provide virtually no information about test protocol, and do not provide any information about the type of stop (e.g., "best efforts" or "panic"); how stopping distances were measured;⁴³ how speed was controlled; or how the test vehicles were instrumented. The videotape of the Caprice Classic shows the third and fourth test runs of what purports to be a stop without the Brake Guard device at 65 m.p.h., but does not show the first or second runs, or explain their absence. These videotapes do not meet the requirements for a valid wheel slip or stopping distance test. See discussion at pp. 15-16, 24-25, *supra*.

The fifth item proffered by the respondents consists of text and test data presented in a foreign language. The document appears to be the test report from a technical institute in Slovenia that is described in English in RX 2. Assuming that this is the case, the document does not address the deficiencies that we have noted with respect to RX 2, and therefore would not be probative. See discussion at p. 23, *supra*.

The sixth item, a collection of testimonials concerning the respondents' device, is also not probative. As discussed earlier, consumers lack sufficient expertise to quantify wheel slip or stopping distances accurately. See discussion at p. 34, *supra*; I.D.F. 58, 64.

VII. RELIEF

The Commission has wide discretion in its choice of a remedy, and it is authorized to enter an order that is sufficiently broad that it will ensure that the respondents will refrain from engaging in like or related law violations. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). The discretion of the Commission is limited by two constraints. First, the order must be sufficiently clear and precise that the requirements of the order can be understood. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Second, the order must bear a "reasonable relation" to the unlawful practices. *Jacob Siegel Co.*, 327 U.S. at 612. The Commission, therefore, may include in an order relief designed to enjoin the particular practices found unlawful as well as "fencing-in" provisions designed to deter the respondents from engaging in similar acts or practices in the future.

In determining whether fencing-in relief is appropriate, the Commission considers the seriousness and deliberateness of the

⁴³ For example, in the fourth video tape, the driver is told to "pace off the difference" between two stops.

violations; the ease with which the unlawful conduct can be transferred to other products; and whether the respondents have a history of past violations. See *Thompson Medical Co.*, 104 FTC at 833. The more egregious the facts with respect to one of these elements, the less important it is that other negative factors be present. See *Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Thompson Medical Co.*, 104 FTC at 833.

The Commission adopts paragraphs I and II of the order proposed by the Administrative Law Judge. These provisions prohibit the respondents from making the claims challenged in the complaint and found unlawful in this proceeding. In addition, we find that the serious and deliberate nature of the respondents' practices and their ready transferability to other products and claims justify fencing-in relief. We therefore extend paragraphs III, IV and V of our order beyond the products for which the challenged claims were made.

In connection with paragraph I, although the respondents have not appealed this issue directly, we have considered whether the deception inherent in the respondents' use of the acronym "ABS" is best remedied by prohibiting the respondents from using the term in conjunction with, or as part of, their trade name. Brand name excision is a remedy that is available to the Commission when a less restrictive remedy, such as a required affirmative disclosure, is insufficient to eliminate the deception conveyed by the name. See *Thompson Medical Co.*, 104 FTC at 837. The relevant question is whether any less restrictive means exists for eliminating the deception inherent in the respondents' use of "ABS" within their trade name or trademark or in advertising their Brake Guard product. See *Jacob Siegel Co. v. FTC*, 327 U.S. at 612; *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81-82 (1934); *Resort Car Systems, Inc. v. FTC*, 518 F.2d 962 (9th Cir.), cert. denied, 423 U.S. 827 (1975); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 479-80 (2d Cir. 1964); *Bakers Franchise Corp. v. FTC*, 302 F.2d 258, 262 (3d Cir. 1962). In this connection, it is not dispositive that the trade name is registered as a trademark. See *Jacob Siegel Co.*, 327 U.S. at 612.

The Commission has recognized that trade names are valuable business assets. *Id.* We are persuaded here, however, that the record shows that the association of the acronym "ABS" with antilock brakes and their performance attributes "is sufficiently established that consumers are likely to assume mistakenly that the Brake Guard device is equivalent to and provides the same benefits advertised for

genuine ABS." I.D. at 46. The acronym "ABS" and the term "antilock brakes" are used interchangeably in advertising for new cars. *See* Mot. for Summary Dec. (Ad Meaning) Exh. 1, Attachs. 1, 4-7, 9-11, 13-18, 21; Exh. 2, Attachs. 1-2, 4-6, 8-9. Indeed, the record demonstrates that new car manufacturers are willing to use promotional materials in which the shorthand expression "ABS" appears without an accompanying explanation, which reflects a high degree of confidence among industry marketing personnel that the consuming public has a clear understanding of the meaning of the term. *See Id.* Exh. 1, Attachs. 12, 19, 21; Exh. Attachs. 3, 7, 10-12, 15-16, 18-19. The fact that consumers commonly use the "ABS" acronym to refer to antilock brakes in their contacts with NHTSA officials is another reliable indicator that consumers would assume that a product described as "ABS" is an antilock braking system. *See Id.* Exh. 1 ¶¶ 2-3.

In light of the strong association of the acronym "ABS" with antilock brakes and their performance attributes, adding a qualifying phrase would result in a contradiction in terms and would likely confuse consumers. *See Continental Wax Corp.*, 330 F.2d at 479-80 (holding that where "the offending deception is caused by a clear and unambiguous false representation implicit in the product's name," and therefore a qualifying phrase would lead to a confusing contradiction in terms, "no remedy short of complete excision of the trade name will suffice"). The potential for confusion is of particular concern to us here, where the product and claims relate to safety and performance of a motor vehicle.

Turning to the fencing-in provisions in paragraphs III, IV and V of the order, the serious and deliberate nature of the respondents' violations is reflected in their willingness to mount a broadly based campaign to market their braking device as an antilock system without regard to whether there was reliable information to support their claims and in the face of substantial information that the claims were false. I.D. at 43-45. They even manipulated a test in order to generate results that would support their claims, and they disseminated these test results in advertising. I.D. at 44; I.D.F. 80. When we take into account that these are "credence" claims that consumers cannot evaluate accurately on their own, when we consider the context, that the claims and product involve the performance and comparative safety of a motor vehicle, and when we

note the respondents' apparently deliberate disregard for testing results inconsistent with their claims, we readily conclude that strong fencing-in relief is required to prevent recurrence of the respondents' unlawful conduct. See *Kraft, Inc.*, 114 FTC 40, 140, 142 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Thompson Medical Co.*, 104 FTC at 832-33; *Sears, Roebuck*, 676 F.2d at 392; *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370-72 (9th Cir. 1982).

Although the respondents do not object directly to the scope of the relief ordered by the Administrative Law Judge, they contest his finding that adverse results of tests conducted by several organizations should have put them on notice that their claims were unsubstantiated and false. See R.A.B. at 16. The respondents' argument seems to be that because the Administrative Law Judge impeached the validity of the tests yielding the adverse results (and, indeed, all the testing other than that performed by NHTSA), those tests should have "no bearing on any scientific inquiry," and their adverse results, therefore, should not be held to have put Brake Guard on notice concerning possible deficiencies in their claims. *Id.*

The Commission does not believe it was reasonable for the respondents simply to disregard test results that were inconsistent with their product claims. Indeed, their apparent failure to obtain an independent and scientific assessment of the adverse test results before continuing their advertising campaign suggests that they did not want to discover the truth. In any event, as discussed above,⁴⁴ competent and reliable tests conducted by NHTSA (which the respondents also appear to have ignored) demonstrate clearly that the Brake Guard device does not reduce stopping-distance or control wheel slip, and that it is not the equivalent of OEM ABS. See I.D. at 43; I.D.F. 106-40.

We also find that the risk of transferability of the violation justifies limiting future claims regarding products in addition to the Brake Guard device. The respondents have demonstrated a lack of concern for proper scientific methodology in the serious context of motor vehicle safety and performance. They have shown a willingness to disregard the results of competent and reliable tests with respect to a product that is designed for use on a motor vehicle, reflecting a recklessness that could be transferred to the testing of other products. *Cf. American Home Products*, 98 FTC 136, 405

⁴⁴ See discussion at pp. 15-20, 26, *supra*.

(1981) ("effort to misrepresent the nature of a quite ordinary ingredient is a technique that could easily be applied to advertising of * * * products other than [this one]"). For these reasons, we conclude that the appropriate scope for fencing-in relief is "any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle."

The order proposed by the Administrative Law Judge applies three different levels of coverage.⁴⁵ All-product coverage, in our view, is overly broad, because the record does not show that the respondents' business has extended beyond manufacturing and promoting one or more versions of the Brake Guard device. On the other hand, coverage limited to any braking system, accessory or device appears less than adequate to protect against future related violations.

In view of the respondents' limited product line and of the absence in the record of evidence showing that the respondents are likely to expand their areas of endeavor beyond automobile and other motor vehicle accessories and devices, we do not believe that all-products coverage is necessary. *Cf. Kraft, Inc.*, 970 F.2d at 327 (violations with respect to Kraft Singles found transferable only to other Kraft cheese products). Therefore, paragraphs III, IV, and V of the final order apply to "any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle." The fencing-in coverage in paragraphs III, IV and V is consistent and, we believe, appropriately tailored.

VIII. CONCLUSION

On the basis of these facts and for the reasons set forth in this opinion, the Commission concludes that the respondents have engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. The Commission issues the attached final order.

⁴⁵ Compare ALJ order ¶ III ("any braking system, accessory, or device"); with ALJ order ¶ IV ("any product in or affecting commerce"); and ALJ order ¶ V ("any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle").

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FINAL ORDER

DEFINITIONS

For the purposes of this order:

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

2. "*Purchasers for resale*" shall mean all purchasers of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS for resale to the public, including but not limited to franchisees, wholesalers, distributors, retailers, installers, and jobbers.

I.

It is ordered, That respondents, Brake Guard Products Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS 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 employing the initials or term ABS in conjunction with or as part of the name for such product or the product logo.

II.

It is further ordered, That respondents, Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 Brake Guard Safety System, Advanced Braking System, or Brake

Guard ABS 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 representing, in any manner, directly or by implication, that such product:

- A. Is an antilock braking system;
- B. Prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
- C. Will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
- D. Complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
- E. Complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
- F. Reduces stopping distances by 20 to 30% or by up to 30%;
- G. Provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; or
- H. Will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product, in emergency stopping situations.

III.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, 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 installation of the system, accessory, or device will make operation of a vehicle safer than a vehicle that is not equipped with the system, accessory or device, 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 Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, 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. That any such product complies with any standard, definition, regulation, or any other provision of any governmental entity or unit, or of any other organization, or the extent of such compliance;

B. That insurance benefits or discounts arising from the use of such product are available or the extent of such availability; or

C. That any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of such a product represents the typical or ordinary experience of members of the public who use the product, unless:

(1) Such representation is true; or

(2) Respondent discloses clearly, prominently, and in close proximity to the endorsement or testimonial the generally expected results for users of such product, or the limited applicability of the endorser's experience to what consumers may generally expect to achieve and the possibility that consumers may not experience similar results.

V.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and its officers, and Ed F. Jones, individually and as an officer and director 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 any braking system, accessory, or device, or any other system, accessory, or device designed to be used in, on, or in conjunction with any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the absolute or comparative attributes, efficacy, performance, safety, or benefits of such system, accessory, or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate shall be competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, its successors and assigns, and Ed F. Jones shall:

A. Within forty-five (45) days after the date of service of this order, compile a current mailing list containing the names and last known addresses of all purchasers of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS since January 1, 1990. Respondents shall compile the 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 service of this order, to all of the purchasers for resale with which respondents have done business since January 1, 1990, an exact copy of the notice attached hereto as Appendix 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, respondent 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 service of this order.

(3) 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 sixty (60) days after the date of service of this order, send by first class mail, postage prepaid, to the last address known to respondents of each purchaser of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS identified on the mailing list compiled pursuant to subparagraph A of this Part, an exact copy of the notice attached hereto as Appendix B. The mailing shall not include any other documents. The envelope enclosing the notice shall have printed thereon in a prominent fashion the phrases "FORWARDING AND RETURN POSTAGE GUARANTEED" and "IMPORTANT NOTICE--U.S. GOVERNMENT ORDER ABOUT BRAKE GUARD OR ADVANCED BRAKING SYSTEM DEVICE."

C. Send 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 Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS, and to any purchaser whose notification letter is returned by the U.S. Postal Service as undeliverable and for whom respondents thereafter obtain a corrected address. The mailing required by this subpart shall be made within ten (10) days of respondents' receipt of a corrected address or information identifying each such purchaser.

D. In the event respondents receive any information that, subsequent to its receipt of Appendix A, any purchaser for resale is using or disseminating any advertisement 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 advertisement or promotional material.

E. Terminate within ten (10) days the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by subparagraph A of this Part.

VII.

It is further ordered, That respondents Brake Guard Products, Inc., a corporation, and Ed F. Jones shall for five (5) years after the last correspondence to which they pertain, maintain and upon request

make available to the Federal Trade Commission or its staff for inspection and copying:

A. The list compiled pursuant to subparagraph A of Part VI of this order;

B. Copies of notification letters sent to purchasers pursuant to subparagraphs B and C of Part VI of this order; and

C. Copies of notification letters sent to purchasers for resale pursuant to subparagraphs A and D of Part VI of this order, and all other communications with purchasers for resale relating to the notices required by Part VI of this order.

VIII.

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 or 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 relied upon for such representation, including complaints from consumers, and complaints or inquiries from governmental organizations.

IX.

It is further ordered, That respondent Brake Guard Products, 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.

X.

It is further ordered, That respondent Brake Guard Products, Inc., its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

XI.

It is further ordered, That respondent Ed F. Jones shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XII.

It is further ordered, That this order will terminate on January 15, 2018, 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. The application of this order to any respondent that is not named as a defendant in such complaint; and
- C. Any provision of 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, 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.

XIII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, 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.

Commissioner Thompson and Commissioner Swindle not participating.

APPENDIX A

[Brake Guard Products, Inc. letterhead]

Dear Brake Guard Reseller:

Our records indicate that you are or have been a distributor or retailer of the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS (hereinafter "Brake Guard"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an order against Brake Guard Products, Inc. regarding certain claims made for the Brake Guard device. Under that order, we are required to notify our distributors, wholesalers and others who have sold the Brake Guard to stop using or distributing advertisements or promotional materials containing these claims. We are also asking for your assistance in compiling a list of Brake Guard purchasers, so that we may contact them directly. Please read this letter in its entirety and comply with all parts.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the Brake Guard device in Brake Guard Products, Inc.'s advertisements, logos and promotional material are FALSE and MISLEADING:

- (a) The Brake Guard is an antilock braking system;
- (b) The Brake Guard prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;

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(c) The Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;

(d) The Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;

(e) The Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;

(f) The Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;

(g) The Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and

(h) The Brake Guard will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product, in emergency stopping situations.

The FTC order requires Brake Guard Products, Inc. to cease and desist from making these false claims for the Brake Guard device.

In addition, the FTC order requires Brake Guard Products, Inc. to cease and desist from making claims that the Brake Guard will make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

We need your assistance in complying with this order.

Please immediately send us the names and last known addresses of all persons or businesses, including other resellers, to whom you have sold a Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS since January 1, 1990. We need this information in order to provide the notification required by the FTC order. If you do not provide this information, we are required to provide your name and address to the FTC.

Please stop using the Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS promotional materials currently in your possession. These materials may contain claims that the FTC has determined to be false or unsubstantiated. You also should avoid making any of the representations as described in this letter. Under the FTC order, we must stop doing business with you if you continue to use the prohibited materials or make the prohibited representations.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Ed F. Jones
President
Brake Guard Products, Inc.

APPENDIX B

[Brake Guard Products, Inc. letterhead]

Dear Brake Guard customer:

Our records indicate that you previously purchased a Brake Guard Safety System, Advanced Braking System, or Brake Guard ABS (hereinafter "Brake Guard"), a brake product. This letter is to advise you that the Federal Trade Commission ("FTC") recently obtained an Order against Brake Guard Products, Inc. regarding certain claims made for the Brake Guard device. Please read this letter in its entirety.

The FTC's Decision and Order

The Federal Trade Commission has determined that the following claims made for the Brake Guard device in Brake Guard Products, Inc.'s advertisements, logos and promotional material are FALSE and MISLEADING:

- (a) The Brake Guard is an antilock braking system;
- (b) The Brake Guard prevents or substantially reduces wheel lock-up, skidding, or loss of steering control in emergency stopping situations;
- (c) The Brake Guard will qualify a vehicle for an automobile insurance discount in a significant proportion of cases;
- (d) The Brake Guard complies with a performance standard set forth in Wheel Slip Brake Control System Road Test Code SAE J46;
- (e) The Brake Guard complies with a standard pertaining to antilock braking systems set forth by the National Highway Traffic Safety Administration;
- (f) The Brake Guard reduces stopping distances by 20 to 30% or by up to 30%;
- (g) The Brake Guard provides antilock braking system benefits, including wheel lock-up control benefits, that are at least equivalent to those provided by original equipment manufacturer electronic antilock braking systems; and
- (h) The Brake Guard will stop a vehicle in a shorter distance than a vehicle that is not equipped with the product in emergency stopping situations.

The FTC order requires Brake Guard Products, Inc. to cease and desist from making these false claims for the Brake Guard device.

In addition, the FTC order requires Brake Guard Products, Inc. to cease and desist from making claims that the Brake Guard will make a vehicle safer, unless at the time of making such representation it possesses competent and reliable scientific evidence substantiating the representation.

If you have any questions, you may call Deborah Kelly of the Federal Trade Commission at (202) 326-3004. Thank you for your cooperation.

Very truly yours,

Ed F. Jones
President
Brake Guard Products, Inc.

IN THE MATTER OF

VENEGAS INC., ET AL.

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

Docket C-3781. Complaint, Jan. 23, 1998--Decision, Jan. 23, 1998

This consent order prohibits, among other things, the New York company and its officer from making unsubstantiated health claims about Alen, a powdered nutritional supplement comprised of wheat germ, wheat bran, soybean extract, and seaweed extract. The consent order also prohibits the respondents from making any representations as to the benefits, performance, or efficacy of any food, drug or dietary supplement without possessing and relying upon competent and reliable scientific evidence to support the claims.

Appearances

For the Commission: *Donald D'Amato, Denise Tighe and Michael Bloom.*

For the respondents: *William Bendix, Brooklyn, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Venegas Inc., a corporation, and Angel Venegas, 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 Venegas Inc. is a New York corporation with its principal office or place of business at 500 Grand Street, Brooklyn, New York.

2. Respondent Angel Venegas is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, participates in, 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 Venegas Inc.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including "Alen," a powdered nutritional supplement that contains wheat germ, wheat bran, soybean extract, and seaweed extract. Advertisements for Alen have appeared

in El Diario, a Spanish language newspaper in the New York City metropolitan area. "Alen" 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.

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 Alen, including but not necessarily limited to the attached Exhibit A (a newspaper advertisement). This advertisement contains the following statements:

"What is Alen?

. . . . a super nutrient which increases our life expectancy, and its balanced formula prevents aging.

Alen is a cellular reconstructor

- (1) Delays the aging process
- (2) Eliminates anemia
- (6) Furnishes raw matter for increasing the immune system's defenses
- (9) Controls addiction to excess fat and sweets
- (10) Increases memory and scholastic performance. . . .
- (14) For diabetics it helps in the natural production of insulin
- (15) Notably reduces rheumatic pain and migraines
- (16) Protects against infections and increases (enhances) the healing process
- (19) Lowers blood pressure
- (20) Helps heal ulcers
- (23) Increases muscular bulk without the need for steroids

Alen is a unique product -- Recognized worldwide" (Exhibit A)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that Alen:

- A. Increases life expectancy;
- B. Delays the aging process;
- C. Eliminates anemia;
- D. Increases the immune system's defenses;
- E. Increases memory and scholastic performance;
- F. Helps diabetics naturally produce insulin;
- G. Reduces the pain of rheumatism and migraines;
- H. Lowers blood pressure;
- I. Helps heal ulcers;
- J. Increases muscle bulk;
- K. Controls addictions to excess fat and sweets; and

L. Protects against infections and increases and enhances the healing process.

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. 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.

Commissioner Thompson and Commissioner Swindle not participating.

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Complaint

EXHIBIT A

Alen Translation

What is Alen?

It consists of nutrients with the ability of being immediately absorbed such as: high concentrations of Oligoelementos (?) in complex organic molecules, yeast, enzymes, biotin, essential amino acids, fibers, and marine algae/seaweed.

Your health is your most valued treasure.

30 Years of Investigation involves a super nutrient which increases our life expectancy, and its balanced formula prevents premature aging.

Alen is a cellular reconstructor

- (1) Delays the aging process
- (2) Eliminates anemia
- (3) Regenerates hair and skin
- (4) Increases physical and mental energy
- (5) Increases pleasure in living and sexual vigor
- (6) Furnishes raw matter for increasing the immune system's defenses
- (7) Regulates sleep
- (8) Reestablishes intestinal function/operation
- (9) Controls addictions to excess fat and sweets
- (10) Increases memory and scholastic performance
- (11) Increases athletic performance
- (12) Complete nutrition and appropriate diet
- (13) Increases vital energy
- (14) For diabetics it helps in the natural production of insulin
- (15) Notably reduces rheumatic pain and migraines
- (16) Protects against infections and increases (enhances) the healing process
- (17) Reduces cholesterol and triglycerides with its non-soluble fibers
- (18) Reduces uric acid by increasing urinary frequency
- (19) Lowers blood pressure
- (20) Helps heal ulcers
- (21) Serves to alleviate anxiety, distress, and nervousness
- (22) Increases nail growth and strength
- (23) Increases muscular bulk without the need for steroids

Alen is a unique product

Recognized worldwide

Alen

Metabolic Harmonizer 100% Organic

Health * Youth * Vitality

Dr. Oscar Argas Machuca

How do you take Alen

Alen is taken with juices, shakes, milk or yogurt. Add one heaping tablespoon of Alen to a glass with your favorite beverage . Mix for a few seconds. Drink immediately after preparing.

You can find it in the best pharmacies and health food stores.

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

The 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 Venegas Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 500 Grand Street, Brooklyn, New York.

Respondent Angel Venegas is an officer and director of the corporate respondent. Mr. Venegas, individually or in concert with others, formulates, directs, and controls the policies, acts, and practices of said corporation, and his business address is the same as that of the said corporate respondent.

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. Unless otherwise specified, "*respondents*" shall mean Venegas Inc., a corporation, its successors and assigns and its officers; Angel Venegas, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.

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

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 Alen or any other product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

- A. Increases life expectancy;
- B. Delays the aging process;
- C. Eliminates anemia;
- D. Increases the immune system's defenses;
- E. Increases memory or scholastic performance;
- F. Helps diabetics naturally produce insulin;
- G. Reduces the pain of rheumatism or migraines;
- H. Lowers blood pressure;
- I. Helps heal ulcers;
- J. Increases muscle bulk;
- K. Controls addictions to excess fat and sweets; or
- L. Protects against infections and increases and enhances the healing process;

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, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Alen 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 benefits, performance, or efficacy 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.

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

IV.

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

V.

It is further ordered, That respondent Venegas Inc., and its successors and assigns, and respondent Angel Venegas 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.

VI.

It is further ordered, That respondent Venegas Inc., and its successors and assigns, and respondent Angel Venegas, 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 respondent Venegas 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 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 Angel Venegas, 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.

IX.

It is further ordered, That respondent Venegas Inc., and its successors and assigns, and respondent Angel Venegas 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 January 23, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

BEYLEN TELECOM, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3782. Complaint, Jan. 23, 1998--Decision, Jan. 23, 1998*

This consent order prohibits, among other things, two companies and an officer from falsely advertising that using their special "viewer" would be "free" and from disconnecting consumers from their local Internet service provider and reconnecting them to international numbers assigned to the country of Moldova. The consent order requires that the proposed settlement include the payment of redress funds to AT&T and MCI, which will issue credits to their customers who were billed for the calls, and to the FTC, which will issue refunds to customers of other long-distance carriers who were billed for the calls.

*Appearances*For the Commission: *Paul Luehr and Eileen Harrington.*For the respondents: *Joel R. Dichter, Klein, Zelman & Rothermel,*
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beylen Telecom, Ltd. and NiteLine Media, Inc., corporations, and Ron Tan, individually and as an officer of NiteLine Media, Inc. ("the 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. Beylen Telecom, Ltd., ("BTL") is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

2. NiteLine Media, Inc. ("NiteLine") is a corporation doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

3. Ron Tan a/k/a Roeun Tan ("Tan") is an officer and shareholder of corporate respondent NiteLine Media, Inc. Individually or in concert with others, he has formulated, directed, controlled or participated in the 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 NiteLine Media, Inc.

4. At all times relevant to this complaint, the respondents have maintained a substantial course of trade, advertising, offering for sale and selling computer-stored images via both the Internet and international and interstate telephone lines, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

COURSE OF BUSINESS

5. From at least December 1996 through January 1997, the respondents Tan and NiteLine posted messages to newsgroups and operated and promoted one or more World Wide Web sites, including the web sites located at "www.erotica2000.com" and "www.erotica2000.com." Through newsgroup messages and these web sites, respondents Tan and NiteLine represented, expressly or by implication, that consumers could view "adult" images for free at sites on the Internet. A newsgroup is a collection of electronic messages, purportedly about a given topic, that consumers may read on the Internet. The World Wide Web or Web is a system used on the Internet for cross-referencing and retrieving information. A web site is a set of electronic documents, usually a home page and subordinate pages, readily viewable on computer by anyone with access to the Web, standard software, and knowledge of the web site's location or address.

6. At one or more of the web sites operated by respondents Tan and NiteLine and in one or more of their newsgroup messages, respondents Tan and NiteLine stated that they offered "FREE XXX Images" for viewing at "FREE ADULT SITES." In addition, at one or more of their web sites, the respondents Tan and NiteLine stated that the international sites they offered entailed:

NO MEMBERSHIP FEES!
NO CREDIT CARDS NEEDED!
NO 900# CHARGES!

7. Web sites operated by respondents Tan and NiteLine instructed consumers that to view the "adult" images offered, the consumer had

to first "download a special image viewer." This "image viewer" was a software program, which was identified as "david.exe," or "david7.exe," or other similar names.

8. Contrary to the clear implication of the term "image viewer" that respondents Tan and NiteLine used on their web sites to describe this software program, the "david.exe" (or similarly named software) was not merely a means for reading computer data and converting such data into visual images. Instead, this software, if downloaded, installed, and activated, would, without any explanations or adequate disclosures: (a) automatically terminate the consumer's computer modem connection to the consumer's local Internet service provider while maintaining the appearance that the computer modem remained connected to such local Internet service provider; (b) automatically direct the consumer's computer modem to dial an international telephone number to re-connect to the Internet; (c) maintain the international long distance telephone connection thus established unless and until the consumer turned off the power switch to his computer or modem, or took other unusual action to terminate the telephone connection; and (d) caused the consumer to incur international long distance telephone charges on his telephone bill at rates in excess of \$2.00 per minute for as long as the international long distance telephone connection was maintained. One of the techniques that this software employed to maintain the appearance that the computer modem remained connected to the consumer's local Internet service provider was to automatically turn off the speaker on the consumer's modem before dialing, thus preventing the consumer from hearing the sound of the international number being automatically dialed.

9. Prior to about January 23, 1997, respondents Tan and NiteLine, at one or more of their web sites and in newsgroup messages, failed to disclose any of the events, described above in paragraph eight, that automatically followed if one downloaded, installed and activated the purported "viewer" software.

10. Respondents Tan and NiteLine changed one or more of their web sites on or about January 23, 1997. Nevertheless, after that date, their web sites and newsgroup messages continued to fail to disclose that once a consumer downloaded, installed and activated the "viewer" software, it caused consumers to incur international long distance telephone charges at rates in excess of \$2.00 per minute. In addition, web sites and news group messages posted by respondents

Tan and NiteLine continued to fail to disclose that the consumer's computer modem would maintain the international long distance telephone connection unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

11. After about January 10, 1997, one or more of respondents' web sites stated if consumers downloaded their "viewer" software, the consumers' computer modems would be connected to a site in Moldova, a former constituent state of the now-defunct Soviet Union. However, the computer modems of consumers who downloaded the software were not connected to a site located in Moldova, but rather were connected to a site located in Canada. Thus, even though the automatic telephone call generated by the "viewer" software went to Canada, the consumer was charged at the comparatively much higher per-minute rates for a call to Moldova.

12. Once a consumer had downloaded, installed and activated the purported "viewer" software offered by respondents Tan and NiteLine, the consumer continued to incur international long distance telephone charges for as long as his computer modem was connected to the international long distance number and even after the consumer had exited respondents Tan and NiteLine's "adult" sites.

13. Respondents Tan and NiteLine's promises of "free" Internet viewing of computer-stored images lured consumers from the U.S. and foreign countries into incurring hundreds of thousands of dollars in international long distance telephone charges.

14. Respondent BTL is a service bureau that provides telecommunications and other services to entities that promote international pay-per-call programs. In that capacity, respondent BTL assigned Moldovan telephone numbers to respondent NiteLine, as well as to Internet Girls, Inc. -- a defendant in the federal court action, *FTC v. Audiotex Connection, Inc.* CV-97 0726 (DRH) (E.D.N.Y. filed Feb. 13, 1997). Directly or indirectly, respondent BTL also provided NiteLine and Internet Girls with the following services: (a) daily telephone traffic and billing reports; (b) the "david.exe" (or similarly named software) program and technical support for this "viewer" software program described above; (c) text or graphics to use in soliciting consumers on the Internet, including information that Tan or NiteLine incorporated into newsgroup messages or that Tan, NiteLine, or Audiotex defendants William Gannon or Internet Girls incorporated into the web sites "www.erotic2000.com,"

"www.erotica2000.com," "www.sexygirls.com," "www.1adult.com," or "www.beavisbutthead.com"; and (d) a termination point for audiotext calls, namely a site in Canada containing computer images for viewing.

15. A foreign telephone carrier contracted to pay respondent BTL a portion of the revenues received from consumers for calls placed to specific international telephone numbers. Respondent BTL, in turn, contracted to pay respondent NiteLine a per-minute rate for calls they generated to those specific international telephone numbers. (Respondent BTL contracted to pay defendant Internet Girls on a similar basis). Thus, respondents BTL, Tan, and NiteLine were to receive a portion of the amount of international telephone charges incurred by consumers.

VIEWING COST

16. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images without cost by downloading, installing and activating purported "viewer" software.

17. In truth and in fact, once a consumer downloaded, installed and activated the purported "viewer" software to view computer-stored images located at Internet sites, the consumer incurred costs for an international long distance telephone call.

18. Therefore, the representations of respondents Tan and NiteLine, as set forth in paragraph sixteen, above, were false and deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

SOFTWARE FOR DOWNLOADING

19. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images by downloading, installing and activating purported "viewer" software.

20. In numerous instances, respondents Tan and NiteLine failed to disclose or disclose adequately to consumers the material facts that, by downloading, installing, and activating the purported "viewer" software, the following would result:

- a. The consumer's computer would terminate its modem connection to the consumer's usual local Internet service provider;
- b. The consumer's modem would dial an international long distance telephone number and establish a long-distance telephone connection with an Internet service provider at some remote location outside the United States;
- c. The consumer would likely incur international long distance telephone charges at rates in excess of \$2.00 per minute for as long as the long-distance telephone connection with the remote Internet service provider was maintained; and
- d. The consumer's computer modem would not terminate the international long distance telephone connection to the remote Internet service provider unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

21. In view of representations by respondents Tan and NiteLine that consumers could view certain images located at Internet sites by downloading, installing and activating purported "viewer" software, as set forth in paragraph nineteen, above, respondents Tan and NiteLine's failure to disclose or disclose adequately the material information set forth in paragraph twenty, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

22. By providing respondent NiteLine (and defendant Internet Girls) with telephone numbers, and by directly or indirectly providing the "viewer" software, text or graphics, or other goods or services described in paragraphs fourteen and fifteen, above, for the purpose of inducing consumers to call international telephone numbers, respondent BTL provided the means and instrumentalities to others, and thereby acted in concert with others or knowingly and substantially assisted others, to engage in the deceptive acts and practices alleged in paragraphs sixteen through twenty-one, above, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

TELEPHONE BILLING

23. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents directly or through an intermediary caused charges for long distance calls to Moldova to appear on the telephone

billing statements of consumers who downloaded, installed and activated respondents' purported "viewer" software.

24. In truth and in fact, the call that a consumer's computer modem dialed when the consumer downloaded, installed and activated respondents' purported "viewer" software did not go to Moldova, which has high per-minute long distance telephone rates for calls from the United States, but instead went to Canada, which has comparatively much lower long distance rates for calls from the United States.

25. Therefore, respondents' practice of causing charges for long distance calls to Moldova to appear on the telephone billing statements of consumers who had downloaded, installed and activated respondents' purported "viewer" software, as set forth in paragraph twenty-three, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

26. 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.

Commissioner Thompson and Commissioner Swindle not participating.

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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents for purposes of the order of all the jurisdictional facts set forth in the aforesaid draft 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:

1a. Respondent Beylen Telecom, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

1b. Respondent NiteLine Media, Inc. is a New York corporation with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

1c. Respondent Ron Tan is an individual residing within the State of New York and is an officer and shareholder of NiteLine Media, Inc. Individually or in concert with others he formulates, direct, or controls the policies, acts, or practices of NiteLine Media. His principal office or place of business is the same as that of NiteLine Media, Inc.

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. "*Beylen*" means Beylen Telecom, Ltd. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

2. "*NiteLine*" means NiteLine Media, Inc. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

3. "*Ron Tan*" means Ron Tan a/k/a Roeun Tan, individually, and in his capacity as an officer and shareholder of NiteLine Media, Inc., and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

4. Unless otherwise specified, "*respondents*" shall mean Beylen and NiteLine, corporations, their successors and their officers; Ron Tan, individually and as an officer of NiteLine; and each of the above's agents, representatives and employees. Unless otherwise specified, "respondent" shall mean NiteLine, Ron Tan or Beylen.

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

6. "*Clearly and conspicuously*" shall mean as follows:

In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. 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. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation. The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

7. "*Document*" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from

which information can be obtained. A draft or non-identical copy is a separate document within the meaning of the term.

8. "*David.exe*" means a software program that, as alleged in the Commission's draft complaint, a respondent has promoted, offered, distributed, or provided on web sites as a "viewer," which consumers may download, install, and execute, and which dials an international long-distance telephone number for which a fee is charged.

9. "*Eligible consumer*" means a telephone subscriber that was billed for international long distance calls to Moldova from December, 1996 through February, 1997 to one of the telephone numbers listed in Schedule A, annexed hereto.

10. "*Relevant charges*" means the dollar amount billed by AT&T, MCI, Sprint or another long distance carrier to an eligible consumer for international long distance calls to Moldova from December 1996 through February 1997, to one of the telephone numbers listed in Schedule A, annexed hereto.

I.

It is therefore ordered, That, in connection with using the Internet to place international long distance telephone calls, each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by:

A. Representing, either directly or by implication, that consumers may download, install, activate or use a computer software program to view computer-stored images without cost, unless there are no costs to consumers arising from such activity.

B. Representing, either directly or by implication, that a consumer may view computer-stored images by downloading, installing and activating a software program known as "*David.exe*" or any other substantially similar software, unless such respondent clearly and conspicuously discloses, in close proximity to the representation, any material facts concerning costs and consequences to a consumer that result from downloading, installing, and activating such software, including, but not limited to, the following:

1. That the consumer's computer will terminate its modem connection to the consumer's usual Internet service provider;

2. That the consumer's modem will dial an international long-distance telephone number and establish a long-distance telephone connection with some remote location outside the United States;

3. (a) A statement that "International long distance telephone charges to [insert country of call termination] apply"; and

(b) Either:

(i) A statement that "This call may cost you as much as [insert the maximum estimate of possible per-minute tariffed charge available through one of the three largest U.S. long-distance carriers (*e.g.* MCI, Sprint or AT&T; hereafter "a major U.S. carrier")] per minute"; or

(ii) A stated range of possible costs per-minute for the call, where the maximum possible per-minute charge available through a major U.S. carrier is disclosed at least as prominently as any lower estimate of possible charges, and the lower estimate is based on a non-promotional standard tariffed charge available through a major carrier, and there is a clear and conspicuous disclosure of the following statement: "To determine your exact per-minute charges, contact your long distance carrier."; and,

4. That, once connected, the consumer's computer modem will not terminate the international long-distance telephone connection to the remote service provider unless and until: (a) the consumer terminates the connection by using a "disconnect" feature that is displayed on the screen throughout the connection; OR (b) the call is terminated automatically after some specific, stated period of time (*e.g.* after 5 minutes); OR (c) the consumer turns off the power switch to his computer or modem, or takes other drastic and unusual action to terminate the telephone connection, if neither (a) nor (b) above are applicable.

II.

It is further ordered, That:

A. Each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by directly causing international long-distance charges to appear on the telephone billing statement of any consumer when such call does not, in fact, go to the international destination for which charges are assessed; and

B. Each respondent, when contracting with any entity for international call charges to appear on any consumer's telephone bill, shall include written terms in such contract requiring calls to go to the destination for which charges are assessed on a consumer's telephone bill. If, at the time of the entry of this order, a respondent has an

existing contract with another entity that arranges call charges to appear on any consumer's telephone bill, the respondent may satisfy the requirements of this Section by obtaining from that entity a letter or other written assurance that calls go to the destination for which charges are assessed on a consumer's telephone bill.

III.

It is further ordered, That:

A. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY) ("the Consent Decree"), and after the entry of such Consent Decree, eligible consumers charged by AT&T or MCI for telephone calls involving David.exe shall, to the extent possible, receive a credit on their monthly telephone bill equal to the amount of the relevant charges. To the extent an eligible consumer has already been credited such an amount in full, no additional credit shall be extended. To the extent an eligible consumer has received a partial credit, only the remaining balance of the original relevant charge shall be credited. The process for issuing the credits to eligible consumers will be administered by AT&T and MCI, respectively, and monitored and/or audited by the FTC. The reasonable costs of the two carriers arising from the issuance of credits for the relevant charges and from such administration of credits shall be reimbursed by the escrow agent by deducting and paying to AT&T and MCI, respectively, the amounts stated below.

B. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY), and after the entry of such Consent Decree, a Redress Escrow Account shall be established at a bank with a branch located in the State of New York, and Joel Dichter, Esq., shall be designated as the sole escrow agent and signatory to this Redress Escrow Account. In addition to the funds deposited by the defendants in *FTC v. Audiotex Connection, Inc.*, the respondents shall deposit sufficient funds into the Redress Escrow Account as are necessary to enable the escrow agent to distribute the funds, consisting of a total deposit of all sums provided by Section IIIB(1) and (2), below, contemporaneously with a deposit of the \$60,000 provided by Section IIIB(3), in the following manner:

1. AT&T shall be distributed the sum of \$660,000 toward the cost of administering the credit to consumers provided by Section IIIA,

above, and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

2. MCI shall be distributed the sum of \$99,302.57 toward the cost of administering the credit to consumers provided by Section IIIA above and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

3. Forty Thousand Dollars (\$40,000) shall be distributed to the Federal Trade Commission and shall be used, where practicable, to provide redress to eligible consumers charged by an international long-distance carrier other than AT&T or MCI (hereinafter referred to as "Eligible Non-AT&T/MCI Consumers"). The Commission, in its sole discretion, may use a designated agent to administer redress for Eligible Non-AT&T/MCI Consumers. If the Commission, in its sole discretion, determines that redress to consumers is wholly or partially impractical, any funds up to Forty Thousand Dollars (\$40,000.00) not so used shall be paid to the United States Treasury. The respondents shall be notified as to how such funds are disbursed, but shall have no right to contest the manner of distribution. Eligible Non-AT&T/MCI Consumers shall have 90 days from the Court's entry of the Consent Decree to request a refund. If the Commission or its designated agent determine within 120 days from the entry of the Consent Decree that the cost of issuing and administering refunds to Eligible Non-AT&T/MCI Consumers exceeds Forty Thousand Dollars (\$40,000.00), the Commission or its designated agent shall so notify the escrow agent, and an additional sum of money not to exceed Twenty Thousand Dollars (\$20,000.00) shall be distributed by the escrow agent to the Commission for redress to Eligible Non-AT&T/MCI Consumers. To the extent that the escrow agent is not notified in writing by the Commission within such 120 day period that all or a portion of the additional Twenty Thousand Dollars (\$20,000.00) is required by the Commission for redress purposes, the \$20,000.00 or remaining portion thereof not required by the Commission for redress purposes shall be released from the Redress Escrow Account and distributed promptly by the escrow agent to any contributing defendant in *FTC v. Audiotex Connection, Inc.* and/or any contributing respondent.

C. If, during the 60-day comment period before the issuance of this order, the respondents distributed funds to the Redress Escrow Account in amounts sufficient to commence the redress program under the Consent Decree in *FTC v. Audiotex Connection, Inc.*, such

payment fulfills the respondents' redress obligations under Section IIIB above.

IV.

It is further ordered, That for a period of three years after the date of entry of this order, each respondent shall maintain, and make available to the FTC upon reasonable notice, documents that, in reasonable detail, accurately, fairly, and completely reflect such respondent's activities related to using the Internet to place international long distance telephone calls including:

A. 1. Representative written and, if distributed in audio format, audiotaped copies of all solicitations, advertisements, or other marketing materials actually used;

2. The number, frequency, and average duration of calls to any international, tolled telephone numbers advertised or promoted directly or indirectly by such respondent, as well as the payments received and payments made for such calls;

3. The portion of the contract or the other written assurance referenced in Section IIB of this order; and,

B. Records that reflect, for every consumer complaint or refund request received from any consumer to whom such respondent has sold, billed or sent any goods or services, or from whom such respondent accepted money for such goods or services, whether received directly or indirectly or through any third party:

1. The consumer's name, address, telephone number and the dollar amount paid by the consumer;
2. The written complaint or refund request, if any, and the date of the complaint or refund request;
3. The basis of the complaint and the nature and result of any investigation conducted concerning the validity of the complaint;
4. Each response from the respondent(s) and the date of the response;
5. Any final resolution and the date of the resolution; and
6. In the event of a denial of a refund request, the reason for such denial.

V.

It is further ordered, That, to enable the Commission to monitor compliance with the provisions of this order, for a period of three years after the date of entry of this order:

A. Each corporate respondent shall notify the FTC in writing, within thirty (30) days of: (1) any reorganization, name change, dissolution, change in majority ownership, or any corporate change that may affect compliance obligations arising under this order; and (2) any affiliation with any new business entity (including but not limited to, any partnership, limited partnership, joint venture, sole proprietorship or corporation) in connection with using the Internet to place international long distance telephone calls, such notification to include: (a) the name of the business entity; (b) the address and telephone number of the business entity; (c) the names of the business entity's officers, directors, principals and managers; and (d) a summary description of the business entity's intended activities; and

B. Each individual respondent shall notify the FTC in writing, within thirty (30) days of the discontinuance of his current business affiliation or employment with a corporate respondent, or of his affiliation or employment with any new business entity (including but not limited to, any partnership, limited partnership, joint venture, sole proprietorship or corporation) in connection with using the Internet to place international long distance telephone calls, in the latter case such notification to include: (a) the name of the business entity; (b) the address and telephone number of the business entity; (c) the names of the business entity's officers, directors, principals and managers; and (d) a summary description of the business entity's intended activities; and

C. Each respondent shall designate its counsel as authorized to accept service of all documents related to this order.

VI.

It is further ordered, That each respondent shall not provide or distribute to any person, except for a court, counsel for the respondents, counsel's consultants, agents of the Commission or other law enforcement authorities, or others as ordered by a court of competent jurisdiction, copies of "David.exe" or "david7.exe" or any substantially similar software.

VII.

It is further ordered, That for a period of three years after the date of entry of this order, each respondent shall in connection with any business using the Internet to place international long distance telephone calls:

A. Provide a copy of this order once to, and obtain a signed and dated acknowledgment of receipt of the same from, each affiliate, subsidiary, division, sales entity, successor, officer, director, shareholder, employee, agent or representative of such respondent; and

B. Maintain, and upon reasonable notice make available to representatives of the Commission, the original and dated acknowledgments of the receipts of copies of this order required by Section VIIA above.

VIII.

It is further ordered, That where required by this order, written notice to:

A. The Commission shall be effected by serving papers, by personal delivery or certified mail, addressed to: Associate Director, Federal Trade Commission, Division of Marketing Practices, Sixth Street and Pennsylvania Avenue, N.W., Room 238, Washington, DC; and

B. The respondents shall be effected by serving papers, by personal delivery or certified mail, addressed to: Joel R. Dichter, Klein, Zelman, Rothermel & Dichter, L.L.P., 485 Madison Avenue, New York, NY.

IX.

It is further ordered, That each respondent shall, within 180 days after the date of entry to this order, file with the Commission a report, in writing, setting forth the manner and form of compliance with this order.

X.

It is further ordered, That, to the extent that this order may conflict with any federal law or regulation which is later enacted or amended, such law and not this order shall apply where such a

conflict exists. For the purposes of this order, a conflict exists if the conduct prohibited by this order is required by such federal law or if conduct required by this order is prohibited by such federal law.

Commissioner Thompson and Commissioner Swindle not participating.

ATTACHMENT A

List of Moldova Phone Numbers

373-955-1100	373-955-2401
373-955-1111	373-955-2402
373-955-1200	373-955-2403
373-955-1300	373-955-2404
373-955-1400	373-955-2405
373-955-1500	373-955-2406
373-955-1600	373-955-2407
373-955-2000	373-955-2408
373-955-2010	373-955-2409
373-955-2020	373-955-2410
373-955-2030	373-955-2411
373-955-2222	373-955-2419
373-955-2400	

IN THE MATTER OF

INSILCO 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-3783. Complaint, Jan. 27, 1998--Decision, Jan. 27, 1998

This consent order requires, among other things, the Ohio-based company to divest two of the Helima aluminum tube mills and associated assets to a Commission-approved buyer and prohibits the respondent from obtaining or providing the type of sensitive information -- such as price and cost information, pricing plans, strategies or policies relating to competition -- to others that it obtained before consummating the acquisition of Helima.

Appearances

For the Commission: *Casey Triggs, Nicholas Koberstein, Katherine Funk, Ann Malester and William Baer.*

For the respondent: *Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Insilco Corporation ("Insilco"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired certain assets of Helmut Lingemann, GmbH, ("Lingemann") 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. DEFINITIONS

For purposes of this complaint the following definitions apply:

1. "*Welded Aluminum Tubes*", including welded aluminum tubes with diameters of 50 millimeters or greater ("Large Welded Aluminum Tubes") and welded aluminum tubes with diameters less than 50 millimeters ("Small Welded Aluminum Tubes"), means thin wall welded-seam aluminum tubes used in the manufacture of heat

exchangers, which are devices that transfer heat from one fluid or gas to another medium, generally air

2. *"Non-Aggregated, Customer-Specific Information"* means information about a product's cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.

II. THE RESPONDENT

3. Respondent Insilco 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 at 425 Metro Place N, Box 7196, Dublin, Ohio.

4. Insilco 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. THE ACQUIRED COMPANY

5. Helima-Helvetion, Inc. ("Helima") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business having been located at Duncan, South Carolina.

6. Helima, at all times relevant herein, was engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and was 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 ACQUISITIONS

7. On or about July 10, 1996, Insilco purchased from Lingemann for \$12.8 million the assets of Helima ("Helima Acquisition"); for \$17 million, the stock of Lingemann's European manufacturer of welded aluminum heat exchanger tubes, ARUP Alu-Rohr und Profil, GmbH; and the option to purchase Maschinenbau, GmbH, a Lingemann subsidiary in Germany that manufactures mills used in the production of aluminum tubes (together, the "Acquisitions").

8. Prior to the consummation of the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information all of which is the type of information that

would likely have been detrimental to competition in the relevant markets if the Acquisition had not been consummated.

9. The Non-Aggregated, Customer-Specific Information transferred from Helima to Insilco included descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-by-customer future pricing strategies.

V. THE RELEVANT MARKETS

10. For purposes of this complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Large Welded Aluminum Tubes.

11. For purposes of this complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Small Welded Aluminum Tubes.

12. For purposes of this complaint, the relevant geographic market for both relevant lines of commerce is North America.

13. Each of the relevant markets is highly concentrated. As a result of the Helima Acquisition, Insilco is currently the only supplier of Large Welded Aluminum Tubes with 100% of the market, and one of only two suppliers of Small Welded Aluminum Tubes, with a market share of over 90%.

14. There has been no entry into the market for Large Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Because the cost of entering and producing Large Welded Aluminum Tubes is relatively high compared to the limited potential sales revenues available to an entrant, entry into this market is not likely to be profitable. Consequently, entry into the Large Welded Aluminum Tube market is not likely to occur in a timely manner and counteract the additional anticompetitive effects likely to result from the Helima Acquisition. Entry into this relevant market is difficult and unlikely.

15. There has been no entry into the market for Small Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Additional anticompetitive effects resulting from the Helima Acquisition are likely and will continue until such time as actual and sufficient entry occurs.

16. Prior to the Acquisitions, Insilco and Helima were actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

17. The Acquisitions have substantially lessened or may substantially lessen competition in the following ways:

- a. They have eliminated Helima as a substantial independent competitor in the relevant markets;
- b. They have eliminated actual, direct, and substantial competition between Insilco and Helima in the relevant markets;
- c. They have increased the level of concentration in the already highly concentrated relevant markets;
- d. They have led, or may lead, to increases in prices in the relevant markets;
- e. They have led, or may lead, to a reduction in service in the relevant markets;
- f. They have led, or may lead, to the reduction in quality in the relevant markets;
- g. They have led, or may lead, to a reduction in technological improvements in the relevant markets;
- h. They have increased barriers to entry into the relevant markets; and
- i. They have given Insilco market power in the relevant markets.

VII. EFFECTS OF INFORMATION TRANSFER

18. Insilco received from Lingemann competitively sensitive information prior to the consummation of the Acquisitions, that, but for the consummation of the Acquisitions, may have detrimentally affected competition in the relevant markets.

VIII. VIOLATIONS CHARGED

19. The effects of the Acquisitions may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45.

20. Insilco, through the Acquisitions, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

21. Prior to the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information about customers for which they both competed in the relevant product markets in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of the assets of Helima-Helvetion International, Inc. ("Helima"), and of all the capital stock of ARUP Alu-Rohr und Profil GmbH ("ARUP") from Helmut Lingemann GmbH & Co. by respondent, 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 received, 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 Insilco 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 425 Metro Place N., Dublin, Ohio.

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*" means Insilco Corporation ("Insilco"), its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Insilco; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Lingemann*" means Helmut Lingemann GmbH & Co., its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Lingemann; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Maschinenbau*" means Helmut Lingemann Maschinenbau GmbH, its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Maschinenbau; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

E. "*Helima Acquisition*" means the acquisition of the assets of Helima-Helvetion International, Inc. and of all the capital stock of ARUP Alu-Rohr und Profil GmbH from Lingemann by Insilco.

F. "*Thin-Wall Welded-Seam Aluminum Tubes*" means welded-seam aluminum heat exchanger tubes with wall thickness less than 0.65 millimeters used in the manufacture of heat exchangers, which are devices that transfer heat from one fluid or gas to another medium, generally air. These heat exchangers generally are used in

automotive applications. Thin-Wall Welded-Seam Aluminum Tubes does not include tubes used as spacers between thermal pane windows, condenser headers, or manifolds.

G. "*Welded Tube Mill*" means a high frequency welding machine capable of producing Thin-Wall Welded-Seam Aluminum Tubes.

H. "*Lingemann Mill*" means a Welded Tube Mill manufactured by Lingemann and operated by Helima-Helvetion International, Inc., or ARUP Alu-Rohr und Profil GmbH prior to the Helima Acquisition.

I. "*Marketability, viability, and competitiveness*" means that the specified assets, when used in conjunction with the assets of the acquirer, are capable of operating in substantially the same manner, quality, and efficiency employed or achieved by the respondent prior to divestiture.

J. "*Non-Aggregated, Customer-Specific Information*" means information about a product's cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.

K. "*Strategies or policies related to competition*" means information relating to a company's approach to negotiating with specific customers, targeting specific customers, identifying or in any other manner attempting to win specific customers, retaining specific customers, or risk of loss of specific customers, including, but not limited to, all sales personnel call reports, market studies, forecasts, and surveys which contain such information.

L. "*Analyses or formulas used to determine costs or prices*" means a method, study, test, program, examination, tool, or other type of logical reasoning used to determine a product's cost and/or price for an identifiable individual customer.

M. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, or trust.

N. "*Independent agent*" means a person not regularly employed by the company that does not have and will not have direct or indirect responsibility for prices or pricing or the ability to influence prices or pricing or an attorney regularly employed by the company that does not have and will not have direct or indirect responsibility for prices or pricing or the ability to influence prices or pricing.

O. "*Assets To Be Divested*" include the following:

(a) One (1) fully functioning and operational Lingemann Mill, consisting of a high frequency welder, a rollforming base, a cutoff saw, a finished product drop table, a stock reel decoder, a vacuum coil lifter, and control cabinets, capable of producing Thin-Wall Welded-Seam Aluminum Tubes with a diameter of less than forty (40) millimeters;

(b) One (1) fully functioning and operational Lingemann Mill, consisting of a high frequency welder, a rollforming base, a cutoff saw, a finished product drop table, a stock reel decoder, a vacuum coil lifter, and control cabinets, capable of producing Thin-Wall Welded-Seam Aluminum Tubes with a diameter of greater than seventy-five (75) millimeters; and

(c) One (1) set of tooling capable of operating on both mills.

P. "*Technology and know-how*" means all of respondent's drawings, patents, specifications, tests, and other documentation, and all information contained therein or available to respondent's personnel relating to the design, and the production methods, processes, and systems used in the production of Thin-Wall Welded-Seam Aluminum Tubes utilizing Lingemann Mills or the operation and maintenance of Lingemann Mills for use in the production of Thin-Wall Welded-Seam Aluminum Tubes. Technology and know-how does not include the drawings, patents, specifications, tests, and other documentation, and all information not acquired by respondent in the Helima Acquisition and not developed by respondent following the Helima Acquisition specifically relating to the design, and the production methods, processes, and systems used in the production of Thin-Wall Welded-Seam Aluminum Tubes utilizing Lingemann Mills or the operation and maintenance of Lingemann Mills for use in the production of Thin-Wall Welded-Seam Aluminum Tubes.

Q. "*Sole Source Replacement Parts*" means all parts needed to operate and maintain the Assets To Be Divested that are not readily available from a source other than respondent.

R. "*Helima Assets*" means all Welded Tube Mills, including machinery, fixtures, equipment, and tooling used in the maintenance or operation of such mills, acquired by Insilco in its acquisition of the assets of Helima-Helvetion International, Inc., from Lingemann.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, no later than four (4) months after the date on which this order becomes final, the Assets To Be Divested.

B. 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. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the same business in which the Assets To Be Divested are presently engaged, and to remedy the lessening of competition resulting from the Helima Acquisition as alleged in the Commission's complaint.

C. Respondent shall also divest to the acquirer such additional ancillary assets that are not readily available from a source other than respondent, including, but not limited to, machinery, fixtures, equipment, and software, used in the maintenance or operation of the Assets To Be Divested as are necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested.

D. Respondent shall grant to the acquirer a perpetual, non-exclusive royalty-free license of any and all technology and know-how necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested. Such license shall be effective only in connection with the operation of the Assets To Be Divested by the acquirer, any successor to the acquirer, or any subsequent owner of the Lingemann Mills included in the Assets To Be Divested. The acquirer shall also have the right to sublicense the technology and know-how encompassed within its license for use on other assets or equipment physically located in North America.

E. A condition of approval by the Commission of the divestiture shall be the submission by the acquirer to the Commission of an acceptable five-year business plan for the Assets To Be Divested demonstrating that the acquirer will establish the Assets To Be Divested as a viable and competitive business in North America.

F. On reasonable notice to respondent from the acquirer of the Assets To Be Divested, respondent shall provide assistance and training to the acquirer to enable the acquirer to design, manufacture, and produce Thin-Wall Welded-Seam Aluminum Tubes at a comparable cost in substantially the same manner and quality employed or achieved by the respondent with the Assets To Be

Divested prior to divestiture. Such assistance and training shall include, without limitation, consultation with employees of Insilco knowledgeable about Lingemann Mills and training at the North American manufacturing facilities of Insilco utilizing Lingemann Mills. If training at the North American manufacturing facilities of Insilco utilizing Lingemann Mills is not possible, respondent shall provide training at any manufacturing facility of Insilco utilizing Lingemann Mills. Respondent shall charge no more than its own direct costs incurred in providing such assistance and training, including reimbursement (commensurate with the salary and benefits of Insilco personnel involved) for the time plus expenses of Insilco personnel providing assistance and training. Respondent shall continue to provide such assistance and training until the acquirer of the Assets To Be Divested is satisfied in its reasonable business judgement that it is capable of producing Thin-Wall Welded-Seam Aluminum Tubes utilizing the Assets To Be Divested at a comparable cost in substantially the same manner and quality achieved by respondent prior to divestiture with the Assets To Be Divested; provided, however, respondent shall not be required to continue providing such technical assistance and training for more than one (1) year after the date on which the divestiture required by this order is made if the acquirer of the Assets To Be Divested is a manufacturer of Thin-Wall Welded-Seam Aluminum Tubes with sales of Thin-Wall Welded-Seam Aluminum Tubes greater than one million dollars (\$1,000,000) in the fiscal year prior to the date of divestiture. If the acquirer of the Assets To Be Divested is not a manufacturer of Thin-Wall Welded-Seam Aluminum Tubes with sales of Thin-Wall Welded-Seam Aluminum Tubes greater than one million dollars (\$1,000,000) in the fiscal year prior to the date of divestiture, respondent shall be required to provide such technical assistance and training for a period not longer than three (3) years after the date on which the divestiture required by this order is made.

G. On reasonable notice to respondent from the acquirer of the Assets To Be Divested, respondent shall provide Sole Source Replacement Parts to the acquirer. Respondent shall charge no more than its own direct costs incurred in providing such Sole Source Replacement Parts. Respondent shall not be required to continue providing such Sole Source Replacement Parts for more than two (2) years after the date on which the divestiture required by this order is made.

H. The Assets To Be Divested shall be supplied as completely wired and piped systems, requiring only the placement and bolting together of the sub-bases, the reconnection of the electrical wires at numbered terminal block junctions, and the connection of the piping to the union joints.

I. Qualification, performance, and the acquirer's acceptance of the Assets To Be Divested shall be performed at the facility of the acquirer in a manner to ensure that the Assets To Be Divested are capable of producing Thin-Wall Welded-Seam Aluminum Tubes in substantially the same manner and quality employed or achieved by the respondent with the Assets To Be Divested prior to divestiture.

J. On reasonable notice to respondent by a customer, respondent shall provide the approved acquirer tooling owned by, assigned to, or licensed to the respondent, which was produced prior to the date this order becomes final and not included in the Assets To Be Divested, and which was manufactured specifically for and used solely for that customer's products. Respondent may charge the reasonable costs incurred in the manufacture of the tooling.

K. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are reasonably necessary to maintain the marketability, viability, and competitiveness of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested.

L. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are reasonably necessary to maintain the marketability, viability, and competitiveness of the Helima Assets to prevent the destruction, removal, wasting, deterioration, or impairment of the Helima Assets.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within four (4) months of the date this order becomes final, then the Commission may appoint a trustee to divest the Helima Assets and effect such additional arrangements as are necessary, in order to assure the marketability, viability, and competitiveness of the Helima Assets. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the

Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by the respondent 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, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposition, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Helima Assets and effect such additional arrangements as are necessary, in order to assure the marketability, viability, and competitiveness of the Helima Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the Helima Assets and effect such additional arrangements as are necessary to assure the marketability, viability, and competitiveness of the Helima Assets, in order to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, 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 for no more than two (2) additional times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

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

commission arrangement contingent on the trustee's accomplishing the divestiture required by this order.

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

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 necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Helima Assets.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That respondent shall not enforce beyond one (1) year any contract for the sale of Thin-Wall Welded-Seam Aluminum Tubes with a term greater than one (1) year entered into after the consummation of the Helima Acquisition and prior to the divestiture of the Assets To Be Divested.

V.

It is further ordered, That:

A. For a period of twenty (20) years from the date this order becomes final, respondent shall not, in any proposed acquisition of stock, share of capital, or production assets of any person that is a competitor of respondent in the design, manufacture, or sale of Thin-Wall Welded-Seam Aluminum Tubes, to which respondent is a party, prior to consummating the acquisition, obtain, seek, provide, or agree to obtain, seek, or provide the following types of information with

respect to Thin-Wall Welded-Seam Aluminum Tubes except to the extent that such information is publicly available: (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices.

B. For a period of ten (10) years from the date this order becomes final, respondent shall not, in any proposed acquisition of stock, share of capital, or production assets of any person that is a competitor of respondent in the design, manufacture, or sale of any product or service, to which respondent is a party, prior to consummating the acquisition, obtain, seek, provide, or agree to obtain, seek, or provide the following types of information with respect to any competing product or service except to the extent that such information is publicly available: (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices.

C. Nothing contained in paragraphs V(A) or V(B) of this order shall prohibit respondent or any other person from obtaining, seeking or providing, or agreeing to obtain, seek or provide (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices, if such information is provided to an independent agent. Information received by an independent agent pursuant to paragraph V of this order may be provided to respondent or any other person by such independent agent if such information is converted into a form that would not be in violation of paragraph V of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission:

(a) Directly or indirectly acquire any production assets of Maschinenbau if the cumulative value of all such acquisitions in the prior twelve (12) months exceeds \$1 million; and

(b) Directly or indirectly acquire any stock, share of capital, or production assets, other than assets acquired in the ordinary course of business, of any person engaged in the design, manufacture, or sale of Welded Tube Mills or any person engaged in the design, manufacture, or sale of Thin-Wall Welded-Seam Aluminum Tubes in North America; provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, respondent will hold no more than five (5) percent of the outstanding shares of any class of securities of such person and provided further that an acquisition of assets will be exempt from the requirements of this paragraph if the acquisition price is less than one (1) million dollars.

VII.

It is further ordered, That the prior notifications required by paragraph VI of this order 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 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 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.

Provided, however, that prior notification shall not be required by paragraph VI of 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.

VIII.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

IX.

It is further ordered, That one (1) year 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 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 IV, V, VI, and VII of this order.

X.

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

XI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representatives of the Commission:

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

B. Upon five (5) days' notice to respondent, and without restraint or interference, to interview officers, employees, or agents of respondent.

Commissioner Swindle not participating.

IN THE MATTER OF

JITNEY-JUNGLE STORES OF AMERICA, 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-3784. Complaint, Jan. 28, 1998--Decision, Jan. 28, 1998

This consent order requires, among other things, the corporations to divest a total of 10 supermarkets to Supervalu, Inc. Supervalu may in turn divest the stores to R & M Foods, Inc. and Southeast Foods, Inc.

Appearances

For the Commission: *James Fishkin, Phillip Broyles and William Baer.*

For the respondents: *Stephen Stack, Dechert, Price & Rhoads, Philadelphia, PA. R. Barry Cannada, Butler, Snow, O'Mara, Steven & Cannada, Jackson, MS. Howard Sinor and Katy Kimbell, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA.*

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 Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), a corporation of which a majority of the voting securities are owned by respondent Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckmann"), a limited partnership, and respondent Delta Acquisition Corporation ("Delta"), a wholly-owned subsidiary of respondent Jitney-Jungle, have entered into an agreement to acquire the outstanding shares of respondent Delchamps, Inc. ("Delchamps"), a corporation, all 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, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Complaint

125 F.T.C.

DEFINITION

1. For the purposes of this complaint:

"Supermarket" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

JITNEY-JUNGLE STORES OF AMERICA, INC.

2. Respondent Jitney-Jungle Stores of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi. Jitney-Jungle had sales of approximately \$1.13 billion at its supermarkets, and total sales of \$1.28 billion, in its 1997 fiscal year.

3. Respondent Jitney-Jungle is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Arkansas, Florida, Louisiana, Mississippi, and Tennessee.

4. Respondent Jitney-Jungle 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.

BRUCKMANN, ROSSER, SHERRILL & CO., L.P.

5. Respondent Bruckmann, Rosser, Sherrill & Co., L.P. is a limited partnership 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 126 East 56th Street, 29th Floor, New York, New York.

6. Respondent Bruckmann is, and at all times relevant herein has been, the owner of a majority of the voting securities of Jitney-Jungle.

7. Respondent Bruckmann 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.

DELTA ACQUISITION CORPORATION

8. Respondent Delta Acquisition Corporation 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 located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

9. Respondent Delta is, and at all times relevant herein has been, a wholly-owned subsidiary of Jitney-Jungle established to acquire the outstanding shares of Delchamps.

10. Respondent Delta 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.

DELCHAMPS, INC.

11. Respondent Delchamps, 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 located at 305 Delchamps Drive, Mobile, Alabama. Delchamps had sales of approximately \$1.08 billion at its supermarkets, and total sales of \$1.1 billion, in its 1997 fiscal year.

12. Respondent Delchamps is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Florida, Louisiana, and Mississippi.

13. Respondent Delchamps 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.

ACQUISITION

14. On or about July 8, 1997, Jitney-Jungle and Delta entered into a cash tender offer agreement with Delchamps to acquire all of the outstanding common stock of Delchamps for \$30 per share. The total value of the proposed acquisition is approximately \$228 million.

TRADE AND COMMERCE

15. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

16. Stores other than supermarkets do not have a significant price-constraining effect on food and grocery products sold at supermarkets. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets. In addition, supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not typically change their food and grocery prices in response to prices at other types of stores.

17. Food stores other than supermarkets, such as convenience stores, "mom & pop" stores, and specialty food stores (*e.g.*, seafood markets, bakeries, etc.), are not in the relevant market because they typically offer far fewer items than the average supermarket and charge higher prices for many of the same or similar items. Other types of stores that sell some food and grocery products, such as large drug stores and mass merchandisers, offer only a limited number of items sold in the typical supermarket. The small number of membership club stores, which offer only a limited number of food and grocery products primarily in bulk sizes, do not have a significant effect on market concentration.

18. Military commissaries are also not in the relevant product market. Military commissaries, which are not open to the public, operate as supermarkets for eligible military personnel and their families with retail prices substantially below the average retail prices at supermarkets for the same or similar items. Retail prices at military commissaries are not advertised and are uniform throughout the country based on the actual cost of the item plus a nationwide uniform surcharge determined by rules established by the Secretary of Defense. Retail prices at military commissaries are not based on local market conditions. Supermarkets do not price-check food and

grocery products sold at military commissaries and do not base their prices on the retail prices at the military commissaries.

19. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the following:

- a. The Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Waveland/Bay Saint Louis, Gulfport, north Gulfport, and Biloxi/D'Iberville;
- b. Pensacola, Florida, and narrower markets contained therein;
- c. Hattiesburg, Mississippi and the area immediately west of Hattiesburg; and
- d. Vicksburg, Mississippi.

MARKET STRUCTURE

20. The retail sale of food and grocery products in supermarkets in each of the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would significantly increase the HHIs in each of the already highly concentrated markets.

ENTRY CONDITIONS

21. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

22. Jitney-Jungle and Delchamps are actual competitors in the relevant line of commerce and sections of the country.

EFFECTS

23. The effect of the acquisition, 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. By eliminating direct competition between supermarkets owned or controlled by Jitney-Jungle and supermarkets owned or controlled by Delchamps;

b. By increasing the likelihood that Jitney-Jungle will unilaterally exercise market power; or

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction, each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

24. The proposed acquisition by Jitney-Jungle, Bruckmann, and Delta of all of the outstanding stock of Delchamps 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.

Commissioner Azcuenaga not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Delchamps, Inc. ("Delchamps") by Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckmann"), and Delta Acquisition Corporation ("Delta") (collectively, "respondents"), and 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 comment 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 Jitney-Jungle Stores of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

2. Respondent Bruckmann, Rosser, Sherrill & Co., L.P. is a limited partnership 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 126 East 56th Street, 29th Floor, New York, New York.

3. Respondent Delta Acquisition Corporation 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 located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

4. Respondent Delchamps, 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 located at 305 Delchamps Drive, Mobile, Alabama.

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.

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

A. "*Jitney-Jungle*" means Jitney-Jungle Stores of America, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Jitney-Jungle, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. Jitney-Jungle, after consummation of the Acquisition, includes Delchamps. A majority of the voting securities of Jitney-Jungle are owned by Bruckmann.

B. "*Bruckmann*" means Bruckmann, Rosser, Sherrill & Co., L.P., its predecessors, successors and assigns, subsidiaries, divisions, groups and affiliates controlled by Bruckmann and their respective general partners, officers, employees, agents, and representatives, and the respective successors and assigns of each. Bruckmann owns a majority of the voting securities of Jitney-Jungle.

C. "*Delta*" means Delta Acquisition Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Delta, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. Delta is a wholly-owned subsidiary of Jitney-Jungle.

D. "*Delchamps*" means Delchamps, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Delchamps, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

E. "*Respondents*" means Jitney-Jungle, Bruckmann, Delta, and Delchamps.

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

G. "*Acquisition*" means Jitney-Jungle's, Bruckmann's and Delta's proposed acquisition of all of the outstanding voting securities of and merger with Delchamps pursuant to the Agreement and Plan of Merger dated July 8, 1997.

H. "*Assets To Be Divested*" shall consist of the supermarkets identified in Schedule A of this order and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and

goodwill, tangible and intangible, related to or utilized in the supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the respondents' trade marks, trade dress, service marks, or trade names.

I. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

J. "*Supervalu*" means Supervalu Inc., 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 11840 Valley View Road, Eden Prairie, Minnesota; and Supervalu Holdings, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota. Supervalu Holdings, Inc. is a wholly-owned subsidiary of Supervalu Inc.

K. "*R & M Foods*" means R & M Foods, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 1612 Adeline Street, Hattiesburg, Mississippi.

L. "*Southeast Foods*" means Southeast Foods, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 1001 North 11th Street, Monroe, Louisiana.

M. "*Supervalu Agreement*" means the Purchase Agreement between Supervalu and Jitney-Jungle executed on August 29, 1997, and all subsequent amendments thereto, for the divestiture by respondents to Supervalu of the Assets To Be Divested.

N. "*Acquirer(s)*" means Supervalu, R & M Foods, Southeast Foods, and/or the entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this order.

O. "*Landlord Consents*" means all consents from all landlords that are necessary to effect the complete transfer to the Acquirer(s) of the assets required to be divested pursuant to this order.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested to:

1. Supervalu, in accordance with the Supervalu Agreement (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement) dated August 29, 1997, no later than,

- a. One (1) month after the date on which this order becomes final, or
- b. Five (5) months after acceptance of the agreement containing consent order by the Commission,

whichever is later; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Supervalu Agreement or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required Landlord Consents.

B. If respondents divest the Assets To Be Divested pursuant to the terms of paragraph II.A.1, Supervalu may sell, within three (3) months of the date on which this order becomes final, any of the supermarkets constituting the Assets To Be Divested to R & M Foods or Southeast Foods, but only in a manner that receives the prior approval of the Commission. Respondents shall use their best efforts to assist Supervalu in the sale of the Assets To Be Divested pursuant to this paragraph in accordance with the terms of this order.

C. A condition of approval by the Commission of the divestiture transaction described in paragraph II.A.1 shall be a written agreement by Supervalu that it will not sell the Assets To Be Divested, other than as provided in paragraph II.B, for a period of three (3) years

from the date on which this order becomes final, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission.

D. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith the Assets To Be Divested pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Assets To Be Divested.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, 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 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 respondents to comply with this order.

C. 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 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 have the exclusive power and authority to divest the Assets To Be Divested.

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 each divestiture required by this order.

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

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may 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 divestitures. 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 respondents' absolute and unconditional obligation to make each divestiture required by this order at no minimum price. Each divestiture shall be made in the manner consistent with the terms of this order; provided, however, if the trustee receives *bona fide* offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest

such asset to the acquiring entity or entities 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, 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 divestitures 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 Assets To Be Divested.

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, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 necessary or appropriate to accomplish each divestiture required by this order.

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Assets To Be Divested.

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

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets To Be Divested pursuant to this order, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of Assets To Be Divested 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 all Assets To Be Divested have been divested as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

Provided, however, that advance written notification shall not apply to the construction of new facilities by respondents or the acquisition of or leasing of a facility that has not operated as a

supermarket within six (6) months of respondents' offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty 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 or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after July 1, 1997, to operate a supermarket at that site if such supermarket was formerly owned or operated by respondents in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

B. Respondents shall not remove any equipment from a supermarket owned or operated by respondents in Hancock, Harrison,

Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida, prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondents in the ordinary course of business, or except as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

VII.

It is further ordered, That:

A. 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 or 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 of this order. 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 all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year 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 verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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 respondents that may affect compliance obligations arising out of the order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents 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 respondents relating to any matters contained in this order; and

B. Upon five (5) days' 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.

Commissioner Azcuenaga not participating.

SCHEDULE A

1. The following supermarket located in Hancock County, Mississippi:

a. Delchamps store no. 64 operating under the "Delchamps" trade name, which is located at Choctaw Plaza Shopping Center, 318 Highway 90, Waveland, MS;

2. The following supermarkets located in Harrison County, Mississippi:

a. Jitney-Jungle store no. 33 operating under the "Jitney-Jungle" trade name, which is located at 917 Division St., Biloxi, MS;

b. Jitney-Jungle store no. 32 operating under the "Jitney-Jungle" trade name, which is located at 1225 Pass Road, Gulfport, MS;

c. Jitney-Jungle store no. 42 operating under the "Jitney-Jungle" trade name, which is located at Handsboro Square Shopping Center, 1345 East Pass Road, Gulfport, MS; and

d. Delchamps store no. 364 operating under the "Delchamps" trade name, which is located at 11240-A Highway 49 North, Gulfport, MS;

3. The following supermarkets located in Escambia County, Florida:

a. Jitney-Jungle store no. 54 operating under the "Jitney-Jungle" trade name, which is located at 4081-A East Olive Road, Pensacola, FL.

b. Jitney-Jungle store no. 52 operating under the "Sack & Save" trade name, which is located at Brent Oaks Mall, East Brent Lane, Pensacola, FL.

4. The following supermarket located in Lamar County, Mississippi:

a. Delchamps store no. 67 operating under the "Delchamps" trade name, which is located at Oak Grove Plaza Shopping Center, 4600 West Hardy Street, Hattiesburg, MS.

5. The following supermarket located in Forrest County, Mississippi:

a. Delchamps store no. 9 operating under the "Delchamps" trade name, which is located at 601 Broadway Street, Hattiesburg, MS.

6. The following supermarket located in Warren County, Mississippi:

a. Delchamps store no. 115 operating under the "Delchamps" trade name, which is located at Delchamps Plaza, 3046-D Indiana Avenue, Vicksburg, MS.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi; Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckman"), a limited partnership 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 Two Greenwich Plaza, Greenwich, Connecticut; Delta Acquisition Corporation ("Delta"), 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 located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi; Delchamps, Inc. ("Delchamps"), 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 located at 305 Delchamps Drive, Mobile, Alabama (collectively "proposed respondents"); 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, Jitney-Jungle, of which a majority of the voting securities are owned by Bruckmann, and Delta, a wholly-owned subsidiary of Jitney-Jungle, pursuant to an Agreement and Plan of Merger dated July 8, 1997, agreed to acquire all of the outstanding stock of Delchamps (hereinafter "the proposed Acquisition"); 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 attached Agreement Containing Consent Order ("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 either withdraw such acceptance or issue and serve its Complaint and its Decision and final Order 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 agreement is not reached preserving the *status quo ante* of the Assets To Be Divested as defined in the attached Consent Order (hereinafter referred to as "Assets" or "Supermarket(s)") during the period prior to their divestiture, any divestiture resulting from the Consent Order or from any other administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the purpose of this Agreement and of the Consent Order is to preserve the Assets pending their divestiture pursuant to the terms of the Consent Order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

Whereas, proposed respondents entering into this Agreement shall in no way be construed as an admission by proposed respondents that the proposed Acquisition is illegal; and

Whereas, proposed respondents 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 period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed respondents 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. Proposed respondents agree that from the date proposed respondents sign this Agreement until the earlier of the dates listed in subparagraphs 2.a and 2.b, proposed respondents will comply with the provisions of this Agreement:

a. Three (3) 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. The date all of the divestitures required by the Consent Order have been completed.

3. Proposed respondents shall maintain the viability, marketability, and competitiveness of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they cause the Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the marketability, viability, or competitiveness of the Assets. Proposed respondents shall conduct or cause to be conducted the business of the Supermarkets in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with each Supermarket's suppliers, customers, employees and others having business relations with the Supermarkets, in the ordinary course of the Supermarkets' business and in accordance with past practice. Proposed respondents shall not terminate the operation of any Supermarket. Proposed respondents

shall continue to maintain the inventory of each Supermarket at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such proposed respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Proposed respondents shall use best efforts to keep the organization and properties of each of the Supermarkets intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with each Supermarket. Included in the above obligations, proposed respondents shall, without limitation:

a. Maintain operations and departments and shall not reduce hours at each Supermarket;

b. Not transfer inventory from any Supermarket other than in the ordinary course of business consistent with past practice;

c. Make any payment required to be paid under any contract or lease when due, and otherwise shall pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

d. Maintain each Supermarket's books and records;

e. Not display any signs or conduct any advertising (including direct mailing, point-of-purchase coupons, etc.), that indicates that any proposed respondent is moving its operations to another location, or that indicates a Supermarket will close;

f. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket;

g. Not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket, other than changes in the ordinary course of business consistent with past practice for supermarkets of the proposed respondents not being closed or relocated; or

h. Not transfer any of the proposed respondents' on-site employees employed at any Supermarket on the date of this Agreement to any other supermarket or location owned or operated by any proposed respondent other than transfers in the ordinary course of business consistent with past practice.

4. Should the Commission seek in any proceeding to compel proposed respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, proposed respondents 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 Acquisition. Proposed respondents also waive all rights to contest the validity of this Agreement.

5. 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 proposed respondents and to their principal office(s), proposed respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of proposed respondents, 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 proposed respondents relating to compliance with this Agreement; and

b. To interview officers or employees of proposed respondents, who may have counsel present, regarding any such matters.

6. This Agreement shall not be binding on the Commission until approved by the Commission.

IN THE MATTER OF

JENNY CRAIG, INC., ET AL.

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

Docket 9260. Amended Complaint, Feb. 19, 1998--Decision, Feb. 19, 1998

This consent order prohibits, among other things, the California-based corporations from making unsubstantiated claims about the weight loss, weight loss maintenance, price and safety of the diet program, as well as from using deceptive consumer testimonials and endorsements. The consent order sets out the types of evidence needed to support Jenny Craig's future weight loss and weight loss maintenance claims. In addition, it requires disclosures concerning the actual maintenance experience of the customers or a statement of the generally expected success for program participants or a statement that the dieters should not expect to experience similar results.

Appearances

For the Commission: *Matthew Gold, Kerry O'Brien, David Newman, Laura Fremont and Jeffrey Klurfeld.*

For the respondents: *Patricia P. Bailey, Squire, Sanders & Dempsey, Washington, D.C. and Warren L. Dennis and James P. Holloway, Proskauer, Rose, Goetz & Mendelsohn, Washington, D.C.*

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Jenny Craig, Inc., a corporation, and Jenny Craig International, Inc., a corporation ("Jenny Craig" or "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 Jenny Craig International, Inc., a California Corporation, is a wholly-owned subsidiary of respondent Jenny Craig, Inc., a Delaware Corporation. Jenny Craig, Inc. dominates and controls the acts and practices of Jenny Craig International, Inc. Both corporations maintain their offices and principal places of business at 445 Marine View Avenue, #300, Del Mar, California.

PAR. 2. Respondents have advertised, offered for sale, and sold weight loss and weight maintenance services and products, including

1000 to 1500 calorie-a-day weight loss programs which they make available to consumers at numerous company-owned and franchised "Jenny Craig Weight Loss Centres" nationwide. These products also include "food" 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 for the Jenny Craig Weight Loss Program, including but not necessarily limited to the attached Exhibits A through V.

SUCCESS CLAIMS

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits A through I and Exhibit N, contain the following statements:

- (a) "Jeanne-Mer Garcia lost 81 lbs." (Exhibit A)
- (b) "Maggie Cardoza lost 105 lbs." (Exhibit B)
- (c) "Toni Todd lost 32 lbs." (Exhibit C)
- (d) "Carol Puckett lost 100 lbs." (Exhibit D)
- (e) "Faith Shipp lost 95 lbs." (Exhibits E and N)
- (f) "[Claudine St. Clair] lost 18 lbs." (Exhibit F)
- (g) "Evelyn Moore lost 52 lbs." (Exhibit G)
- (h) "Jaynie Qualls lost 71 lbs." (Exhibit H)
- (i) "Kathy Chamblin lost 73 lbs." (Exhibit I)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-I and N, respondents have represented, directly or by implication, that Jenny Craig customers typically are successful in reaching their weight loss goals.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-I and N, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated the representation.

PAR. 8. In truth and in fact, at the time they made the representation set forth in paragraph six, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit B and Exhibits D through M, contain the following statements:

(a) "I'd tried a million other weight loss programs, but I'd always gain the weight back." (Exhibit D)

(b) "I lost 95 pounds in just over six months. And, I've kept the weight off for nearly one year!" (Exhibit E)

(c) "I lost eighteen pounds in only six weeks. And I've kept the weight off for over a year." (Exhibit F)

(d) "My weight slowly crept up over the years. I joined Jenny Craig because I wanted to lose those extra pounds -- permanently." (Exhibit G)

(e) "I've been overweight so long that I just felt like I was destined to be fat. And now look at me. . . What I learned from Jenny Craig is moderation. Anyone can lose weight. But the key is to learn how to keep it off. And that's what the Lifestyle Classes do." (Exhibit H)

(f) "I used to dream that one day I'd wake up and be slim. Thanks to Jenny Craig, it happened. I tried other programs, but the second I'd go off, I'd gain everything back and then some. While they helped me lose weight, they never taught me how to eat in the real world and keep it off." (Exhibit I)

(g) "And most importantly, I've learned how to maintain my weight. That's key." "Y lo más importante es que he aprendido a mantener mi peso. Eso es la clave." (Exhibits B and J)

(h) "I've kept [89 pounds] off nearly two years." (Exhibit K)

(i) "If you discovered a way to control your weight, who would you tell? 'My Mom and Dad' 'My doubles partner' . . . That's what these successful Jenny Craig clients did." (Exhibit L)

(j) "You know, I [Jenny Craig] get so many letters from people. Sometimes they, they write to me even after they've had their weight off for maybe two or three years. . . I never get tired of hearing about the successes." (Exhibit M)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-M, respondents have represented, directly or by implication, that:

(a) Overweight or obese Jenny Craig customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently, and

(b) Jenny Craig customers typically are successful in maintaining their weight loss achieved under the Jenny Craig Weight Loss Program.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-M, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 12. In truth and in fact, at the time respondents made the representations set forth in paragraph ten, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation as set forth in paragraph eleven was, and is, false and misleading.

PROJECTION OF WEIGHT LOSS CLAIM

PAR. 13. In the routine course and conduct of their business, respondents state, during the initial sales presentation, that consumers typically will reach their desired weight loss goal within the time frame set by respondents' "PD Presentation" computer program.

PAR. 14. In truth and in fact, consumers typically will not reach their desired weight loss goal within the time frame set by respondents' "PD Presentation" computer program. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements described in paragraph thirteen, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis for the representation.

PAR. 16. In truth and in fact, at the time respondents made the representation set forth in paragraph thirteen, they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PRICE CLAIMS

PAR. 17. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit L and Exhibits N through R, contain the following statements:

(a) "Pay as you go for just \$9 a week, or lose all you want for just \$49." (Exhibit L)

(b) "Lose all the weight you want for only a \$185 service fee." (Exhibit N)

(c) "Jenny Craig was different. It didn't have any gimmicks. It's one set price. There wasn't any adding. It was honest. This was the truth. And I've checked every place." (Exhibit O)

(d) "Call the wrong weight loss program and you end up playing 'Let's Make a Deal.' Some have hidden charges. Others, high administrative fees. And some even charge you by the pound. It's like they punish you just because you have to lose weight. At Jenny Craig, we charge you one low fee to lose all the weight you want. No gimmicks. No hidden charges. Jenny Craig. Where weight loss means losing weight. Not your bank account." (Exhibit P)

(e) "Most weight loss programs spend more time on their figures than yours. They figure out ways to hit you with administrative fees. Hidden charges. Some even charge you by the pound. It's like they're punishing you for losing weight. At Jenny Craig you can lose all the weight you want for one low service fee. No gimmicks. No hidden costs. Jenny Craig. Where you get thin. And your wallet doesn't." (Exhibit Q)

(f) "Our price is guaranteed. At Jenny Craig, we fervently adhere to one, often overlooked principle: Honesty. That's why our price is exactly what we say it is. No hidden costs. No deal-of-the-day. It's just one set price. And we'll even tell it to you over the phone. If all that doesn't sound too remarkable, try calling other programs and compare for yourself. Chances are you'll be very surprised at what they tell you. Or more likely, what they don't tell you." (Exhibit R)

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the statements in the advertisements attached as Exhibits L and N-R, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the Jenny Craig Weight Loss Program.

PAR. 19. In truth and in fact, the advertised price is not the only cost associated with losing weight on the Jenny Craig Weight Loss Program. There are substantial additional mandatory expenses associated with participation in the Jenny Craig program that far exceed the advertised price. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

PAR. 20. In their advertising and sale of the Jenny Craig Weight Loss Program, respondents have represented, directly or by

implication, that the advertised price is the only cost associated with losing weight on the Jenny Craig Weight Loss Program. Respondents have failed to disclose adequately to consumers the existence and amount of all mandatory expenses associated with participation in the Jenny Craig program. This fact would be material to consumers in their purchase decisions regarding the program. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

HEALTH RISKS CLAIMS

PAR. 21. In the routine course and conduct of their business, respondents state:

(a) "In just a moment the computer will show you how safely and easily you are going to lose weight without feeling hungry. To put your mind at ease...we have a registered dietitian along with our medical consultant team to ensure that while your weight loss is easy, it is also 100% safe and hunger-free." (Suggested sales script for Jenny Craig tour guide)

(b) "Our Program provides a safe, easy weight loss that is personally supervised." ("Sample Telephone Script" contained in Jenny Craig Sales Manual)

(c) "Our experience has taught us that using drugs is neither safe nor permanent. Our program aims at more permanent weight loss results and it's 100% safe." ("Sample Telephone Script" contained in Jenny Craig Sales Manual)

PAR. 22. In the routine course and conduct of their business, respondents provide their customers with diet protocols that require said customers, *inter alia*, to come in to a Jenny Craig Weight Loss Centre at least once a week for monitoring of their progress, including weighing in.

PAR. 23. Through the use of the statements set forth in paragraph twenty-one, and through the conduct of the monitoring described in paragraph twenty-two, respondents have represented, directly or by implication, on an ongoing basis to each customer, that customers on respondents' weight loss program lose weight safely and do not experience an increased risk of developing health complications.

PAR. 24. In the course of regularly monitoring their customers' weight loss progress, respondents, in some instances, are presented with weight loss results indicating that a customer is losing weight significantly in excess of what would be expected, considering the daily caloric intake prescribed for that customer, which is an indication that the customer may not be consuming all of the calories prescribed by his or her diet protocol. Such conduct could, if

prolonged, result in health complications associated with rapid weight loss.

PAR. 25. Respondents have failed to disclose, either in their advertising, at point of sale, or to individual customers losing weight too rapidly, that such weight loss, if prolonged, could result in health complications, including the development of gallbladder disease. This fact would be material to consumers in their purchase and use decisions regarding respondents' program.

PAR. 26. In light of the representations set forth in paragraph twenty-three, respondents' failure to disclose that not consuming all of the calories prescribed by the diet protocol, if prolonged, could result in health complications, including the development of gallbladder disease, is a deceptive practice.

PAR. 27. In providing the advertisements referred to in paragraph four and the materials referred to in paragraph thirteen and paragraph twenty-one to their individual franchised stores for the purpose of inducing consumers to purchase their weight loss services and products, respondents have furnished the means and instrumentalities to those stores to engage in the acts and practices alleged in paragraphs five through twenty-six.

CUSTOMER SATISFACTION CLAIMS

PAR. 28. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits S through V and Exhibit L, contain the following statements:

(a) "9 out of 10 Clients Would Recommend Jenny Craig.... When we asked our clients if they would recommend our program to their friends they gave us a resounding, 'Yes!' And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it." (Exhibit S)

(b) "86% liked the counseling...89% liked the program...And 94% would recommend us to a friend. National Survey of Jenny Craig Clients Oct-Dec 1991. Now what could be more impressive than that?" (Exhibit T)

(c) "The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking..." (Exhibit U)

(d) "National Survey of Jenny Craig Clients Oct-Dec 1991 Percentage of Jenny Craig clients responding 'completely satisfied' or 'very satisfied':

- * With the overall Jenny Craig program 89%
- * With the weekly personal counseling sessions 87%
- * With the friendliness of the Jenny Craig staff 91%
- * That would recommend the program to a friend 94%

YOU'RE PROBABLY WONDERING WHAT ELSE WE COULD POSSIBLY DO TO IMPRESS YOU." (Exhibit V)

(e) "In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends." (Exhibit L)

PAR. 29. Through the use of the statements contained in the advertisements referred to in paragraph twenty-eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits S-V and L, respondents have represented, directly or by implication, that competent and reliable studies or surveys show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 30. In truth and in fact, competent and reliable studies or surveys do not show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program. Therefore, the representation set forth in paragraph twenty-nine was, and is, false and misleading.

PAR. 31. Through the use of the statements contained in the advertisements referred to in paragraph twenty-eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits S-V and L, respondents have represented, directly or by implication, that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 32. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits S-V and L, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs twenty-nine and thirty-one, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 33. In truth and in fact, at the time they made the representations set forth in paragraphs twenty-nine and thirty-one, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirty-two was, and is, false and misleading.

PAR. 34. 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.

Chairman Pitofsky recused and Commissioner Azcuenaga not participating.

EXHIBIT A

**JEANNE-MER GARCIA
LOST 81 LBS.**

Height 5'4"	BEFORE	AFTER
Weight	245 lbs.	164 lbs.
Dress Size	20-22	10-12

"I just love the service and the results. I've lost 81 lbs. in 18 months and I feel great!"

THE REAL LIFE ANSWER

We'll pay you a dollar for every pound you lose.

Right now Jenny Craig will pay you a dollar for every pound you've lost once you reach your goal weight. 40 pounds to lose? Get \$40 back. 60 pounds? \$60 back, etc., etc., etc. How much would you like to get back?

DIAL DIRECT 1-800-92-JENNY

JENNY CRAIG
Weight Loss Centers

There are 7 centres in the Milwaukee area including:

Bayshore	Brown Deer	Greenfield	St. Francis
Brookfield	East Brady	Racine	

Some restrictions apply. See Jenny Craig website for details. ©1992 Jenny Craig International, Inc.

Exhibit A

Complaint

125 F.T.C.

EXHIBIT B

"Jenny Craig helped me become the person I've always wanted to be."



Maggie Carozza
lost 125 lbs.

Thanks to Jenny, I feel like I have a new lease on life. I feel stronger both physically and emotionally. And I have so much more self-confidence than I ever thought possible. I've learned how to eat healthy, well-balanced meals. And most importantly, I've learned how to maintain my weight. That's key!

SUMMER SPECIAL
\$79

Now you can.
JENNY CRAIG
Weight Loss Center

CALL TODAY

*Some fee • Some Center additional • Most credit cards accepted • Open Saturdays and evenings • Massachusetts: Products sold online • © 1992 Jenny Craig International

Maggie Carozza Testimonial
Ad #102163

Exhibit B

\$79

SUMMER SPECIAL
\$92

Low price for 2 weeks
\$92

\$97

\$145

\$149
Price per week

Low price for 2 weeks
\$185
Price per week

Low price for 2 weeks
\$195
Price per week

5234

EXHIBIT C

20c 6/7/71

Call Now. \$99.*

Lose All You Want.

- One-on-one counseling.
- Nutritionally balanced menu plans.
- Weight management classes.
- Personal exercise plan.



Terri Todd lost
32 lbs. in 5 months

ROSS PLAZA
 4770 Montgomery NE. #C115
 (Montgomery at Monroe)
888-1368

MANZANO CENTER
 800 Juan Tabo NE #M
 (Juan Tabo at Lomas)
275-7252

*Offering based on Jenny Craig's 1970-71 Menu Plan. *Montgomery Plaza location. *Individual results may vary. ©1971 Jenny Craig International, Inc.

Complaint

125 F.T.C.

EXHIBIT D

“Jenny Craig was the only program that didn't make me feel like I was suffering.” I guess you could call me an experienced dieter. I'd tried a million other weight loss programs, but I'd always gain the weight back. Jenny Craig is special because it offers individual counseling and lifestyle classes that really smart me things like how to control cringing. It's such a good feeling to be proud of the way I look. I don't feel like hiding in corner anymore. I wear exactly what I want. And for the first time in years, I put my true weight on my driver's license. **Now you can.**

JENNY CRAIG
Light Your Change

Call today.

© Jenny Craig, Inc. 1994. Jenny Craig is a registered trademark of Jenny Craig, Inc. All other trademarks are the property of their respective owners.

OFFSPECIAL
Lose all the weight you want.
\$97⁵⁰*
Price Guaranteed.

Lose all the weight you want.
\$92⁵⁰*
Price Guaranteed.

Lose all the weight you want.
\$99*
Price Guaranteed.

Lose all the weight you want.
\$97⁵⁰*
Price Guaranteed.

Lose all the weight you want.
\$149*
Price Guaranteed.

Lose all the weight you want.
\$185*
Price Guaranteed.

Lose all the weight you want.
\$195*
Price Guaranteed.

Lose all the weight you want.
\$235*
Price Guaranteed.

The following Ad (3 col.)
Carol
Ad # 102064
23

Exhibit D

. 000015

EXHIBIT E

“I never thought I'd keep my weight off for more than an hour! Who is that fat girl? That's what I screamed when I saw myself on a home video a year and a half ago. I vowed, then and there, to find a weight loss program I could survive—physically and financially. Jenny Craig fit my needs. I lost 95 pounds in just over six months. And, I've kept the weight off for nearly one year! My family and friends say, 'If Faith can do it, so can I!' I just want to tell the world that losing weight is possible and frivable.”

Now you can.



Faith Stepp lost 95 lbs.



JENNY CRAIG
Weight Loss Center

Lose all the weight you want. Only \$185*
Call today.

© 1994 Jenny Craig, Inc. All rights reserved.
*Offer by Jenny Craig additional.
*Must meet other criteria. Open Signature and meeting. *Manufacture: Product shown.

#192272

EXHIBIT E

Complaint

125 F.T.C.

EXHIBIT F

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL

Claudine St. Clair (talking to camera):
 Hi. I'm Claudine St. Clair of KJOI Radio, here to tell you about the Jenny Craig weight loss program. On Jenny's program everything was planned for me. I lost eighteen pounds in only six weeks. And I've kept the weight off for over a year."

Jenny Craig (talking to camera):
 "At Jenny Craig, we not only help you lose weight, we teach you how to keep it off. We helped Claudine St. Clair of KJOI Radio lose weight and improve her confidence. We'd like to do that for you too."

Announcer:
 "Call now and lose all the weight you want for only a \$185 service fee. Jenny's cuisine not included."

VISUAL

Claudine St. Clair
 KJOI Radio

Lost 18 lbs. in 6 weeks

Individual results may vary

Jenny Craig

Jenny Craig Weight Loss
 Centres Lose all the Weight
 You Want \$185 Open Saturdays
 and Evenings Call 411 for
 location nearest you

EXHIBIT G

“As far as I’m concerned, Jenny Craig is the only way to go. My weight slowly crept up over the years. I joined Jenny Craig because I wanted to lose those extra pounds—permanently. And I didn’t want to waste time and money on a bunch of gimmicks. The most exciting thing for me is being able to wear my dream size, a nine. My family and friends can’t believe my new look. These days, I actually wear my Nise tucked in. Jenny Craig gave me the encouragement and confidence I needed.”




5X-OFF SPECIAL
Lose all the weight you want.
\$92.50*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$97.50*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$99*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$149*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$185*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$195*
Price Guaranteed.

5X-OFF SPECIAL
Lose all the weight you want.
\$235*
Price Guaranteed.

Now you can.
JENNY CRAIG
The Weight Control Center

Call today.

Testimonial Ad (3 cont.)
Evelyn
Ad #102063

Exhibit G

FOR PAGES 347-3

Complaint

125 F.T.C.

EXHIBIT H

JENNY CRAIG TELEVISION CO.

ORAL

WOMAN (talking to camera):
 I've been overweight so long that I
 just felt like I was destined to be fat.
 And now look at me. I can wear
 things that are tight around my waist
 and big prints and I'll even show my
 legs. What I learned from Jenny
 Craig is moderation. Anyone can lose
 weight. But the key is to learn how
 to keep it off. And that's what the
 Lifestyle Classes do. There's just
 something I'd like to say to all the
 people who have teased me when I
 was a kid. Nah. Nah. Nah. Nah.
 Nah. Nah. I'm on TV and you're not.*

Announcer:
 Now you can.

Lose all the weight you want for only
 a \$79 service fee.

Call 1-800-76 Jenny.*

VISUAL

Jaynie Qualls lost 71 lbs

Individual results may vary

Now you can

JENNY CRAIG

Weight Loss Centers
 Lose all the weight you want

\$79

Jenny Craig continues

1-800-76-JENNY

EXHIBIT I

“Before Jenny Craig, I would never have dreamed of wearing spandex in public. I used to dream that one day I’d wake up and be slim. Thanks to Jenny Craig, it happened. I tried other programs but the second I’d go out, I’d gain everything back and then some. While they helped me lose weight, they never taught me how to eat in the real world and keep it off. I was so disappointed, overweight, that I never wanted to do anything outside my house. But now I’m much more confident, much more sure of myself. Some people don’t even recognize me. That makes me feel great.”

Now you can.

JENNY CRAIG
Weight Loss Center

Call today.

*Some items have additional fees and restrictions. Offer valid only in the U.S. © 1998 Jenny Craig, Inc.

5% OFF SPECIAL
Lose all the weight you want.
\$92.50*
Price Guaranteed.

5% OFF SPECIAL
Lose all the weight you want.
\$97.50*
Price Guaranteed.

Lose all the weight you want.
\$92.50*
Price Guaranteed.

Testimonial Ad (3 col.)
Kathy
Ad 1102065
33

Lose all the weight you want.
\$99*
Price Guaranteed.

Lose all the weight you want.
\$97.50*
Price Guaranteed.

Lose all the weight you want.
\$149*
Price Guaranteed.

Lose all the weight you want.
\$185*
Price Guaranteed.

Lose all the weight you want.
\$195*
Price Guaranteed.

Lose all the weight you want.
\$235*
Price Guaranteed.

Complaint

125 F.T.C.

EXHIBIT J

"Jenny Craig me ayudó a convertirme en la persona que siempre quise ser"



Maggie Carlson redujo 100 lbs.

"Gracias a Jenny, un día me convertí en la persona que siempre quise ser. Me siento mejor en la vida y en la sociedad. Y tengo tanta confianza como antes lo era posible. Me siento a gusto y feliz. Y lo más importante es que he aprendido a cuidarme a mí misma. Eso es lo clave."

¡Ahora sí puede!

JENNY CRAIG

LLAME HOY MISMO 005257.

<p>¿CÓMO FUNCIONA?</p> <p>Se trata de un programa de alimentación controlada que te ayuda a perder peso de forma saludable y sostenible. Incluye un plan de comidas personalizadas y apoyo emocional para ayudarte a mantener tus hábitos saludables a largo plazo.</p>	<p>¿QUÉ BENEFICIOS OBTENDRÁS?</p> <p>Perderás peso de forma saludable y sostenible. Mejorarás tu salud y tu bienestar emocional. Tendrás un plan de comidas personalizado que se adapta a tus gustos y necesidades.</p>	<p>¿CÓMO SE PUEDE OBTENER?</p> <p>Se puede obtener a través de un programa de membresía que incluye un plan de comidas personalizadas y apoyo emocional. El programa está disponible en español y en inglés.</p>
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Exhibit J

EXHIBIT K

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORALVISUAL

WOMAN 1 (talking to camera):
"Like a whole new life."

Lost 71 lbs.

WOMAN 2 (talking to camera):
"I feel like I matter."

Lost 138 lbs.

MAN 1 (talking to camera):
"I don't think like a fat person."

Lost 50 lbs.

Jenny Craig Success Stories

WOMAN 1 (talking to camera):
"Control means success."

Lost 71 lbs.

WOMAN 3 (talking to camera):
"How to say no."

Lost 31 lbs.

WOMAN 4 (talking to camera):
"Actually to eat only when I'm
hungry."

Lost 39 lbs.

MAN 1 (talking to camera):
"Not being the first person finished
all the time."

Lost 50 lbs.

WOMAN 2 (talking to camera):
"Leaving a little something on my
plate."

Lost 138 lbs.

WOMAN 5 (talking to camera):
"Success is losing weight with Jenny
Craig."

Lost 89 lbs.

WOMAN 6 (talking to camera):
"And controlling it."

Lost 30 lbs.

WOMAN 5 (talking to camera):
"I've kept it off nearly 2 years."

Lost 89 lbs.

Complaint

125 F.T.C.

EXHIBIT K

ANNOUNCER:
***Join our new success program**

Jenny Craig
Weight Loss Centres
New Success Program

for only a \$79 service fee.

JENNY CRAIG

Weight Loss Centres

\$79

Lose all the weight you want

Individual Results may Vary
Jenny's Calorie Intake Plan Maintenance Program Optional

Call 1-800-76-Jenny.*

1-800-76-JENNY

EXHIBIT L

JENNY CRAIG TELEVISION COMMERCIAL ---

ORAL

Announcer:
If you discovered a way to
control your weight,

who would you tell?

WOMAN1 (talking to camera):
"My Mom and Dad"

WOMAN2 (talking to camera):
"My doubles partner"

WOMAN3 (talking to camera):
"The guy at the donut shop"

WOMAN2 (talking to camera):
"Half the girls at the club"

MAN1 (talking to camera):
"My mechanic"

WOMAN1 (talking to camera):
"My day care lady"

Announcer:
"That's what these successful
Jenny Craig clients did"

WOMAN4 (talking to camera):
"My dog trainer"

WOMAN1 (talking to camera):
"My father"

WOMAN5 (talking to camera):
"My aunt"

WOMAN2 (talking to camera):
"My chiropractor"

VISUAL

If You Discovered A
Way to Control Your Weight...

Who Would You Tell?

Dori Green lost 24 lbs. in 6
months

Shelly Benedict lost 27 lbs.
in 5 months

Leslie Baldwin lost 36 lbs. in
8 months

Mark Hackbarth lost 66 lbs. in
13 months

That's What These
Successful Jenny Craig
Clients Did

Joanne Walton lost 32 lbs. in
10 months

Nanci Porter lost 31 lbs. in 4
months

Complaint

125 F.T.C.

EXHIBIT L

Announcer:
"In fact, 9 out of 10 Jenny Craig
clients

9 out of 10
Jenny Craig Clients
and would recommend Jenny Craig to their friends.

would recommend Jenny Craig to
their friends."

Would Recommend
Jenny Craig
To Their Friends.
Individual weight loss and maintenance may vary.

WOMAN1 (talking to camera):
"There are so many"

Announcer:
"Pay as you go for just \$9 a week, or

Pay as you go.

\$9

A WEEK

Program Fee
JENNY CRAIG

Weight Loss Centers
Jenny's Centers nationwide

lose all you want for just \$49"

Lose all the weight.

\$49

Program Fee
JENNY CRAIG

Weight Loss Centers
Jenny's Centers nationwide

Call 1-800-92 Jenny."

1-800-92-JENNY

EXHIBIT M

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL

VISUAL

Jenny Craig (talking to camera):
 "You know, I get so many letters from
 people. Sometimes they, they write
 to me even after they've had their
 weight off for maybe two or three
 years. Probably the thing that I hear
 most often is that 'Your counselors
 are wonderful. They really care.' I
 never get tired of hearing about the
 successes. I just feel like we're doing
 something important.

Jenny Craig

Announcer:
 "Now you can.

Now you can.

Lose all the weight you want for only
 a \$79 service fee.

JENNY CRAIG

Weight Loss Centres
 Lose all the weight you want

\$79

Jenny's Choice additional

Call 1-800-76-Jenny."

1-800-76-JENNY

Complaint

125 F.T.C.

EXHIBIT N

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL

JENNY CRAIG (talking to Camera):
 "Usually something happens in a
 person's life that will say, they'll say
 to themselves 'I've got to do
 something about this weight
 problem.' And when that happens,
 then what they're really saying is
 'teach me how to do that.' Over the
 years, we've learned what really
 works with people, and that's what
 we've tried to incorporate into the
 Jenny Craig program. It's as easy
 and as quick as you can possibly
 make a weight loss program."

ANNOUNCER:
 "Now you can.

Loss all the weight you want for
 only a \$185 service fee.

Call 1-800-76-Jenny."

VISUAL

Jenny Craig

Now

you

can

Now you can

JENNY CRAIG

Weight Loss Centers

Lose all the weight you want

\$185

Jenny's Complete Address

1-800-76-JENNY

EXHIBIT O

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL

WOMAN (talking to camera):
"I saw myself on this video tape at
my son's birthday. I go: 'Who is
this fat girl?' I just said right then
'I've got to do something.' Jenny
Craig was different. It didn't have
any gimmicks. It's one set price.
There wasn't any adding. It was
honest. This was the truth. And I
checked every place. I've lost 95
pounds. Ta Da"

Announcer:
"Now you can.

Lose all the weight you want for
only a \$185 service fee.

Call 1-800-76-Jenny."

VISUAL

Faith Shipp lost 95 lbs.

Individual results may vary

Now you can

JENNY CRAIG

Weight Loss Centres
Lose all the weight you want

\$185

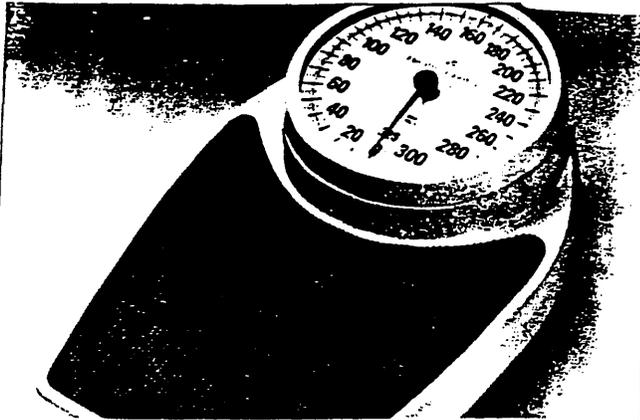
Jenny Craig additional

1-800-76-JENNY

Complaint

125 F.T.C.

EXHIBIT P



To most weight loss programs
this is a cash register.

Call the wrong weight loss program and you end up playing "Let's Make a Deal!" Some have hidden charges. Others, high administrative fees. And some even charge you by the pound. It's like they punish you just because you have to lose weight.

At Jenny Craig, we charge you one low fee to lose all the weight you want. No gimmicks. No hidden charges. Jenny Craig. Where weight loss means losing weight. Not your bank account.

\$185*

Lose all the weight you want for one low service fee.

Now you can.



Call today.

\$99*

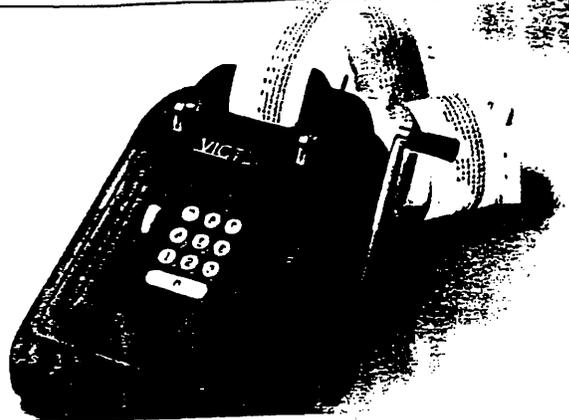
\$235*

\$195*

© 1997 Jenny Craig International

*Service fee • Jenny's Cuisine additional • Maintenance Products optional • Major credit cards accepted • Open 6 days and evenings

EXHIBIT Q



Most weight loss programs are more concerned with their bottom line than your waistline.

Most weight loss programs spend more time on their figures than yours. They figure out ways to hit you with administrative fees. Hidden charges. Some even charge you by the pound. It's like they're punishing you for losing weight. At Jenny Craig you can lose all the weight you want for one low service fee. No gimmicks. No hidden costs. Jenny Craig. Where you get thin. And your wallet doesn't.

\$185*
Lose all the weight you want for one low service fee.

Now you can.

JENNY CRAIG
Weight Loss Centers
Call today.

\$99*
\$235*
\$195*

*Service fee • Jenny's Cuisine additional • Maintenance Products optional • Major credit cards accepted • Open Saturdays and evenings

EXHIBIT R

"We've thought of everything you need to lose weight."

1. Counselors who care. Nothing is more important than having the encouragement and support of a personal counselor who understands you. Counselors are available to help you at every step. During private sessions, we'll help you set goals and address your individual concerns. Everything you learn is based on the latest research. Our counselors are well-trained. They're exceptional. They're Jenny Craig.



2. Learn from experts. Our Jenny Craig diet has been painstakingly researched and developed by experts in nutrition, medicine, psychology, and exercise. Each weekly session is focused on a single, manageable topic, whether it's cooking for others, dining out, or learning how to eat all the foods you allow without gaining weight. Our classes give you the tools you need to succeed.



3. Fresh-frozen entrees. Let's be honest, for our weight loss program to work, it has to serve the food. Which is why our entrees are fresh-frozen, not frozen-dried. The same goes for our other meals. We'll have you eating like a pro in just a few weeks. Jenny Craig's Fresh-Frozen Entrees include: Chicken, Beef, Pork, Turkey, Fish, Shellfish, Seafood, Chicken, Beef, Pork, Turkey, Fish, Shellfish, Seafood. And if it's something you're curious about, our personal Jenny Craig is happy to help. Just call us at 1-800-850-8500, and we'll be there to help you.



4. Our price is guaranteed. At Jenny Craig, we're committed to helping you lose weight. That's why our price is guaranteed. No hidden costs. No extra charges. It's just one set price. And we'll even call you over the phone if all that Jenny Craig help isn't enough. We're calling often to progress and compare for success. Chances are you'll be very surprised at what they tell you. Or more likely, what they don't tell you.

Now you can.

JENNY CRAIG
Weight Loss Center

Call today

Lose all the weight you want. **\$99*** Price Guaranteed.

50% OFF SPECIAL Lose all the weight you want. **\$97.50*** Price Guaranteed.

Lose all the weight you want. **\$235*** Price Guaranteed.

Lose all the weight you want. **\$195*** Price Guaranteed.

Lose all the weight you want. **\$185*** Price Guaranteed.

Lose all the weight you want. **\$149*** Price Guaranteed.

Lose all the weight you want. **\$97.50*** Price Guaranteed.

50% OFF SPECIAL Lose all the weight you want. **\$92.50*** Price Guaranteed.

JENNY CRAIG
© 2001
No. 1122001

EXHIBIT S

9 Out Of 10 Clients Would Recommend Jenny Craig. Who Did They Tell?

 "I told my hairdresser" Nancy Kujawa lost 25 lbs.	 "I told my coach" Queen Oakley lost 200 lbs.	 "I told my parents" Laurie Jackson lost 20 lbs.
 "I told my secretary" Kelly Allington lost 25 lbs.	 "I told my best friend" Cynthia West lost 45 lbs.	 "I told my best friend" Betsy Buchanan lost 20 lbs.
 "I told my doctor" Joni Lortie lost 55 lbs.	 "I told everyone I know" Carol Puckler lost 200 lbs.	 "I told my best friend" Helen Harvey lost 25 lbs.

When we asked our clients if they would recommend our program to their friends they gave us a resounding "Yes!" And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it.

CALL NOW 1-800-97-JENNY



Pay As You Go

\$6

A Week Program Fee

Weight Loss Center

Jenny Craig is a service. Individual results may vary. * Maintenance/Products optional. * Open Saturdays and evenings. © 1991 Jenny Craig International

Issaquah Press (Seattle)
9 Out of 10
Ad #132095, 3 col x 8"
3/17 Insertion

Exhibit S

Complaint

125 F.T.C.

EXHIBIT T

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	JCI-GEN-422062	Title	Statistics/L5
Client	JENNY CRAIG	Status	AS PRODUCED
Product		Length	:30
ISCI No	YJCJ 0527	Date	4/16/92
	CORPORATE		

VIDEO	AUDIO
TITLE: WHAT TO YOU LIKE ABOUT LOSING WEIGHT WITH JENNY CRAIG?	AYQ: What do Jenny Craig clients like about Jenny Craig?
CUT TO MARIA GENOVESE	MARIA: My Jenny Craig counselor is wonderful.
CUT TO LAURA BECK	LAURA: She was always encouraging.
TITLE: 86% LIKED THE COUNSELING NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991	AYQ: 86% liked the counseling.
CUT TO MARIA GENOVESE	MARIA: The Lifestyle classes are so important.
CUT TO PHIL MCDERMOTT	PHIL: The food was great.
CUT TO LAURA BECK	LAURA: The Jenny Craig Program works in real life.
TITLE: 89% LIKED THE PROGRAM NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991	AYQ: 89% liked the program.
CUT TO PHIL MCDERMOTT	PHIL: If you want to lose weight.
CUT TO MARIA GENOVESE	MARIA: Go to Jenny Craig.
CUT TO PHIL MCDERMOTT	PHIL: Right away.
TITLE: 94% RECOMMEND TO A FRIEND NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991	AYQ: And 94% would recommend us to a friend.
CUTS OF MARIA, PHIL, AND LAURA	Now. What could be more impressive than that?
TITLE: Lose all you want. \$9 Program Fee (LOGO) Jenny's Cuisine additional.	Lose all you want for \$39.
TITLE: Get back a dollar a pound once you reach your goal weight. (LOGO) Some restrictions apply	Then get back a dollar for every pound you lose.
TITLE: Get back a dollar a pound. 1-800-92-JENNY (LOGO) Some restrictions apply	Call 1-800-92-JENNY. How much would you like to get back?

Exhibit T

EXHIBIT U

J. Walter Thompson

R A D I O

SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	732011	Title	*9 OUT OF 10/947*	
Client	JENNY CRAIG	Status	AS PRODUCED	
Product		Length	:45:15	
ISCI No.	YICR2017	Date	3/24/93	2126/am

WOMAN:

The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking. If Jenny Craig helped me control my weight -- oh not my usual starve-stuff, give my scale a whiplash kind of control -- but *real* control, who would I tell? Well, not being one to gloat, I'd casually mention it to my mother and a few dear, dear friends. I'd drop a hint about Jenny to my boss. My dry cleaner. My plumber. My therapist. I'd tell my neighbor Fred who mows his lawn without a shirt. Geezh! I'd run up forty floors to the top of my office building and shout "hey, you down there, look what Jenny did, I can manage my weight now." But before I hit the talk show circuit, do my book tour, gather awards and acclaim the world over, I better call Jenny Craig first.

LIVE ANNCR:

At Jenny Craig lose all the weight you want for just a \$1 a pound. Call 1-800-947-JENNY. 1-800-947-J-E-N-N-Y. Offer good at participating centres. Jenny's Cuisine additional.

**National Survey
of Jenny Craig Clients**

Oct-Dec 1991

Percentage of Jenny Craig clients responding
"completely satisfied" or "very satisfied":

- With the overall Jenny Craig program **89%**
- With the weekly personal counseling sessions **87%**
- With the friendliness of the Jenny Craig staff **91%**
- That would recommend the program to a friend **94%**

**YOU'RE PROBABLY WONDERING
WHAT ELSE WE COULD POSSIBLY
DO TO IMPRESS YOU.**

FREE PROGRAM FEE.

We're so sure you'll be satisfied with the Jenny Craig program, that when you bring this coupon in, we'll waive your program fee. Jenny's Choice is a required additional purchase.

JENNY CRAIG
Weight Watchers Center
THE REAL LIFE ANSWER

DIAL DIRECT 1-800-92-JENNY

© 1991 Jenny Craig, Inc.

#122081 4 ct x 15.75

EXHIBIT V

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, and having modified the order in several respects, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Jenny Craig, 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 445 Marine View Avenue, #300, Del Mar, California.

Respondent Jenny Craig International, 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 445 Marine View Avenue, #300, Del Mar, California.

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

A. "*Competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, surveys 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.

B. "*Weight loss program*" shall mean any program designed to aid consumers in weight loss or weight maintenance.

C. "*Broadcast medium*" shall mean any radio or television broadcast, cablecast, home video, or theatrical release.

D. For any order-required disclosure in a print medium to be made "*clearly and prominently*" or in a "*clear and prominent manner*," it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type.

E. For any order-required disclosure given orally in a broadcast medium to be made "*clearly and prominently*" or in a "*clear and prominent manner*," the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

F. For any order-required disclosure given in the video portion of a television or video advertisement to be made "*clearly and prominently*" or in a "*clear and prominent manner*," the disclosure must be of a size and shade and must appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.

G. "*Short broadcast advertisement*" shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That Jenny Craig, Inc., a corporation, and Jenny Craig International, Inc., a corporation ("respondents"), their successors and assigns, and respondents' officers, representatives,

agents, and employees, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation;

Provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondents' program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program, or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary.";

Provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program;

Provided, however, that a truthful statement that merely describes the existence, design or content of a weight maintenance or weight management program or notes that the program teaches clients about how to manage their weight will not, without more, be considered for purposes of this order a representation regarding weight loss maintenance success;

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D herein, and except through endorsements or testimonials referred to in paragraph I.E herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants,

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed, and

(3) If the participant population referred to is not representative of the general participant population for respondents' programs:

(a) The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "Jenny Craig makes no claim that this [these] result[s] is [are] representative of all participants in the Jenny Craig program.";

Provided, however, that for representations about weight loss maintenance success that do not use a number or percentage, or descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term," respondents may, in lieu of the disclosures required in C.(1)-(3) above,

(i) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record."; and

(ii) For a period of time beginning with the date of the first dissemination or broadcast of any such advertisement and ending no sooner than thirty (30) days after the last dissemination or broadcast of such advertisement, give to each potential client, upon the first presentation of any form asking for information from the potential client, but in any event before such person has entered into any agreement with respondents, a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B and subparagraphs I.C(1)- (3) of this order, formatted in the exact type size and style as the example form described in paragraph I.D(2)(a) and set out below;

Provided, further, that compliance with the obligations of this paragraph I.C in no way relieves respondents of the requirement under paragraph I.A of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record.";

in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term";

Provided, however, that the provisions of paragraph I.D shall not apply to endorsements or testimonials referred to in paragraph I.E herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss program if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for Jenny Craig customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Jenny Craig customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; and that for endorsements or testimonials about weight loss success, respondents can satisfy the requirements of this subparagraph by accurately disclosing:

(a) The generally expected success for Jenny Craig customers in the following phrase: "Weight loss averages (number) lbs. over ___ weeks"; or

(b) The average number of pounds lost by Jenny Craig customers, using the following phrase: "Average weight loss (number) lbs. More details at centers"; and, for a period of time beginning with the date of the first dissemination of any such advertisement and ending no sooner than thirty days after the last dissemination of such advertisement, making in any on-site video promotion the preceding disclosure orally and complying with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(i) Give to each potential client a separate one-page document with an appropriate title that alerts customers that important information follows, which shall disclose, clearly and prominently, what the generally expected success would be for Jenny Craig customers in losing weight, expressed in terms of both average number of pounds lost and average duration of participation in the Jenny Craig program; such document shall be formatted in the following type size and style: heading (Helvetica 14 pt. bold), disclosures (Helvetica 14 pt. bold), signature block (Times Roman 12 pt.), and any other language (no larger than 14 pt.); provided, further, that no information that contradicts this information shall be included in the document required by this subparagraph;

(ii) Ask each potential client to sign such document;

(iii) Give each client a copy of such document; and

(iv) Retain in each client file a copy of the notice provided to clients under the requirements of this subparagraph; or

(2) 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; respondents can satisfy the requirements of this subparagraph by clearly and prominently disclosing in close proximity to the representation one of the following statements:

(a) "You should not expect to experience these results."

(b) "This result is not typical. You may not do as well."

(c) "This result is not typical. You may be less successful."

(d) "_____ 's success is not typical. You may not do as well."

(e) "_____ 's experience is not typical. You may achieve less."

(f) "Results not typical."

(g) "Results not typical of program participants."

Provided, however, that a truthful statement that merely describes the existence, design or content of a weight maintenance or weight management program or notes that the program teaches clients how to manage their weight, or which states either through the endorser or in nearby copy that under the program "weight loss maintenance is possible," or words to that effect, will not, without more, be considered for purposes of this paragraph a representation regarding

weight loss maintenance success or trigger the need for separate or additional maintenance disclosures required by other paragraphs of the order;

Provided, further, that:

(i) A representation about maintenance by an endorser that states a number or percentage, or uses descriptive terms that convey a quantitative measure, such as "I have kept off most of my weight loss for 2 years," shall be considered a representation regarding weight loss maintenance success;

(ii) If endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either (1) in close proximity to such representation, the existence and amount of all mandatory costs and fees associated with the program offered; or (2) in immediate conjunction with such representation, the following statement: "Plus the cost of [list of products or services that participants must purchase at additional cost].";

Provided, further, that in a broadcast medium, if the representation that triggers the disclosure is oral, the required disclosure must also be made orally.

H. Failing to disclose over the telephone, for a period of time beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of any such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any mandatory costs or fees associated with participation in the program.

I. Representing, directly or by implication, that prospective participants in respondents' weight loss program will reach a specified weight within a specified time period, unless at the time of making

such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Misrepresenting, directly or by implication, the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss.

K. Failing to disclose, clearly and prominently, in writing either:

- 1) To all participants when they enter the program; or
- 2) To each participant whose average weekly weight loss exceeds two percent (2%) of his or her initial body weight, or three pounds, whichever is less, for at least two consecutive weeks;

that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications.

L. Misrepresenting, directly or by implication, the performance, efficacy, price, or safety of any weight loss program or weight loss product.

M. Representing, directly or by implication, that participants on any weight loss program recommend or endorse the program unless, at the time of making any 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.

N. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey.

II.

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

III.

It is further ordered, That for three (3) 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.

IV.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

V.

It is further ordered, That:

A. Respondents shall distribute a copy of this order to each of their franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondents may satisfy this contractual requirement by incorporating such order requirements into their current Operations Manual; and

B. Respondents shall further make reasonable efforts to monitor their franchisees' and licensees' compliance with the order provisions; respondents may satisfy this requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondents determine is failing materially or repeatedly to comply with any order provision that such franchisee or licensee is not in compliance with the order provisions and that disciplinary action may result from such noncompliance; and (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified;

provided, however, that the requirements of this Part V will not, by themselves, increase the liability of respondents for any acts and practices of their franchisees or licensees that violate this order.

VI.

It is further ordered, That this order will terminate on February 19, 2018, 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.

VII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and one year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Pitofsky recused and Commissioner Azcuenaga not participating.

IN THE MATTER OF

THE DOW CHEMICAL 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-3785. Complaint, Feb. 20, 1998--Decision, Feb. 20, 1998

This consent order requires, among other things, the Michigan-based chemical company to divest, simultaneously with its acquisition of Sentrachem, Limited, a South African chemical company, the Hampshire Chemical Company's chelant business to Akzo Nobel N.V., which imports small volumes of chelants into the United States.

Appearances

For the Commission: *Morris Bloom, Joseph Krauss, Howard Morse and William Baer.*

For the respondent: *Robert Schlossberg and Peter Halle, Morgan, Lewis & Bockius, Washington, D.C. and Scott R. Pennock, in-house counsel, Midland, MI.*

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, having reason to believe that the Dow Chemical Company's proposed acquisition of the South African company, Sentrachem Limited ("Sentrachem"), including its U.S. subsidiary, Hampshire Chemical Corporation ("Hampshire"), would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, 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. THE RESPONDENT

The Dow Chemical Company

1. Respondent Dow is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office

and principal place of business located at 2030 Dow Center, Midland, Michigan. In 1996 Dow had worldwide sales of approximately \$20 billion.

2. Dow produces chemicals, plastics, and agricultural and consumer products. Through its Chemical Division, it is the leading producer in the U.S. of aminopolycarboxylic chelating agents, also known as chelants.

3. At all times relevant herein, Dow has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, Dow has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE ACQUIRED COMPANY

4. Sentrachem, a South African company, develops, manufactures, and markets a number of different commodity and specialty chemical products. In 1996 Sentrachem had worldwide sales of approximately \$1 billion. Sentrachem competes in the U.S. chelant market through its U.S. subsidiary, Hampshire, a Delaware corporation, with its principal place of business in Lexington, Massachusetts. In 1996, Hampshire's sales were approximately \$200 million.

III. THE ACQUISITION

5. On or about August 5, 1997, Dow announced a cash tender offer to acquire all of the shares of Sentrachem for approximately \$425 million.

IV. THE RELEVANT MARKET

6. One relevant line of commerce in which to analyze the proposed acquisition is the research, development, manufacture, and sale of chelants, which are chemicals used to inactivate iron, calcium, copper, magnesium and other metal ions in water solutions. Chelants are used in cleaners, pulp and paper, water treatment, photography, agriculture, and food and pharmaceutical applications. Chelant customers use chelants because they are high quality metal ion control chemicals that are cost effective across a wide variety of applications. Chelants are an extremely small part of the customer's overall product or processing costs. Because of the time and cost associated with researching and qualifying an alternative to chelants,

customers do not reformulate away from chelants. There are no economic substitutes for chelants to which customers would switch in response to a price increase in chelants.

7. The United States is one relevant geographic area within which to analyze the likely effect of the proposed acquisition on competition in the chelant market. Chelants produced overseas are not economic substitutes for most chelants sold in the United States, particularly those diluted in water, because shipping costs are high and there are too many uncertainties and delays inherent in long distance shipping. Imports of chelants are less than 4 percent of U.S. consumption.

V. CONCENTRATION

8. Based on 1996 dollar sales, Dow and Hampshire are the two leading of only three producers of chelants in the United States, with a combined market share of over 70 percent. The U.S. chelant market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The proposed acquisition would increase the HHI by more than 2,800 points to more than 6,100 points.

VI. ENTRY CONDITIONS

9. Entry into the chelant market would not be timely, likely, or sufficient to deter or offset the adverse effects of the proposed acquisition on competition. A new entrant would have to build both a chelant production plant and a plant to produce hydrogen cyanide ("HCN"), a key input in the production of chelants, which would take over two years and entail large fixed, and mostly sunk, costs. In addition to the time to construct these facilities, a new firm must secure the environmental permits to produce HCN, a toxic substance. In order to recoup its investment, a new entrant would need to obtain a market share at least as large as that held by any of the current domestic producers, which would be difficult because of the significant amount of chelant sales that are subject to long term supply agreements. All these factors make entry into the U.S. chelant market unlikely.

VII. EFFECT OF THE PROPOSED MERGER ON COMPETITION

10. The proposed acquisition would substantially lessen competition or tend to create a monopoly in the U.S. chelant market, because, among other things:

- a. It increases concentration substantially in a highly concentrated market;
- b. It eliminates actual, direct, and substantial, competition between Dow and Hampshire;
- c. It facilitates the unilateral exercise of market power by the merged firm; and
- d. It will likely result in increased prices for chelants.

VIII. VIOLATIONS CHARGED

11. The proposed acquisition by Dow of all the shares of Sentrachem, described in paragraph five, would violate 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.

Commissioner Azcuenaga and Commissioner Thompson not participating.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by The Dow Chemical Company ("Dow"), through its wholly-owned subsidiary, Dow South Africa Holdings (Pty) Ltd., of the entire issued share capital of Sentrachem Limited ("Sentrachem"), which in turn owns Hampshire Chemical Corporation ("Hampshire"), and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; 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 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 Dow 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 2030 Dow Center, Midland, 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

I.

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

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

B. "*Respondent*" or "*Dow*" means The Dow Chemical Company, its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; subsidiaries, divisions, and groups and affiliates controlled by Dow, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "*Sentrachem*" means Sentrachem Limited, a South African company, with its principal place of business at 5 Protea Place Sandown 2196, 2146 Sandton, Republic of South Africa.

D. "*Hampshire*" means Hampshire Chemical Corporation, a wholly-owned subsidiary of Sentrachem Limited, with its principal place of business at 55 Hayden Avenue, Lexington, Massachusetts.

E. "*Akzo*" means Akzo Nobel N.V., a company located in The Netherlands, with its principal place of business at Velperweg 76, 6800 SB Arnhem, The Netherlands, and its subsidiary Akzo Nobel Chemicals Inc.

F. "*Acquisition*" means the acquisition by Dow, through its subsidiary, Dow South Africa Holdings (Pty) Ltd., of the entire issued share capital of Sentrachem Limited.

G. "*Chelating agents*" means chemicals used to react with metal ions to form ring structures incorporating the metal ion within the molecule.

H. "*Chelant products*" means ethanoldiglycine sodium ("EDG") and diethanolglycine sodium ("DEG") and aminopolycarboxylic acids and salts, including, but not limited to, ethylenediaminetetraacetic acid ("EDTA"), diethylenetriaminepentaacetic acid ("DTPA"), hydroxyethylenediaminetriacetic acid ("HEDTA"), nitrilotriacetic acid ("NTA"), ethylenediaminetriacetic ("ED3A"), and the salts and nitrile precursors of EDTA, DTPA, HEDTA, ED3A, and any other chelating agents, but excluding propylenediaminetetraacetic acid ("PDTA").

I. "*Hampshire Chelant Products*" means all chelant products that have been, at any time in the two (2) years preceding the Acquisition, researched, developed, manufactured, distributed or sold by Hampshire in the United States or Canada, including, but not limited to, all projects in research and development by Hampshire that relate to improving existing or developing new chelant products, or improving processes for manufacturing chelant products.

J. "*Hampshire Non-Chelant Products*" means any product other than Hampshire Chelant Products, that have been, at any time in the two (2) years preceding the Acquisition, researched, developed, manufactured, distributed, or sold at the Lima Facility or Other Hampshire Facilities, including, but not limited to, all projects in research and development by Hampshire that relate to improving existing or developing new Hampshire Non-Chelant Products, or improving processes for manufacturing Hampshire Non-Chelant Products.

K. "*Hampshire Products*" means Hampshire Chelant Products and Hampshire Non-Chelant Products.

L. "*Lima Facility*" means Hampshire's Lima, Ohio manufacturing facility.

M. "*Other Hampshire Facilities*" means Hampshire's facilities located at Deer Park, Texas and Nashua, New Hampshire.

N. "*Akzo Lima Expansion*" means such improvements, additions, and expansions to the Lima Facility to produce no less than 175 million pounds per annum (on a solution pound basis) of chelant

products and to provide sufficient hydrogen cyanide ("HCN"), nitrile, and other raw material storage, chelant products warehouse space and related facilities, to enable the Hampshire Chelant Business to operate at sustained levels of output no less than 175 million pounds per annum (on a solution pound basis) of chelant products.

O. "*Akzo Lima Expansion Milestones*" means: (i) the submission by Akzo of complete applications for any and all federal, state, and local governmental permits that may be required to complete the Akzo Lima Expansion, within twelve (12) months after the date this order becomes final; (ii) the receipt by Akzo of all federal, state, or local governmental permits that are required to complete the Akzo Lima Expansion, within eighteen (18) months after the date this order becomes final; provided, however that if Akzo has not received approval or final disapproval of its permit application(s) within eighteen (18) months after the date this order becomes final, this second milestone shall be extended until Akzo receives approval or final disapproval for a period up to, but in no event longer than, twelve (12) months; (iii) the completion by Akzo of the structural steel installation required for the Akzo Lima Expansion, within twelve (12) months after permitting.

P. "*Dow's Competing Chelant Business*" means all assets, properties, business and goodwill, tangible and intangible of Dow relating to the research, development, manufacture, distribution or sale of chelant products, its employees, agents, representatives, and any other personnel assigned to such business, or to whom such persons report directly or indirectly.

Q. "*Dow's Contract Manufacturing Services*" means the Dow business unit engaged in the contract manufacture of chemical and polymer products and services for independent firms.

R. "*Hampshire Chelant Business*" means all assets, properties, business and goodwill, tangible and intangible, of Hampshire relating to the research, development and manufacture in the United States, and the distribution and sale in North America, of Hampshire Chelant Products, including, but not limited to:

1. All rights, title and interest in and to owned or leased real property at the Lima Facility (including completion of the current nitrile expansion project underway), together with its appurtenances, licenses and permits; but excluding real property at (i) the Other Hampshire Facilities; (ii) Hampshire's Lexington, Massachusetts facility; and (iii) Hampshire's Teeside, United Kingdom facility;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property located at the Lima Facility, but excluding machinery, fixtures, equipment, transportation facilities located at (i) the Other Hampshire Facilities; (ii) Hampshire's Lexington, Massachusetts facility; and (iii) Hampshire's Teeside, United Kingdom facility;

3. All intangible assets associated with Hampshire Chelant Products, including, but not limited to, processes, process improvements projects, production projects, permits, supporting data and documents, patents, patent applications and other intellectual property relating to any Hampshire Chelant Product;

4. All intellectual property used by Hampshire at the Lima Facility and all intellectual property used for the research, development, manufacture or sale of Hampshire Chelant Products, including, but not limited to, trade secrets, test data, technology and know-how (including, but not limited to, manufacturing know-how and application know-how), and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

5. All books, records and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, specifications, designs, drawings, and quality control data;

6. All right, title and interest in and to contracts and agreements entered into in the ordinary course of business with customers (together with associated bid and performance bonds), joint ventures, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, including, but not limited to, Hampshire's existing contract with BP Chemicals Inc. for the supply of liquid hydrogen cyanide and the related service agreements and land lease; and all existing Hampshire contracts for railcars used in the transport of Hampshire Chelant Products;

7. All projects in research and development by Hampshire as of the date of the Acquisition that relate to improving existing chelant products, or developing chelant products, including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how and application know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to all such projects in research and development;

8. All research materials and inventions and intellectual property used for research and development relating to Hampshire Chelant Products or processes, including, but not limited to, trade secrets, test data, technology and know-how, and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

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

10. All rights, titles and interests in registrations or other governmental approvals for manufacture and sale of any Hampshire Chelant Products or research and development efforts for Hampshire Chelant Products; and

11. All Hampshire (including Hampshire UK) brand names and trademarks for Hampshire Chelant Products worldwide, but excluding the Hampshire corporate name and any brand names or trademarks that include the full word "Hampshire."

In addition, the "Hampshire Chelant Business" shall include all intellectual property used by Hampshire in the research, development, and manufacture in the United States, and the distribution and sale worldwide, of PDTA.

S. "*Hampshire Business Unit*" means the Hampshire Chelant Business and all assets, properties, business and goodwill, tangible and intangible of Hampshire relating to the research, development and manufacture in the United States, and the distribution and sale in North America of Hampshire Products, including, but not limited to:

1. All right, title and interest in and to owned or leased real property at the Lima Facility and Other Hampshire Facilities together with its appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property located at the Lima Facility and Other Hampshire Facilities;

3. All inventory and storage capacity;

4. All intangible assets associated with Hampshire Products, including, but not limited to, processes, process improvements projects, production projects, permits, supporting data and documents, patents, patent applications and other intellectual property relating to any Hampshire Product;

5. All intellectual property used for the research, development, manufacture or sale of Hampshire Products, including, but not limited to, trade secrets, test data, technology and know-how (including, but not limited to, manufacturing know-how and application know-how),

and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

6. All books, records and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, specifications, designs, drawings, and quality control data;

7. All right, title and interest in and to contracts and agreements entered into in the ordinary course of business with customers (together with associated bid and performance bonds), joint ventures, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees including, but not limited to, all existing contracts with BP Chemicals Inc. for the supply of liquid hydrogen cyanide and the related service agreements and land lease; and all existing contracts for railcars used in the transport of Hampshire Products;

8. All projects in research and development as of the date of the divestiture required by this order pursuant to paragraph IV.B that relate to improving existing, or developing new, Hampshire Products, including, but not limited to, all research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to, manufacturing know-how and application know-how), specifications, designs, drawings, processes, quality control data, and formulas, as well as licenses thereto, relating to all such projects in research and development;

9. All research materials and inventions and intellectual property used for research and development relating to Hampshire Products, including, but not limited to, trade secrets, test data, technology and know-how, and all patents, patent applications, patent rights, licenses, registrations, submissions and approvals;

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

11. All items of prepaid expense;

12. All rights, titles and interests in registrations or other governmental approvals for manufacture and sale of any Hampshire Non-Chelant Products, or research and development efforts for Hampshire Non-Chelant Products; and

13. All Hampshire (including Hampshire UK) brand names and trademarks for Hampshire Products worldwide, including the Hampshire corporate name and any brand names or trademarks that include the full word "Hampshire."

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, as an ongoing business, simultaneously with consummation of the Acquisition, the Hampshire Chelant Business to Akzo pursuant to the agreement between Dow and Akzo dated as of November 15, 1997. Provided, however, that respondent may retain (i) a non-exclusive, fully-paid and global license from Akzo to intangible assets and intellectual property used by the Hampshire Chelant Business in the research, development or manufacture of Hampshire Chelant Products to make, have made, use and sell Hampshire Non-Chelant Products; and (ii) a non-exclusive, fully-paid and global license relating to the manufacture of ED3A to make, have made, use and sell ED3A for use as a precursor for surfactants; and (iii) a non-exclusive, fully-paid, and global license to intellectual property used in the manufacture of PDTA to make, have made, use and sell PDTA in any part of the world.

B. The purpose of the divestiture of the Hampshire Chelant Business is to ensure the continuation of the Hampshire Chelant Business as an ongoing, viable business engaged in the research, development, manufacture, distribution and sale of chelant products independent of Dow, and in competition with Dow, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. On reasonable notice to respondent, respondent shall provide technical assistance and know-how to Akzo with respect to the Hampshire Chelant Business. Such technical assistance shall include, without limitation, consultation with knowledgeable employees of Hampshire and training at the manufacturing facilities of Hampshire. Respondent may charge the reasonable costs incurred in providing such technical assistance, including reimbursement (commensurate with the salary and benefits of Hampshire personnel involved) for the time plus expenses of Hampshire personnel providing the technical assistance. Hampshire shall continue to provide such technical assistance until Akzo is satisfied that it is capable of producing, and of developing for production, commercially saleable chelant products utilizing the assets of the Hampshire Chelant Business; provided, however, Hampshire shall not be required to continue providing such technical assistance and training after the earlier of (i) one (1) year

after the Akzo Lima Expansion is fully operational and released to production; or (ii) three (3) years after the date this order becomes final.

III.

It is further ordered, That:

A. Respondent shall exclusively toll manufacture for Akzo Hampshire Chelant Products at the Other Hampshire Facilities, at no more than Hampshire's historical cost as provided for in the agreement between Dow and Akzo dated as of November 15, 1997, in order to provide Akzo with sufficient time to accomplish the Akzo Lima Expansion for such period as Akzo may request, but in no event to extend beyond the earlier of (i) the date the Akzo Lima Expansion is fully operational and released to production or (ii) four (4) years after the date this order becomes final. Upon the Akzo Lima Expansion being released to production, respondent shall not manufacture at the Other Hampshire Facilities any chelant products for a period of one (1) year.

B. Dow's Contract Manufacturing Services shall (i) oversee the production of Hampshire Chelant Products at the Other Hampshire Facilities for Akzo, and (ii) administer and control the supply and allocation of HCN from Akzo at Lima, Ohio to respondent. Dow's Contract Manufacturing Services shall maintain any information arising from its obligations under paragraph III.B as confidential and not disclose such information to Dow's Competing Chelant Business. Any Dow or Hampshire employees supervised by Dow's Contract Manufacturing Services in carrying out the obligations of this paragraph III.B shall also maintain such information as confidential and not disclose such information to Dow's Competing Chelant Business.

C. Respondent shall use information relating to the Hampshire Chelant Business only to fulfill its obligations in paragraphs II.C and III.A, and shall not provide, disclose or otherwise make available to Dow's Competing Chelant Business, any information relating to Hampshire Chelant Products or the Hampshire Chelant Business, including information obtained as a result of the Acquisition, or directly or indirectly from Dow's Contract Manufacturing Services, or from respondent's operations of the Other Hampshire Facilities, and Dow shall not use any such information in Dow's Competing

Chelant Business, until respondent has fulfilled all obligations under paragraph III.A, above.

IV.

It is further ordered, That:

A. In the event that any of the Akzo Lima Expansion Milestones is not achieved, respondent shall acquire back from Akzo, within thirty (30) days, the Hampshire Chelant Business pursuant to the agreement between Dow and Akzo dated as of November 15, 1997.

B. Upon its acquisition of the Hampshire Chelant Business pursuant to paragraph IV.A, above, respondent shall divest, absolutely and in good faith, within sixty (60) days after respondent has obtained from Akzo all assets pursuant to paragraph IV.A the Hampshire Business Unit as a viable and competitive business. Provided, however, respondent may seek Commission approval to divest, in lieu of the divestiture of the Hampshire Business Unit, less than all assets of the Hampshire Business Unit and/or such other assets if such divestiture meets the purpose of paragraph IV.C, below. Respondent shall divest the Hampshire Business Unit or such other assets approved by the Commission only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Hampshire Business Unit is to ensure the continuation of the Hampshire Chelant Business as an ongoing, viable enterprise engaged in the research, development, manufacture, distribution and sale of chelant products independent of Dow, and in competition with Dow, and to remedy the lessening of competition alleged in the Commission's complaint.

D. Respondent shall take such actions as are necessary to maintain the viability and marketability of the Hampshire Business Unit and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of the Hampshire Business Unit, except in the ordinary course of business and except for ordinary wear and tear, until the Akzo Lima Expansion Milestones are achieved, or until the divestiture required by paragraph IV.B, above.

V.

It is further ordered, That:

A. In the event that any of the Akzo Lima Expansion Milestones is not achieved, and if respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Hampshire Business Unit or such other assets approved by the Commission pursuant to paragraph IV.B within the time required by paragraph IV of this order, then the Commission may appoint a trustee to divest the Hampshire Business Unit. The trustee shall have all rights and powers necessary to permit the trustee to effect the divestiture of the Hampshire Business Unit in order to assure the viability, competitiveness, and marketability of the Hampshire Business Unit so as to expeditiously accomplish the remedial purposes of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Hampshire Business Unit in order to accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the Hampshire Business Unit, and to divest such additional ancillary assets of Sentrachem and effect such additional arrangements, in order to assure the viability, competitiveness, and marketability of the Hampshire Business Unit so as to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, 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 for no more than two (2) additional terms.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph IV of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities

selected by respondent from among those approved by the Commission.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Hampshire Business Unit.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

VI.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Provided, however, that within ten (10) days of Akzo's failure to meet any of the Akzo Lima Expansion Milestones, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs IV and V of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs IV and V. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, IV and V of the order, including a description of all substantive contacts or negotiations for any divestiture required under paragraph IV and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VII.

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

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent, and without restraint or interference, the right to interview officers, employees, or agents of respondent.

IX.

It is further ordered, That this order shall terminate on February 20, 2008.

Commissioner Azcuenaga and Commissioner Thompson not participating.

IN THE MATTER OF
SEARS, ROEBUCK AND CO.

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

Docket C-3786. Complaint, Feb. 20, 1998--Decision, Feb. 20, 1998

This consent order prohibits, among other things, the Illinois-based retail corporation from misrepresenting that any reaffirmation agreement it obtains will be filed with the bankruptcy court, that any reaffirmation agreement is binding, or any other material fact while attempting to collect debts subject to a pending bankruptcy proceeding. In addition, the consent order prohibits the respondent from collecting debts that have been discharged in bankruptcy proceedings. The consent order also preserves the Commission's right to file an action in federal district court to seek full redress for consumers if Sears' refunds to debtors pursuant to a separate class action lawsuit settlement total less than \$100 million.

Appearances

For the Commission: *Paul Block, John Dugan and Phoebe Morse.*

For the respondent: *Stephen H. Olesky, Hale & Dorr, Boston, MA. Theodore N. Mirvis, Wachtell, Lipton, Rosen & Katz, New York, N.Y. and Ronald L. Rose, Dykema Gossett, Bloomfield Hills, MI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., 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 Sears, Roebuck and Co. is a New York corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois. Respondent is engaged in, among other things, the consumer retail business. In the course and conduct of its business, respondent has regularly extended credit for the purpose of facilitating consumers' purchase of respondent's products and services (hereinafter referred to as "consumer credit accounts").

2. 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.

THE UNITED STATES BANKRUPTCY CODE

3. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 523(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

4. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

5. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

VIOLATIONS OF SECTION 5(a) OF THE
FEDERAL TRADE COMMISSION ACT

6. From at least 1985 to 1997, respondent regularly induced consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their pre-petition consumer credit account debts that would otherwise be discharged through bankruptcy proceedings.

7. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

8. In truth and in fact, in many cases respondent did not intend to file, and in fact did not file, the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph seven was, and is, false or misleading.

9. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

10. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondent did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondent filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In the course and conduct of its business, respondent regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondent was not permitted by law to collect. Respondent's actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondent's collection of debts that it was not permitted by law to collect was, and is, unfair.

12. 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.

Commissioner Azcuenaga not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Boston Regional Office and the Division of Credit Practices 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, 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 had 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 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 Sears, Roebuck and Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 3333 Beverly Road, Hoffman Estates, 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

DEFINITIONS

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

1. Unless otherwise specified, "*respondent*" shall mean Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of any transaction.

3. "*Reaffirmation agreement*" shall mean any agreement between a creditor and debtor in bankruptcy whereby a debt that is otherwise dischargeable with respect to the personal liability of the debtor is reaffirmed by the debtor.

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

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any debt, shall not:

A. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that reaffirmation agreements will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any reaffirmation agreement is legally binding on the consumer; or

C. Collect any debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any debt subject to a pending bankruptcy proceeding.

III.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all reaffirmation agreements signed by consumers and records sufficient to show that such reaffirmation agreements were filed in bankruptcy courts and were subsequently

approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

IV.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, for 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, managerial employees, and bankruptcy court representatives having debt collection 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, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. 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 ninety (90) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Sears, Roebuck and Co., 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.

VI.

It is further ordered, That respondent, and its successors and assigns, shall provide notification of all proposed settlement terms relating to the action filed by the United States Attorney for the District of Massachusetts in *United States of America v. Sears, Roebuck and Co.*, Civil No. 97- 10839JLT, allegations made by the Attorneys General of various states and any other currently pending legal actions by government entities not cited herein, and all currently pending class action lawsuits, against respondent or any of its predecessors or affiliates, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

VII.

It is further ordered, That respondent Sears, Roebuck and Co., 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.

VIII.

This order will terminate on February 20, 2018, 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.

Commissioner Azcuenaga not participating.

IN THE MATTER OF

AMERICA ONLINE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 907 OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION
E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3787. Complaint, March 16, 1998--Decision, March 16, 1998

This consent order prohibits, among other things, the Virginia-based Internet service provider from: misrepresenting the terms or conditions of any online service trial offer; or representing that online service is free or otherwise representing that consumers need not pay for the online service, unless any obligation to cancel or to take other action to avoid charges is disclosed clearly and prominently in the instructional materials, and all other advertisements include a statement directing consumers to where this disclosure is available. In addition, the consent order requires the respondent to disclose the manner in which fees or charges are assessed or calculated and prohibits misrepresentations concerning the terms or conditions of any electronic fund transfer from a consumer account.

Appearances

For the Commission: *Lucy Morris, David Medine, Nina Chang*
and *Steven Silverman*.

For the respondent: *Kevin Duke*, in-house counsel, Dulles, VA.

COMPLAINT

The Federal Trade Commission, having reason to believe that America Online, Inc. ("America Online" or "respondent") has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, as well as the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693-1693r, as amended, and its implementing Regulation E, 12 CFR 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. America Online is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia.
2. America Online has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, America Online provides consumers with a range of options including electronic mail,

interactive magazines and newspapers, transactional services, and access to the Internet.

3. America Online has been and is now engaged in the regular practice of making "electronic fund transfer[s]" from "consumer" "account[s]" as those terms are defined in the EFTA and its implementing Regulation E.

4. The acts and practices of America Online alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act.

AMERICA ONLINE'S COURSE OF BUSINESS

5. America Online has disseminated or has caused to be disseminated advertisements for its online service through various media including, but not limited to, print, television, direct mail, promotional materials, and instructional materials. These advertisements include, but are not limited to, the attached Exhibits A and B, which contain the following statements:

Exhibit A

OPEN HERE TO BEGIN YOUR FREE TRIAL

It Just Takes 3 Easy Steps . . . To explore America Online® for TEN Hours on us. So, go for it and we'll see you online soon!

* * *

You NEED America Online . . . To access the Internet with graphical ease . . . to download over 120,000 software files and get computing support . . . To investigate your special interests or discover new ones AND MUCH MORE! All For Ten Hours, FREE!

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Use of America Online requires a major credit card or checking account. Users outside the United States pay an additional per-minute surcharge at all times, including trial time. . . . Additional phone charges may apply. Your free trial time must be used within 30 days of your initial sign-on. Limit one free trial per household.

Exhibit B

Open Here For Free Software.

Try America Online FREE For 10 Hours! Try the nation's most exciting online service -- FREE.

* * *

Just Use This Software To Try America Online Free. . . . Start using your 10 FREE hours today.

* * *

Special Trial Offer 10 FREE Hours To Explore America Online....

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Communication surcharges may apply. See online registration information for details on your free trial offer. Use of America Online requires a major credit card or checking account. Limit one free trial per household. Your free trial time must be used within 30 days of your initial sign-on. Members outside the 48 contiguous United States may pay a surcharge at all times, including trial time. . . .

6. Consumers choosing to participate in the free trial offer do so by connecting to the America Online service through a telecommunication modem attached to their personal computers. Upon their initial connection to the service, consumers view a series of registration screens including, but not limited to, the attached Exhibits C and D. The registration screens obtain identification and billing information from consumers, prompt consumers to select screen names and passwords for future access to the online service, and provide basic information about the online service, including the following details about the terms of the free trial offer:

Exhibit C

HERE'S HOW YOUR FREE TRIAL WORKS:

So you can explore America Online at no risk:

Your first TEN hours of connect time are free.

The monthly membership fee of \$9.95 has been waived for your first month.

Your free trial time must be used within 30 days of your first sign-on. You will not be charged unless you use more than your 10 free hours.

In addition, the registration screens display basic membership terms including the monthly charges incurred by America Online members:

Exhibit D

YOUR AMERICA ONLINE MEMBERSHIP

Your monthly membership fee of \$9.95 (charged at the end of your first month)

INCLUDES FIVE free hours of connect time EACH month.

After your five free hours, you may use additional time at the rate of \$2.95 per hour. . . .

7. Upon completion of the registration process, consumers are provided an opportunity to review America Online's Terms of Service Agreement and Rules of the Road. To do so, consumers must access the Members' Service area, available online. These documents, along with the Membership Conditions viewed during the registration process, are collectively referred to by America Online as the Terms

of Service and comprise the contract between America Online and its members.

8. While the hourly charge for use of the America Online service is disclosed during the registration process, neither the registration screens nor the Terms of Service disclose the manner in which America Online calculates the time that consumers spend online. Consumers may, however, obtain information on this subject by accessing online resource areas, including an online explanation of America Online's billing practices. This explanation, attached hereto as Exhibit E, provides in relevant part:

Exhibit E

CONNECT RATE[:] If you use MORE time online this month than the number of free hours noted at the top of this screen [5 hours/month], you will be charged a connect rate. You will be charged for your extra [connect] time on America Online in one- minute increments. . . .

AMERICA ONLINE'S VIOLATIONS OF SECTION 5(a) OF THE FTC ACT

9. Through the means described in paragraphs five through eight, America Online has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within thirty days of their initial sign-on and do not exceed ten hours of online use.

10. In truth and in fact, consumers who participate in America Online's free trial offer and use less than ten hours of online time during the thirty days following their initial sign-on, but who fail to cancel their memberships during the trial period, incur charges. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. In the advertising and sale of its online service, America Online has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within thirty days of their initial sign-on and do not exceed ten hours of online use. America Online has failed to disclose adequately to consumers that, upon completion of ten hours of online use or thirty days from the date of initial sign-on, whichever is earlier, consumers who fail to contact America Online and cancel their trial memberships are automatically enrolled as members of America Online and are charged a monthly membership fee plus applicable hourly fees. These fees continue to accrue until the consumers affirmatively cancel their memberships.

Such facts would be material to consumers in their purchase or use of the America Online service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

12. Through the means described in paragraphs five through eight, America Online has represented, expressly or by implication, that it calculates online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, for time spent online beyond the five free hours of monthly connect time. In addition, America Online rounds up portions of a minute to the next highest whole minute. Thus, America Online has represented, for example, that an online session lasting 2 minutes and 46 seconds would be billed as 3 minutes.

13. In truth and in fact, America Online does not merely calculate online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, with portions of a minute rounded up to the next whole minute. Rather, America Online adds 15 seconds of connect time to each online session, allegedly representing the time required for a user's modem to connect to America Online at the start of an online session and the time required to disconnect from America Online at the close of a session. When online usage consists of a whole minute plus 46-59 seconds, the additional 15 seconds causes the total connect time to exceed the next whole minute. Thus, for example, an online session of 2 minutes and 46 seconds, with the 15 second supplement, totals 3 minutes and 1 second and is billed as 4 minutes. Likewise, when an online session consists of a whole minute exactly, the additional 15 seconds causes the session to be rounded to the next whole minute. Therefore, the representation set forth in paragraph twelve was, and is, false or misleading.

14. In the advertising and sale of its online service, America Online has represented, expressly or by implication, that it calculates online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, for time spent online beyond the five free hours of monthly connect time. America Online has failed to disclose adequately to consumers its practice of adding 15 seconds of connect time to each online session, as described in paragraph thirteen. Such facts would be material to consumers in their purchase or use of the America Online service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

15. In the course of the online registration process, consumers view a screen titled "Billing Options," attached as Exhibit F, that states:

Exhibit F

Choose a billing method

To ensure that we have the correct billing information on file for charges incurred beyond your trial time, please select one of the following payment options:

VISA

MasterCard

American Express

DiscoverCard

Checking

Consumers choosing the Checking option are first informed that America Online will deduct automatically from their checking accounts each month any charges that they incur in using the online service. Until at least September 1995, such consumers also viewed a screen, attached as Exhibit G, that states:

Exhibit G

Processing your Checking Authorization

Thank you for trying America Online. In the next few days you will receive a checking authorization form in the mail. This form gives America Online authorization to deduct the charges you incur from your checking account automatically every month. We request that this form be returned at your earliest convenience. Until it is received, your account will be limited to \$50.00.

16. Through the means described in paragraph fifteen, America Online has represented, expressly or by implication, that it would not debit consumers' checking accounts before it received the authorization forms permitting it to do so.

17. In truth and in fact, America Online in many instances debited the checking accounts of consumers before receiving their authorization forms or without ever receiving such forms. Therefore, the representation set forth in paragraph sixteen was, and is, false or misleading.

AMERICA ONLINE'S VIOLATIONS OF SECTION 907 OF THE EFTA

18. As described in paragraph seventeen, in the course and conduct of its business, America Online in many instances has debited consumers' checking accounts before receiving their authorization forms or without ever receiving such forms. In addition, in the course and conduct of its business, America Online in many

instances has failed to provide consumers with advance written notice of transfers from their accounts varying in amount from previous transfers.

19. America Online's aforesaid practices violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

20. The acts and practices of America Online as alleged in this complaint constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act. Such acts and practices additionally violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d).

Commissioner Azcuenaga not participating.

Complaint

125 F.T.C.

EXHIBIT A

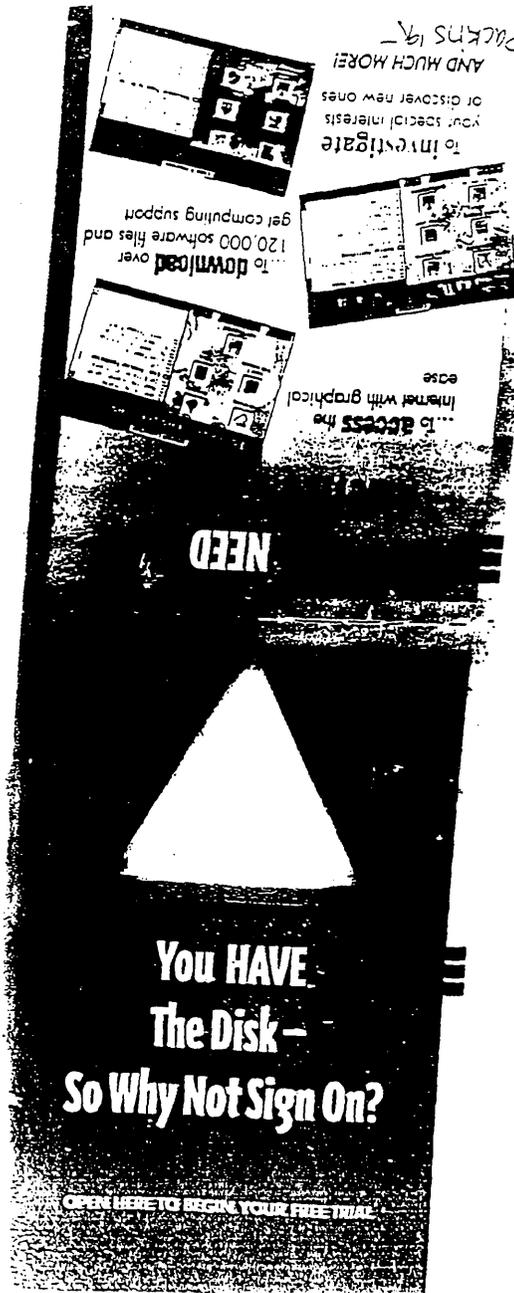


EXHIBIT A

CCC03S

Is Your America Online
Software Missing?
No Problem!
Call 1-800-827-6364
For A FREE Replacement.

- ▼ Use this
- ▼ special
- ▼ registration
- ▼ number and
- ▼ password
- ▼ for your
- ▼ free trial.



If you're having trouble connecting
to America Online, call us toll-free at:
1-800-827-3338

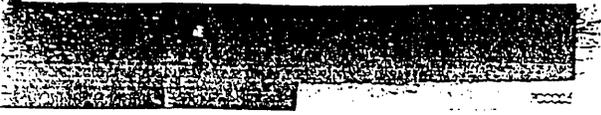


EXHIBIT A

.....

It Just Takes **3 Easy** Steps...

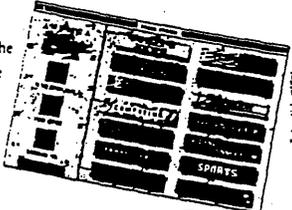
- Step 1** Insert the attached disk in your disk drive and double-click on the Install icon.
- Step 2** Click Continue when prompted and click on the Install button to begin installing the America Online software.
- Step 3** Once installation is complete, click on OK, open your new folder, double-click on the America Online icon, and follow the simple, step-by-step instructions on your screen. When prompted, enter the registration number and password below.

...To explore
America Online®
for **TEN** hours
on us.

So, go for it
and we'll
see you online
soon!

Are You Ready?

Are you ready to use the online service with the most intuitive interface around, because it has all the point-and-click ease of your Mac??



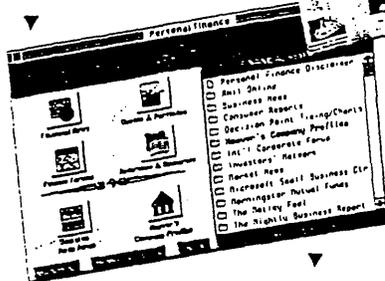


Are you ready to access text and compelling **graphics** online and download graphics files to view, save, and send?

.....

EXHIBIT A

of all the latest **news**
stories and to track your
with the
click of a mouse?



Are you ready to **chat** online with thousands of members
across the nation and meet recognized *personalities*
from academia to Hollywood at online conferences?

**If You're Ready For All That, Then
You're Ready For America Online!**

The American Online service is available only to U.S. residents who are at least 18 years old. American Online is not responsible for any damage to your computer or any other loss that may result from using the service. American Online is not responsible for any content or information posted or transmitted by any user of the service. American Online is not responsible for any loss of data or information that may result from using the service. American Online is not responsible for any loss of data or information that may result from using the service.

Complaint

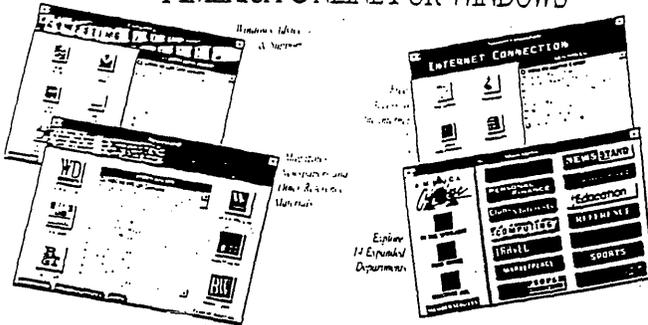
125 F.T.C

EXHIBIT B

OPEN HERE FOR FREE SOFTWARE
TRY AMERICA ONLINE FREE FOR 10 HOURS!



SPECIAL TRIAL OFFER
10 FREE HOURS TO EXPLORE
AMERICA ONLINE FOR WINDOWS



TRY THE NATION'S
MOST EXCITING ONLINE
SERVICE—FREE

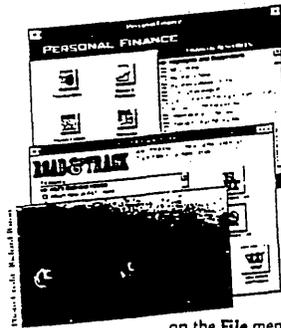
Now available
14,400 Baud

DM-Still Use

EXHIBIT B

JUST USE THIS
SOFTWARE
TO TRY
AMERICA ONLINE
FREE.

Is Your AMERICA ONLINE
SOFTWARE MISSING?
NEED MAC OR DOS FORMAT?
No PROBLEM.
CALL 1-800-827-6364
FOR A FREE REPLACEMENT.



Sign on with this disk and it's all yours — your choice of over 60,000 free software and shareware programs along with online support from more than 300 hardware and software companies. Explore hundreds of services, including live, interactive chat, TIME Magazine, Compton's searchable encyclopedia, the Windows Support Forum, live conferences and events, and much more.

Read your favorite newspaper or magazine online, and with America Online's new graphics viewer, download photographs and graphics and see them online!

Start using your 10 FREE hours today.

Just insert the enclosed disk in your disk drive, click on the **File** menu of your **Windows Program Manager**, and select **Run**. Then type A:\SETUP (or B:\SETUP) and press ENTER. Follow the easy instructions and you'll be online in minutes!

America Online is also available in DOS and Macintosh formats.

If you're having trouble connecting to America Online or need a different disk size or type, call us toll-free at 1-800-827-6364.



EXHIBIT C

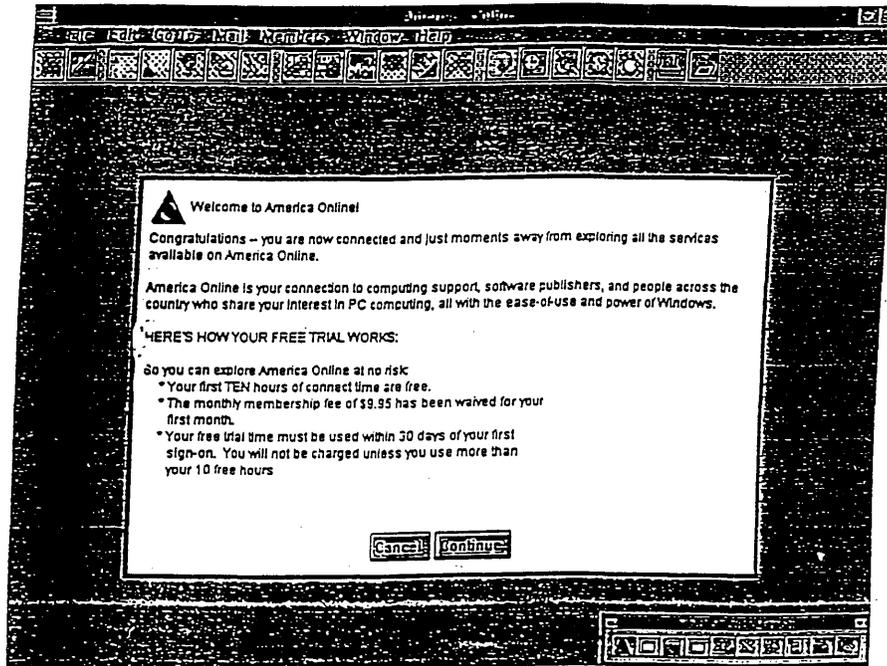


EXHIBIT D

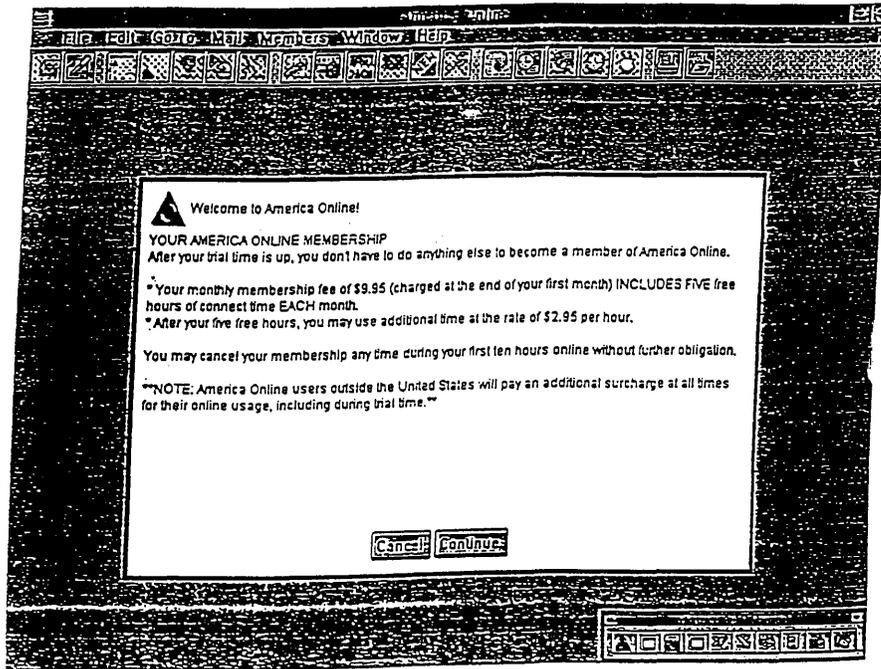


EXHIBIT D

Complaint

125 F.T.C.

EXHIBIT E

The following is an explanation of the terms described at the top of this screen:

MONTHLY FEE AS a part of your trial offer, you will pay no monthly fee the first month. At the end of your first month online (on your anniversary date, noted above as next billing date) you will be charged the fee for your second month of membership.

FREE HOURS AS part of your trial offer, you will get free time online to explore America Online. At the top of your screen, you will see the number of free hours offered during your first month. These free hours are only valid during the first thirty days of membership.

CONNECT RATE If you use MORE time online this month than the number of free hours noted at the top of this screen, you will be charged a connect rate. You will be charged for your extra time on America Online in one-minute increments. If you live outside the continental United States, you will be assessed a 20 cent per minute telecommunications surcharge. This surcharge will apply any time you are online.

DAYTIME SURCHARGE Surcharges apply only if noted above, from 6am. to 6pm. Monday through Friday.

NEXT BILLING DATE On the date noted above, two things will happen: You will be charged your monthly fee for your second month as an America Online member AND you will be granted more free time to use America Online during that month.

EXHIBIT F

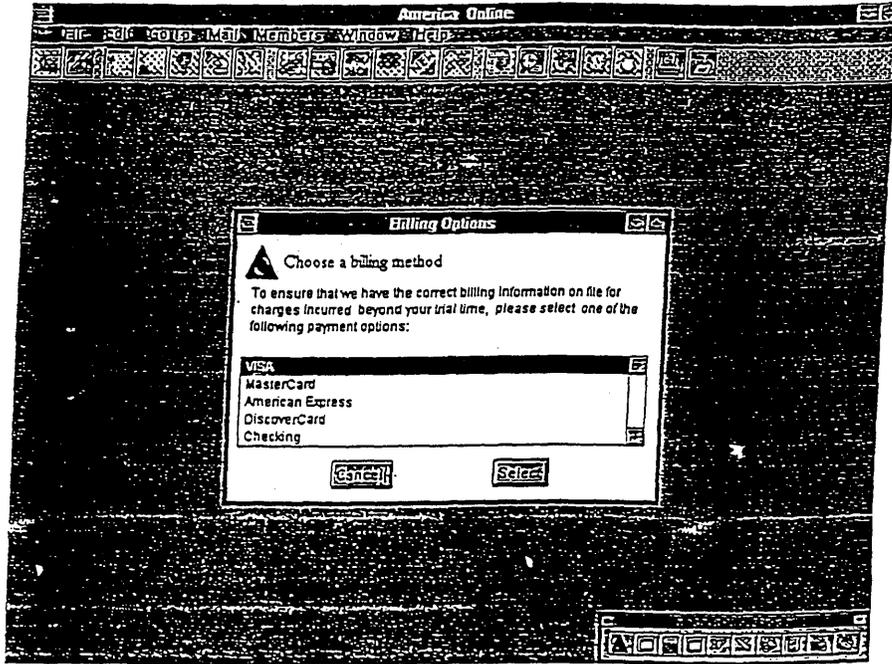
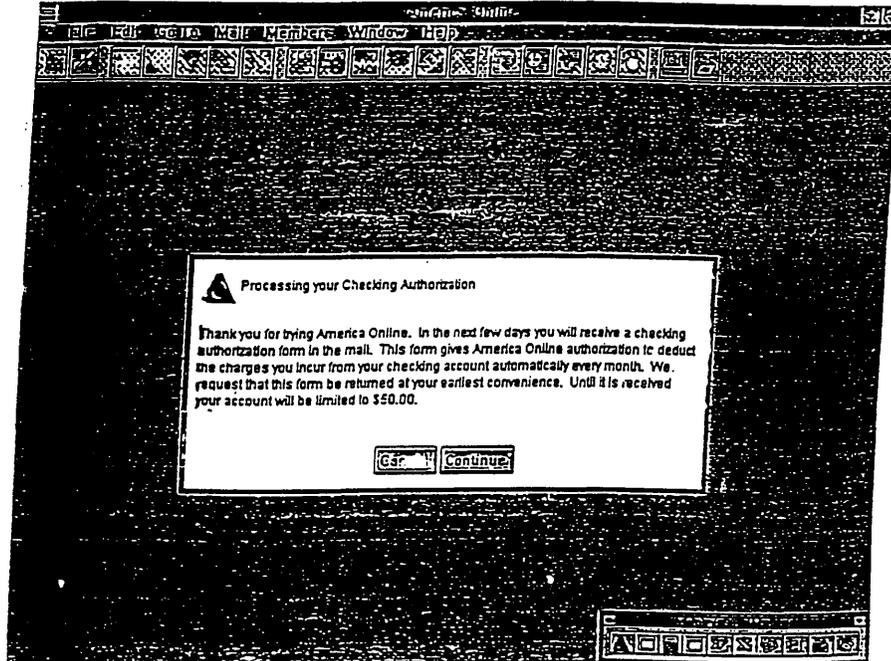


EXHIBIT F

000001

EXHIBIT G



000817

000817

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Electronic Fund Transfer Act and its implementing Regulation E; 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 Acts and Regulation, 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 America Online, Inc. is a Delaware corporation, with its principal office or place of business at 22000 AOL Way, Dulles, VA.

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 terms shall have the meanings set forth below, unless specifically stated otherwise:

1. "*Account*" means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held either directly or indirectly by a financial institution, as defined below, and established primarily for personal, family, or household purposes.

2. "*Financial institution*" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer.

3. "*Consumer*" means a natural person or other entity which may be billed for online services; provided that, for purposes of paragraphs V, VI, and VIII(A) of this order, "consumer" shall only mean a natural person.

4. "Electronic Fund Transfer," as defined by the Electronic Fund Transfer Act, 15 U.S.C. 1693a(6), means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephone, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account, except that it does not mean a transaction made using a debit card or debit card account which a consumer has identified as a credit card or credit card account.

5. "Online Service" shall mean a respondent-controlled access, information, communication, or transaction service which is made available to consumers as a paid service via connection by computers, modems, or other means, to a proprietary or non-proprietary network of telecommunication or computer facilities.

6. Unless otherwise specified, "*respondent*" shall mean America Online, Inc., its successors and assigns, and its officers, agents, servants, divisions, and employees.

7. "*Respondent-controlled*" shall mean respondent makes the management decisions affecting compliance with the provisions of this order.

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 respondent, directly or through any respondent-controlled corporation, subsidiary or other device, in connection with the advertising, promotion, offering for sale, sale, or

distribution of any Online Service in or affecting commerce, shall not misrepresent, expressly or by implication, the terms or conditions of any trial offer of any Online Service.

II.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not represent, expressly or by implication, that the Online Service is offered "free," "without risk," "without charge," "without further obligation," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the Online Service unless respondent discloses clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service.

Provided, that for purposes of this paragraph II, "clearly and prominently" shall mean with respect to any representation, described in the foregoing paragraph and made in respondent's detailed instructional materials (e.g., starter kits, guidebooks) distributed to consumers, a disclosure in a type size and in a location that are sufficiently noticeable so that an ordinary consumer could notice, read, and comprehend it.

Provided, further, that for purposes of this paragraph II, "clearly and prominently" shall mean, as to any representation described above in this paragraph, apart from any representation covered by the preceding proviso, and made in the context of any advertisement or promotion of the Online Service through any media, including radio, television or other broadcast media, direct mail, interactive network (except as provided in paragraph IV below), or print media (including promotion packages attached thereto), a statement directing consumers to a location where the disclosure required herein will be available (e.g., "For conditions and membership details," followed by: "load up trial software" or "see registration process" or words of similar effect.) In the case of an audio statement, the statement shall be delivered in a volume and cadence sufficient for an ordinary consumer to notice, hear, and comprehend it. In the case of a video statement, the statement shall be of a size and shade and shall appear for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In the case of print media, the statement shall be in a

type size and in a location sufficient for an ordinary consumer to notice, read, and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

III.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall not misrepresent, expressly or by implication, the fees or charges assessed for such Online Service.

IV.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall disclose, clearly and prominently, during the final registration process, and prior to the consumer incurring any financial obligation or liability to respondent, the terms of all mandatory financial obligations to respondent which will be incurred by the consumer as a result of using such Online Service, including but not limited to the following:

A. The financial terms and conditions of any plan or practice (*e.g.*, trial offer) by which consumers enroll in or renew enrollment in such Online Service and by which, accordingly, respondent charges the consumer; provided, that if such plan or practice exists, respondent must also disclose clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service and provide at least one reasonable means by which the consumer may effectively cancel his or her enrollment by a date certain and thereby avoid further charges;

B. Any mandatory membership, enrollment, or usage fees (*e.g.*, monthly or hourly usage charges); and

C. The manner in which such fees or charges are assessed and calculated, provided, that respondent may satisfy this provision by disclosing that: (i) additional charges might apply; (ii) information about assessing and calculating the consumer's fees or charges can be

found online; and (iii) the exact location, such as the particular area online (e.g., Keyword: Billing), where consumers can find detailed information about assessing and calculating the consumer's fees or charges.

Provided, however, that for purposes of this paragraph IV, a disclosure is "clearly and prominently" made if it is of a size and shade, and appears for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In addition to the foregoing, such disclosure shall not be avoidable by consumers. Provided, further, that such disclosure shall not be deemed avoidable for purposes of this order based solely on an ordinary consumer's failure to read it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

V.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any consumer account, shall not misrepresent the terms or conditions of such Electronic Fund Transfer.

VI.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any consumer account, shall not:

A. Fail to obtain consumer authorization before initiating any Electronic Fund Transfer from any consumer account as required by Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a), and Section 205.10(b) of Regulation E, 12 CFR 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

B. Fail to provide any consumer with advance notice of Electronic Fund Transfers from the consumer's account varying in amount from previous transfers as required by Section 907(b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(b), and Section 205.10(d) of Regulation E, 12 CFR 205.10(d), as more fully set out in Section

205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

VII.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for five (5) years after the last date of dissemination of any representation covered by paragraphs I - V of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying business records demonstrating compliance with the terms and provisions of this order, except as provided for in paragraph VIII of this order, including, but not limited to:

A. All advertisements, promotional materials, and instructional materials distributed or accessible to consumers containing the representation;

B. For five (5) years after the date of receipt or generation, all written complaints from consumers, governmental or consumer protection organizations and responses thereto; provided, however, that in lieu of maintaining all electronic mail communications, respondent may comply with this provision by maintaining a representative sample of such communications.

VIII.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for two (2) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All documents pertaining to respondent's use of Electronic Fund Transfers from consumer accounts, including written complaints from consumers, governmental or consumer protection organizations and responses thereto; provided, however, in lieu of maintaining all electronic mail communications, respondent may comply with this provision by maintaining a representative sample of such communications; and

B. All business records which demonstrate respondent's compliance with paragraph VI of this order; provided, however, in lieu of maintaining all electronic mail communications, respondent

may comply with this provision by maintaining a representative sample of such communications.

IX.

It is further ordered, That respondent, and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, senior managers (*e.g.*, vice-presidents or above), and agents (including, without limitation, advertising agencies) 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 and its successors and assigns, shall prepare a summary of this order, and shall distribute a copy of that summary to all current and future managers with responsibilities or duties affecting compliance with the terms of this order.

X.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, 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 dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a parent or respondent-controlled subsidiary or respondent-controlled 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.

XI.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, within sixty (60) days after the date of service of this order, and at

such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

XII.

It is further ordered, That, no later than six (6) months from the effective date of this order, respondent shall establish and implement a program to educate consumers about consumer use of electronic payment systems. Such program:

A. May be established jointly with, or under the auspices of, an appropriate trade association or other consumer education program (e.g., Project Open);

B. Shall have a duration of not less than one (1) year from the date of implementation;

C. Shall be of a scope and employ media reasonably necessary to reach a wide audience of consumers, including but not limited to:

1. At least 50,000 color brochures designed, produced, printed, and disseminated by respondent directly to consumers and organizations with direct access to consumers likely to use electronic payments systems;

2. The Internet;

3. Reference on respondent's Online Service; and

4. A direct link to the Internet from respondent's Online Service;

and

D. Shall include, but not be limited to, information about: various types of electronic payment systems available to consumers; obligations of consumers, merchants, and financial institutions in using such systems; how such payment systems are used, including the means by which consumers may attempt to prevent the fraudulent use of those systems; various legal protections available to consumers under each system; and organizations, including law enforcement agencies, from which consumers may obtain further information or assistance.

No later than ninety (90) days from the date of issuance of this order, respondent shall submit for review and approval to the Associate Director, Division of Credit Practices, a draft plan for the program and drafts of any materials to be disseminated pursuant to paragraph

XII(C) above. Such approval shall not be unreasonably withheld. Such description and materials should be sent by overnight delivery to the Associate Director, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIII.

This order will terminate on March 16, 2018, 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.

Commissioner Azcuenaga not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

PRODIGY SERVICES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 907 OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION
E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3788. Complaint, March 16, 1998--Decision, March 16, 1998

This consent order prohibits, among other things, the New York-based Internet service provider from: misrepresenting the terms or conditions of any online service trial offer; or representing that online service is free or otherwise representing that consumers need not pay for the online service, unless any obligation to cancel or to take other action to avoid charges is disclosed clearly and prominently in the instructional materials, and all other advertisements include a statement directing consumers to where this disclosure is available.

Appearances

For the Commission: *Lucy Morris, David Medine, Nina Chang and Steven Silverman.*

For the respondent: *Richard Kurnit, Frankfurt, Garbus, Klein & Salz, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Prodigy Services Company, a general partnership, which has been succeeded by Prodigy Services Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58, as amended, as well as the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693-1693r, as amended, and its implementing Regulation E, 12 CFR 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Prodigy Services Company was a New York general partnership comprised of two equal partners: International Business Machines Corporation and Sears, Roebuck and Company. Prodigy Services Corporation, a Delaware corporation with its principal office or place of business at 445 Hamilton Avenue, White Plains, New York, is a successor corporation to Prodigy Services Company, a general partnership. Prodigy Services Company, a general

partnership, and Prodigy Services Corporation, a successor corporation, shall be hereinafter collectively referred to as "Prodigy."

2. Prodigy has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, Prodigy has provided consumers with a range of options including electronic mail, interactive magazines and newspapers, transactional services, and access to the Internet.

3. Prodigy has been and is now engaged in the regular practice of making "electronic fund transfer[s]" from "consumer" "account[s]" as those terms are defined in the Electronic Fund Transfer Act and its implementing Regulation E.

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

PRODIGY'S COURSE OF BUSINESS

5. Prodigy has disseminated, or has caused to be disseminated, advertisements for its online service through various media including, but not limited to, print, television, the Internet, direct mail, promotional materials, and instructional materials. These advertisements include, but are not limited to, the attached Exhibits A and B, which contain the following statements:

Exhibit A

10 free* hours

10 free hours* of prodigy to surf the internet

Free Trial!

FREE PRODIGY SOFTWARE*

FREE 1ST MONTH'S MEMBERSHIP

FREE 10 HOURS to explore PRODIGY in your first month

The advertisement contains a statement at the bottom of the back panel, in fine print, that provides:

* This trial offer includes the first month's membership fee and 10 free hours of trial usage the first month. Usage beyond the trial offer will result in extra fees, even during the first month. 10 free hours will not carry over into future billing months and may not be used for certain features. Some features may be charged for separately.

Offer details available during online enrollment. . . .

Exhibit B

Get 10 free hours* of Prodigy with easy Internet access!

Get 10 free hours to explore the Internet

To get free software and 10 free hours CALL US AT 1-800-PRODIGY

After your 10 free hours, Prodigy is only \$9.95 a month for 5 hours, with no extra charge for Internet access.

The advertisement contains a statement at the bottom of the front panel, in fine print, that provides:

*This offer includes first month's membership fee and 10 free hours of usage in the first month. Usage beyond the trial offer will result in extra fees. Some features charged for separately. . . .

6. Consumers choosing to participate in the free trial offer do so by connecting to the Prodigy service through a telecommunication modem attached to their personal computers. Upon their initial connection to the service, consumers view a series of enrollment screens which request identification and billing information, prompt them to select passwords for future access to the online service, and provide basic information about the online service.

7. At times relevant to this complaint, the online enrollment process included a "Welcome" screen, attached as Exhibit C, that provides, in part:

Exhibit C

Welcome to the PRODIGY service. There's never been a better time to connect with the PRODIGY service. Live on PRODIGY, right now, you can have instant access to investment advice, sports scores, business news, travel tips, games, an encyclopedia, and so much more!

To continue with the enrollment process, consumers next must choose one of three icons or "buttons" arrayed vertically on the right side of the "Welcome" screen. These buttons provide, in descending order, the following three options: "Enroll Now," "Plan Details," and "Guarantee." The "Enroll Now" button has a flashing border.

a. When consumers select the "Enroll Now" button from the "Welcome" screen, the enrollment process continues without display of either the "Plan Details" screen or the "Guarantee" screen.

b. The "Plan Details" button leads to a screen that provides:

Exhibit D

Plan Details

Prodigy offers several Membership Plans. For details about your Plan, please refer to the materials included with your software. Other plans are available online.

Certain features are priced separately and prices are designated online. Charges for extra-fee features used by your household will be billed to your account when online, Jump: fees for details about pricing.

If you have any questions, please call us at 1-800-PRODIGY (1-800-776-3449).

From this screen, consumers next must choose one of two buttons to view another screen: "Previous Page" or "Enroll Now." The "Previous Page" button leads back to the "Welcome" screen. Choosing the "Enroll Now" button causes the enrollment process to continue without display of the "Guarantee" screen.

c. From the "Welcome Screen," the "Guarantee" button leads to a screen that provides:

Exhibit E

Satisfaction Guarantee

We want you to be completely satisfied with the service. If you're not, let us know during your first month and we'll cancel your Membership. Otherwise, we'll automatically continue your Membership. Other plans are available online.

From this screen, consumers next must choose one of two buttons to view another screen: "Previous Page" or "Enroll Now." The "Previous Page" button leads back to the "Welcome" screen. Choosing the "Enroll Now" button causes the enrollment process to continue without display of the "Plan Details" screen.

8. In the course of the enrollment process, Prodigy requires consumers to choose a billing method. Consumers must provide a credit, charge, or debit card number. Alternatively, consumers may choose an automatic checking account debiting program called AutoPay. Prodigy requires consumers choosing AutoPay to submit a written authorization form before debiting their accounts. Prodigy does not require such written authorization from consumers choosing to pay by debit card.

PRODIGY'S VIOLATIONS OF SECTION 5(a) OF THE FTC ACT

9. Through the means described in paragraphs five through eight, Prodigy has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided

only that they use the trial time within one month of their initial sign-on and do not exceed ten hours of online use.

10. In truth and in fact, consumers who participate in Prodigy's free trial offer and do not exceed ten hours of online time during the month following their initial sign-on, but who fail to cancel their memberships during the trial period, incur charges. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

11. In the advertising and sale of its online service, Prodigy has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within one month of their initial sign-on and do not exceed ten hours of online use. Prodigy has failed to disclose adequately to consumers that, upon completion of ten hours of online use or one month from the date of initial sign-on, whichever is earlier, consumers who fail to contact Prodigy and cancel their trial memberships are automatically enrolled as members of Prodigy and are charged a monthly membership fee plus applicable usage fees. These fees continue to accrue until the consumers affirmatively cancel their memberships. Such facts would be material to consumers in their purchase or use of the Prodigy service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

PRODIGY'S VIOLATIONS OF SECTION 907 OF THE EFTA

12. As described in paragraph eight, in the course and conduct of its business, Prodigy in many instances has debited consumers' accounts via their debit cards without their written authorization. In addition, in the course and conduct of its business, Prodigy in many instances has failed to provide consumers with advance written notice of transfers from their accounts varying in amount from previous transfers.

13. Prodigy's aforesaid practices violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

14. The acts and practices of Prodigy as alleged in this complaint constitute deceptive acts or practices in or affecting commerce, in

violation of Section 5(a) of the Federal Trade Commission Act. Such acts and practices additionally violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d).

Commissioner Azcuenaga not participating.

EXHIBIT A

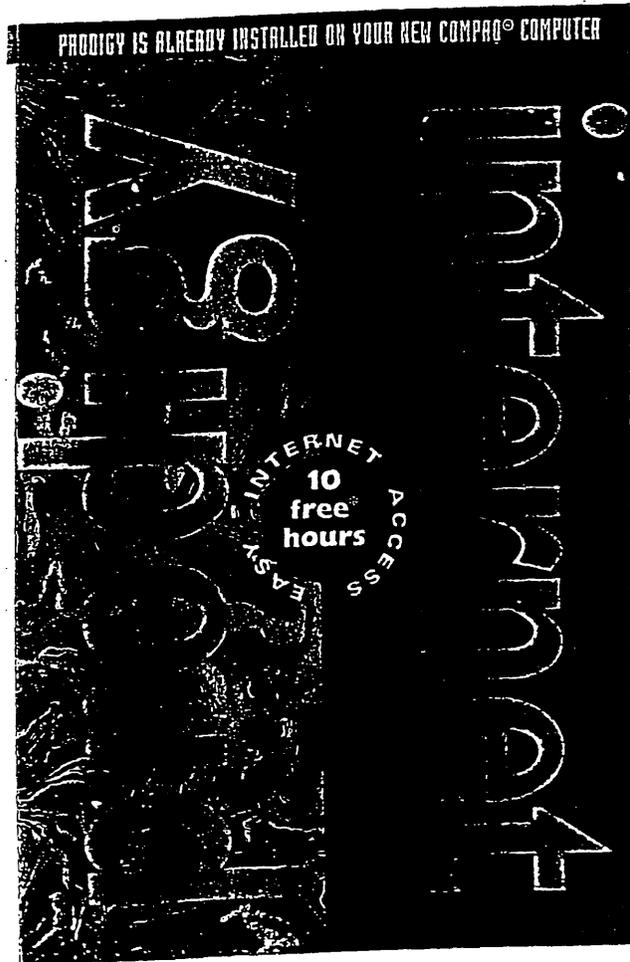


EXHIBIT A

10-free-hours* of prodigy to surf the Internet

2 clicks and you're On the Net

Use your 10 free hours to surf the Internet...take a computer tour of the White House, browse the Library of Congress, or correspond with millions of people around the world who share your interests. Featuring:

- * Point-and-click access to Internet's **World Wide Web** and its vast resources.
- * Easy access to Internet's thousands of **USENET Newsgroups**.
- * Full Internet **E-Mail** to message anyone, anywhere in the world.

PRODIGY America's largest online service, connects you to the people and information you care most about.

No other online service offers all this:

- * Live Chat
- * Hundreds of help, bulletin boards
- * Personal libraries with online shopping
- * The latest stock quotes
- * Hundreds more and thousands more
- * Regularly updated encyclopedia
- * Complete Library of Economics Reports
- * Major newspaper online
- * Complete travel information and reservations
- * And...

HomeNetwork Helper™ - a complete electronic library updated daily. Access more than 700,000 articles to help you like or research virtually every aspect of life.

COMPAG Support Online:

Product news and information is just a click away from you. Complete & more for every...

Getting started is simple!

PRODIGY is already available on your computer. Just select the PRODIGY icon from the Windows Program Manager and follow the on-screen instructions. It's easy. We'll ask you a few simple questions like your name, address and payment method. You will then receive an ID and create a password during the online enrollment process.

Welcome!

After you're enrolled, spend a few moments in the New Member area of the Member Help Center. There you'll find out how to get started, where to find help online and how to send a mail of your own online.

- * New member Helen Board lists with tips and suggestions to get you started!
- * New Member Items will teach you how to navigate
- * Learn how to use keywords, which are the easiest way to get around PRODIGY!

get online NOW!

Complaint

125 F.T.C.

EXHIBIT A

EASY INTERNET ACCESS!



Free Trial!

- * FREE PRODIGY® SOFTWARE*
- * FREE 1ST MONTH'S MEMBERSHIP
- * FREE **10** HOURS

to explore PRODIGY in your first month.

Connect now because the
Internet's never been hotter
and nobody makes it as easy
as PRODIGY.

* This trial offer includes the first month's membership fee and 10 free hours of trial usage the first month. Usage beyond the trial offer will result in extra fees, even during the first month. 10 free hours will not carry over into future billing months and may not be used for certain features. Some features may be charged for separately.

Offer details available during online enrollment. Fees, service content, features and allowances are as of 3/95 and are subject to change without notice. Credit card required upon enrollment. Phone charges may apply. Some features not available outside the U.S. Service and instructions in English. Fees in U.S. Dollars. Limited time offer subject to change.

PRODIGY is a registered mark of Prodigy Services Company. Microsoft is a registered trademark, and Windows and the Windows Logo are trademarks of Microsoft Corporation. COMPAD is a registered trademark of Compaq, Inc. ©1995 Prodigy Services Company. All rights reserved.

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EXHIBIT A-1

EXHIBIT C

★ PRODIGY Service Enrollment

MEMBER SERVICES

Welcome to the PRODIGY service

There's never been a better time to connect with the PRODIGY service. Live on PRODIGY, right now, you can have instant access to investment advice, sports scores, business news, travel tips, games, an encyclopedia, and so much more!

Right now millions of people across the country use PRODIGY because it's fun, it's useful, and it's a great value.

See for yourself. Take a moment to enroll now. Then, you too will be live on PRODIGY!

[Enroll Now](#)

[Plan Details](#)

[Guarantee](#)

FREE

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EXHIBIT C

Complaint

125 F.T.C.

EXHIBIT D

PRODIGY Service Enrollment

Plan Details

[Enroll Now](#)[Previous Page](#)

Prodigy offers several Membership Plans. For details about your Plan, please refer to the materials included with your software. Other plans are available online.

MEMBER SERVICES

Certain features are priced separately and prices are designated online. Charges for extra-fee features used by your household will be billed to your account. When online, Jump: fees for details about pricing.

If you have any questions, please call us at 1-800-PRODIGY (1-800-776-3449).



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EXHIBIT D

EXHIBIT E

PRODIGY Service Enrollment

Satisfaction Guarantee

[Enroll Now](#)

[Previous Page](#)

MEMBER SERVICES

We want you to be completely satisfied with the service. If you're not, let us know during your first month and we'll cancel your Membership. Otherwise, we'll automatically continue your Membership

Other plans are available online



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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 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 Electronic Fund Transfer Act and its implementing Regulation E; 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 Acts and Regulation, 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 Prodigy Services Corporation is an Ohio corporation with its principal place of business or office at 445 Hamilton Avenue, White Plains, New York.

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

ORDER

DEFINITIONS

For purposes of this order, the following terms shall have the meanings set forth below, unless specifically stated otherwise:

1. "*Account*" means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held either directly or indirectly by a financial institution, as defined below, and established primarily for personal, family, or household purposes.

2. "*Financial institution*" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer.

3. "*Consumer*" means a natural person or other entity that may be billed for online services; provided that, for purposes of paragraphs IV and VI of this order, "consumer" shall only mean a natural person.

4. "*Electronic Fund Transfer*," as defined by the Electronic Fund Transfer Act, 15 U.S.C. 1693a(6), means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephone, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account, except that it does not mean a transaction made using a debit card or debit card account which a consumer has identified as a credit card or credit card account.

5. "*Online Service*" shall mean a respondent-controlled access, information, communication, or transaction service which is made available to consumers as a paid service via connection by computers, modems, or other means, to a proprietary or non-proprietary network of telecommunication or computer facilities.

6. Unless otherwise specified, "*respondent*" shall mean Prodigy Services Corporation, its successors and assigns, and its officers, agents, servants, divisions, and employees.

7. "*Respondent-controlled*" shall mean respondent makes the management decisions affecting compliance with the provisions of this order.

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 respondent, directly or through any respondent-controlled corporation, subsidiary or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not

misrepresent, expressly or by implication, the terms or conditions of any trial offer of any Online Service.

II.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not represent, expressly or by implication, that the Online Service is offered "free," "without risk," "without charge," "without further obligation," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the Online Service unless respondent discloses clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service.

Provided, that for purposes of this paragraph II, "clearly and prominently" shall mean with respect to any representation, described in the foregoing paragraph and made in respondent's detailed instructional materials (*e.g.*, starter kits, guidebooks) distributed to consumers, a disclosure in a type size and in a location that are sufficiently noticeable so that an ordinary consumer could notice, read, and comprehend it.

Provided, further, that for purposes of this paragraph II, "clearly and prominently" shall mean, as to any representation described above in this paragraph, apart from any representation covered by the preceding proviso, and made in the context of any advertisement or promotion of the Online Service through any media, including radio, television or other broadcast media, direct mail, interactive network (except as provided in paragraph IV below), or print media (including promotion packages attached thereto), a statement directing consumers to a location where the disclosure required herein will be available (*e.g.*, "For conditions and membership details," followed by: "load up trial software" or "see registration process" or words of similar effect.) In the case of an audio statement, the statement shall be delivered in a volume and cadence sufficient for an ordinary consumer to notice, hear, and comprehend it. In the case of a video statement, the statement shall be of a size and shade and shall appear for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In the case of print media, the statement shall be in a

type size and in a location sufficient for an ordinary consumer to notice, read, and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

III.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall disclose, clearly and prominently, during the final registration process, and prior to the consumer incurring any financial obligation or financial liability to respondent, the terms of all mandatory financial obligations to respondent which will be incurred by the consumer as a result of using such Online Service, including but not limited to the following:

A. The financial terms and conditions of any plan or practice (*e.g.*, trial offer) by which consumers enroll in or renew enrollment in such Online Service and by which, accordingly, respondent charges the consumer; provided, that if such plan or practice exists, respondent must also disclose clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service and provide at least one reasonable means by which the consumer may effectively cancel his or her enrollment by a date certain and thereby avoid further charges; and

B. Any mandatory membership, enrollment, or usage fees (*e.g.*, monthly or hourly usage charges).

Provided, however, that for purposes of this paragraph III, a disclosure is "clearly and prominently" made if it is of a size and shade, and appears for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In addition to the foregoing, such disclosure shall not be avoidable by consumers. Provided, further, that such disclosure shall not be deemed avoidable for purposes of this order based solely on an ordinary consumer's failure to read it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

IV.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any consumer account, shall not:

A. Fail to obtain consumer authorization before initiating any Electronic Fund Transfer from any consumer account as required by Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a), and Section 205.10(b) of Regulation E, 12 CFR 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

B. Fail to provide any consumer with advance notice of Electronic Fund Transfers from the consumer's account varying in amount from previous transfers as required by Section 907(b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(b), and Section 205.10(d) of Regulation E, 12 CFR 205.10(d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

V.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for five (5) years after the last date of dissemination of any representation covered by paragraphs I - III of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying business records demonstrating compliance with the terms and provisions of this order, except as provided for in paragraph VI of this order, including, but not limited to:

A. All advertisements, promotional materials, and instructional materials distributed or accessible to consumers containing the representation;

B. For five (5) years after the date of receipt or generation, all written complaints from consumers, governmental or consumer protection organizations and responses thereto; provided, however, that in lieu of maintaining all electronic mail or similar communications, respondent may comply with this provision by maintaining a representative sample of such communications.

VI.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for two (2) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying all business records which demonstrate respondent's compliance with paragraph IV of this order; provided, however, that in lieu of maintaining all electronic mail or similar communications, respondent may comply with this provision by maintaining a representative sample of such communications.

VII.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, senior managers (*e.g.*, vice-presidents or above), and agents (including, without limitation, advertising agencies) 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, and its successors and assigns, shall prepare a summary of this order, and shall distribute a copy of that summary to all current and future managers with responsibilities or duties affecting compliance with the terms of this order.

VIII.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, 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 dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a parent or respondent-controlled subsidiary or respondent-controlled 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.

IX.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on March 16, 2018, 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.

Commissioner Azcuenaga not participating.

IN THE MATTER OF
COMPUSERVE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 907 OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION
E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3789. Complaint, March 16, 1998--Decision, March 16, 1998

This consent order prohibits, among other things, the Ohio-based Internet service provider from: misrepresenting the terms or conditions of any online service trial offer; or representing that online service is free or otherwise representing that consumers need not pay for the online service, unless any obligation to cancel or to take other action to avoid charges is disclosed clearly and prominently in the instructional materials, and all other advertisements include a statement directing consumers to where this disclosure is available.

Appearances

For the Commission: *Lucy Morris, David Medine, Nina Chang and Steven Silverman.*

For the respondent: *Brian Dengler*, in-house counsel, Columbus, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that CompuServe, Inc. ("CompuServe" or "respondent") has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58, as amended, as well as the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693-1693r, as amended, and its implementing Regulation E, 12 CFR 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. CompuServe is an Ohio corporation with its principal office or place of business at 5000 Arlington Centre Boulevard, Columbus, Ohio.
2. CompuServe has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, CompuServe provides consumers with a range of options including electronic mail, interactive magazines and newspapers, transactional services, and access to the Internet.

3. CompuServe has been and is now engaged in the regular practice of making "electronic fund transfer[s]" from "consumer" "account[s]" as those terms are defined in the EFTA and its implementing Regulation E.

4. The acts and practices of CompuServe alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act.

COMPUSERVE'S COURSE OF BUSINESS

5. CompuServe has disseminated or has caused to be disseminated advertisements for its online service through various media including, but not limited to, print, television, the Internet, direct mail, promotional materials, and instructional materials. These advertisements include, but are not limited to, the attached Exhibits A and B, which contain the following statements:

Exhibit A

Take a joy ride on the information superhighway! . . . Courtesy of your friends at CompuServe®. C'mon, your first 10 hours are FREE!

* * *

Hop on the information highway with CompuServe for 10 free hours of fun, news, games, live chat, entertainment, and lots more!

* * *

Get more out of life, work, and play -- and get 10 hours plus your first month's membership FREE!

* * *

Dear friend

[Y]ou can take a 10-hour free ride on that highway right now with CompuServe®. All you need is your computer, a modem, and the two free CompuServe disks included with this letter.

* * *

You really have nothing to lose. You've got everything you need right now. Your first month's membership is free. And during your first month, you and your family will have 10 free hours to explore CompuServe and the world of the Internet. If you decide that CompuServe isn't for you, you can cancel at any time with no obligation whatsoever.

The advertisement contains an insert card attached to which are two computer disks that permit access to CompuServe's online service. On the reverse side of this card, a bold-face statement provides:

Go now. Go fast. Go free.

To start enjoying your 10 free hours on CompuServe, use the two disks on the back of this card

A fine-print statement at the bottom of the card provides:

Please have your credit card ready. If you use more than ten hours during your first month's free membership, you will be billed \$2.95 per hour by CompuServe. Thereafter you will be billed \$9.95 per month for membership, plus \$2.95 for each hour after 5 hours.

Exhibit B

GET CONNECTED TODAY FOR FREE! COMPUSERVE CONNECTS YOU TO A WORLD OF EDUCATION, FUN, BUSINESS COMMUNICATION AND MORE.

* * *

CONNECT TO COMPUSERVE TODAY AND TRY VIRTUALLY EVERYTHING WE OFFER - ON US.

* * *

EXPLORE COMPUSERVE FOR ONE MONTH FREE!

For a monthly membership fee of \$9.95 US*, you and your family have access to a phenomenal world of education, entertainment and communication. And it's easy to begin. All you need is your home computer, your regular phone line and a modem. Plus, to help you get started, we'll give you one FREE month of membership (a \$9.95 US* value) plus 10 FREE* hours your first month to explore virtually everything we offer.

The advertisement contains a statement at the bottom of the final panel, in fine print, that provides:

*All pricing quoted in US dollars.

Some premium services carry additional charges. Communication surcharges may apply in some areas. Some mail services are not included within your 5 free hours. CompuServe is for use subject to the terms, operating rules and conditions found online.

6. Consumers choosing to participate in the free trial offer typically do so by connecting to the CompuServe service through a telecommunication modem attached to their personal computers. Upon their initial connection to the service, consumers view a series of registration screens including, but not limited to, the attached Exhibit C. The registration screens obtain identification and billing information from consumers, verify the consumers' user identification numbers and passwords, and provide basic information about the online service, including the following details about the terms of the free trial offer:

Exhibit C

10 FREE HOURS TO START.

To help you get started on CompuServe, we're giving you one free month of membership (a \$9.95 value) and 10 free hours during your first month to explore the services you choose. Surf the Internet..Send e-mail..Set up travel reservations. It's all completely up to you.

But what if you don't use all 10 hours your first month? Or what if you use more? No problem. Use as many or as little of your 10 hours as you want -- just be sure you use them within your first month (30 days) online. After that, they expire. If you do go over 10 hours, additional time is only \$2.95 US per hour.

The registration screen continues with basic membership terms including the monthly charges incurred by CompuServe members:

5 FREE HOURS A MONTH.

Then, if you choose to continue your membership (and we're certain you will!) you'll get 5 FREE hours each month. And -- starting at the beginning of your second month -- you'll pay a monthly membership fee of \$9.95 US. Remember that your hours can't be carried over to the next month. Additional online hours are only \$2.95 each.

COMPUSERVE'S VIOLATIONS OF SECTION 5(a) OF THE FTC ACT

7. Through the means described in paragraphs five and six, CompuServe has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within one month from their initial sign-on and do not exceed ten hours of online use.

8. In truth and in fact, consumers who participate in CompuServe's free trial offer and use less than ten hours of online time during the month following their initial sign-on, but who fail to cancel their memberships during the trial period, incur charges. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. In the advertising and sale of its online service, CompuServe has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within one month from their initial sign-on and do not exceed ten hours of online use. CompuServe has failed to disclose adequately to consumers that, upon completion of ten hours of online use or one month from the date of initial sign-on, whichever is earlier, consumers who fail to contact CompuServe and cancel their memberships are treated as members of CompuServe and are charged a monthly membership fee plus applicable hourly fees. These fees

continue to accrue until the consumers affirmatively cancel their memberships. Such facts would be material to consumers in their purchase or use of the CompuServe service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

COMPUSERVE'S VIOLATIONS OF SECTION 907 OF THE EFTA

10. In the course of the online registration process, consumers must select one of several payment options listed on a registration screen titled "Signup - Billing/Country." These options include credit and charge cards and a payment method referred to as "Direct Debit." CompuServe automatically debits the checking accounts of consumers choosing the Direct Debit option, but requires such consumers to sign and submit a written authorization form before debiting their accounts. Additionally, although CompuServe does not identify debit cards as a payment option, its payment system will process debit cards presented by consumers in place of credit cards. CompuServe does not, however, obtain written authorization under such a circumstance.

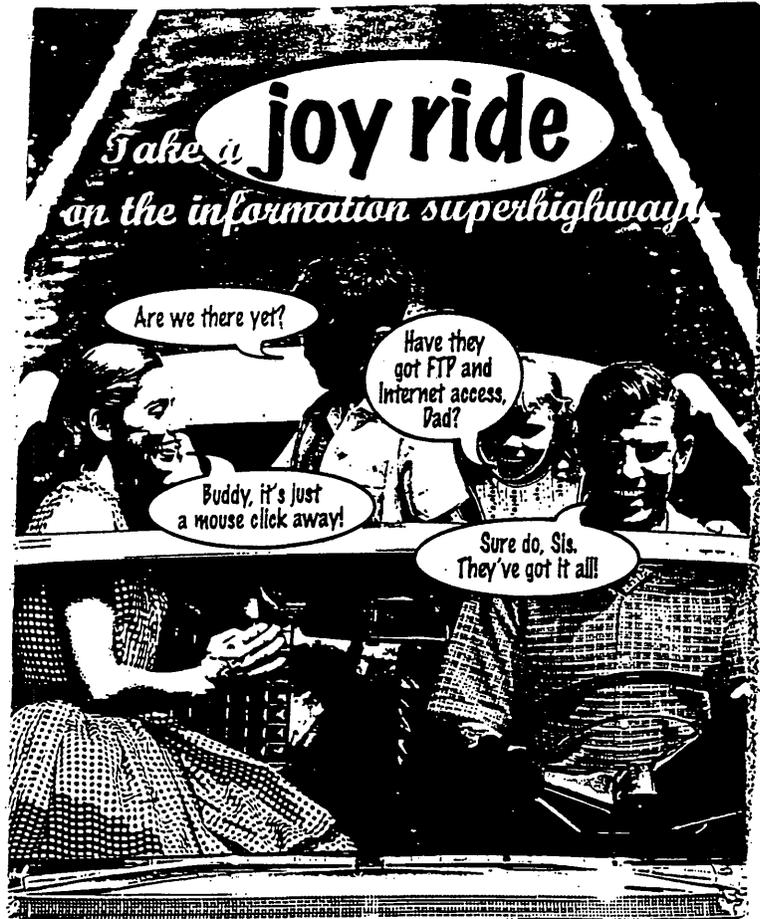
11. In the course and conduct of its business, CompuServe has debited consumers' accounts via their debit cards without their written authorization. In addition, in the course and conduct of its business, CompuServe in many instances has failed to provide consumers with advance written notice of transfers from their accounts varying in amount from previous transfers.

12. CompuServe's aforesaid practices violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

13. The acts and practices of CompuServe as alleged in this complaint constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act. Such acts and practices additionally violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 CFR 205.10(b) and (d).

Commissioner Azcuenaga not participating.

EXHIBIT A



Courtesy of your friends at

 **CompuServe**

C'mon, your first 10 hours are FREE!

EXHIBIT A



**Hop on the information highway with CompuServe
for 10 free hours of fun, news, games, live chat,
entertainment, and lots more!**

Dear friend:

The information highway's filling up with exciting new ways to talk to friends, play games, shop, get information, and have fun!

And you can take a 10-hour free ride on that highway right now with CompuServe®. All you need is your computer, a modem, and the two free CompuServe disks included with this letter.

When you go with CompuServe you'll be on the smoothest, easiest, and most breath-taking ride imaginable. That's because CompuServe is the world's premier online service.

With CompuServe you can —

- surf the internet and cruise the World Wide Web with the click of a button!
- get instant news, sports scores, and weather.
- review new movies before you take your family.
- exchange e-mail with over 3.6 million CompuServe members and millions more on the internet.
- join special interest groups for live online chat.
- save money on airfare and travel plans.
- manage your money more effectively.



**Get more out of life, work, and play —
and get 10 hours plus your first month's membership FREE!**

We've invited millions to join our member family. Over 3.6 million people from around the world have already signed up. Thousands more are joining every day.

And you're holding your membership invitation right now. Join us today, and you'll enjoy 10 free hours of access time — 5 free bonus hours plus 5 more hours during your first free month.

But that's just for starters. This special invitation also includes —

- FREE CompuServe Magazine — this monthly publication is packed with software reviews, computer news, and tips for making the most of your membership.
- FREE How to Use CompuServe — a handy reference manual to help you get the most out of CompuServe.
- FREE CompuServe 101 — the ultimate guide to our 3,000-plus services.



Complaint

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EXHIBIT A

Your 30 free hours, first month's membership, our monthly magazine, New Member Guide, and Directory of Services add up to a ~~\$69.45~~ value. And these savings come with absolutely no strings attached: if you're not completely satisfied with CompuServe, you can cancel your subscription at any time. No questions asked!

No online service offers you more, for so little!

CompuServe is the one online service that you'll never outgrow. We say that because no other service — not Prodigy, not AOL, not Microsoft's Network — can put so much at your fingertips.

Your CompuServe membership gives instant access to over 3,000 services. No matter what your interests, hobbies, occupation, or dreams — CompuServe can be there ... with information ... help from specialists ... and advice and ideas for members in 140 countries.

Something for every member of your family!

CompuServe has something for everyone. Whether it's to your home or your office, CompuServe delivers —



- **financial services** — Investing funds for college tuition or retirement? Do it yourself by accessing the same information that Wall Street brokers use every day. Check out corporate performance. Track your mutual funds. Talk to market analysts live. Even buy and sell via online brokers!
- **entertainment** — See how Roger Ebert rates the movies (and check their ratings and why they got them) before taking the family. Get the latest Hollywood gossip. Check up on your favorite TV soaps when you can't see them. See what's hot and what's not in the current issues of People Magazine and Rolling Stone. Talk to stars. Join a fan club. Preview music before you get that CD.
- **news** — Forget the morning paper, TV news, and all those subscriptions. You get the world's events as they happen with AP Online and CNN Online, dozens of newspapers, magazines like U.S. News and World Report, nationally acclaimed columnists, and more.
- **weather** — Get the complete weather picture for where you are now or where you're planning to go for business, vacation, or weekend trips. View continually updated satellite Accu-Weather® maps. Go online with the Weather Channel Forum!
- **reference** — Students can get the facts from Grolier's Academic American Encyclopedia, American Heritage Dictionary, Peterson's College Guide, and over 1,000 databases. And professionals will find a vast range of business, financial, academic, scientific, and technical services for making informed decisions about emerging opportunities, changing markets, and consumer trends.
- **Women's Wire** — Today's woman will find a whole new online service devoted exclusively to issues that affect her career, health, family, relationships, and more.
- **zines** — Get zines and newsletters from over 100 different family members, old friends and the new ones, from all over the world. Meet and chat with them. Or buy zines and newsletters.



EXHIBIT A

- **sports** — For fans who need to know it all, CompuServe's got the latest scores and standings, news on who's been traded, the complete play-off picture, and in-depth stories from Sports Illustrated online. It's all just seconds away.
- **shopping** — Avoid the crowds and packed parking lots. Shop The Electronic Mall and visit over 160 popular shops like Lands' End, Brooks Brothers, JCPenney, and Service Merchandise. Compare and save. Find the best bargain (and make the right choice with Consumer Reports).

No online service offers time much, so all adds up to an incredible value for you and your family. And it's all yours now for 10 hours free during your first month.

Unleash the potential of your home computer!

Is the newest version of Windows right for you? Should you buy it now or wait? You'll find the answers on CompuServe, along with free technical advice, shareware, software demos, bug fixes, and access to experts. Plus lots more.



A few mouse clicks is all it takes to get one-stop access to today's leading hardware and software companies. No more calling those always busy computer help lines. Just quick answers from technical representatives at IBM, Apple, Compaq, Aldus, Hewlett-Packard, Novell, WordPerfect, and many, many more — over 1,000 in all!

You can also share tips and techniques with pros in desktop publishing, graphics, multimedia, networking, and database Forum sites. Download and preview new software demos, get free shareware, cheaters for today's hot computer games like DOOM, Marathon, and Dark Forces. Access templates for page layouts, spreadsheets, and newsletters. We've got some 30,000 files in all! Available to you any time — day or night.

Make new friends and expand your horizons.

Thousands of people from around the world are chatting live on CompuServe right now! And they're discussing almost every imaginable topic ... crafts, fashion, and home decorating ... the latest computer games ... the hottest teams in sports ... the best cars. They're trading recipes, tips on gardening and crafts, and fashion trends. Discussing emerging markets and investment strategies. Searching for their family roots around the world.

If it's part of your world, you'll find it and someone to share it with on CompuServe! Today we have over 600 special interest Forum sites. And the number continues to grow as more people like you join our family.

Get on the Internet with the click of a button!

Once the world of computer "techniques," the Internet is now home to millions of everyday computer users. And thanks to CompuServe, the Internet neighborhood has become friendlier than ever.

That's because every CompuServe member has free access to our award-winning Internet software that makes getting on the Internet as simple as a click. Our multiple, easy-to-use, and secure Internet access options let you connect to the Internet with your CompuServe account.



Complaint

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EXHIBIT A

When you jump on the Internet with CompuServe, you and your family can easily exchange e-mail, download files, and access an incredible array of research materials. And you can do it all at no cost with your 10 free hours!

Getting started is easy — and help's just a free phone call away.

CompuServe is committed to making going online as easy as possible. Your two free sign-up disks come with easy-to-follow on-screen instructions to guide you through the install and sign-up process. If you have any problems at all, simply call 1-800-338-6823 for quick, friendly advice.

You really have nothing to lose. You've got everything you need right now. Your first month's membership is free. And during your first month, you and your family will have 10 free hours to explore CompuServe and the world of the Internet. If you decide that CompuServe isn't for you, you can cancel at any time with no obligation whatsoever.

Why wait another minute? Put your free sign-up disks in your computer and hit the "Info Highway" today!

Sincerely,



Paulette White
Vice President
Marketing Communications

P.S. This special offer of 10 FREE hours and first month's membership to CompuServe is available exclusively to new members and comes with no obligation to buy anything. If you are already a member, why not pass this special offer along to a friend?

Go now. Go fast. Go free!

To start enjoying your 10 free hours on CompuServe, use the two disks on the back of this card and follow these simple instructions:

- 1 Place WinCIM disk 1 in your computer's A: or B: disk drive.
- 2 From Windows Program Manager, select Run from the File menu, and enter "A:SETUP" (or B:SETUP).
Note: for Windows 95, select Run from the Start button menu and enter "A:SETUP" (or B:SETUP).
- 3 Follow the on-screen prompts, paying special attention to the those related to "Winsock" (this is what your computer recognizes as your Internet connection).
- 4 Install disk 2 when prompted.
- 5 To complete installation, follow the remaining on-screen instructions.

John Q Sample
123 Anywhere St
Anycity, US 12345-6789

When signing up, you will be asked to enter the following information:

AGREEMENT NUMBER: XXXX99
SERIAL NUMBER: 999999



If you have your credit card ready, you can receive more than 10 hours of online time your first month, but you must pay for the first \$2.99 per hour for CompuServe. Thereafter, you will be billed \$9.99 per month for membership plus \$2.99 for each hour after 10 hours.

That's all there is to it. After you're signed up, you can click the CompuServe icon to get online. Your Internet connection and Internet Web browser are built in — you'll find a direct Internet button right on the CompuServe menu.

Questions about getting started?
Call 1-800-336-6123.



EXHIBIT A

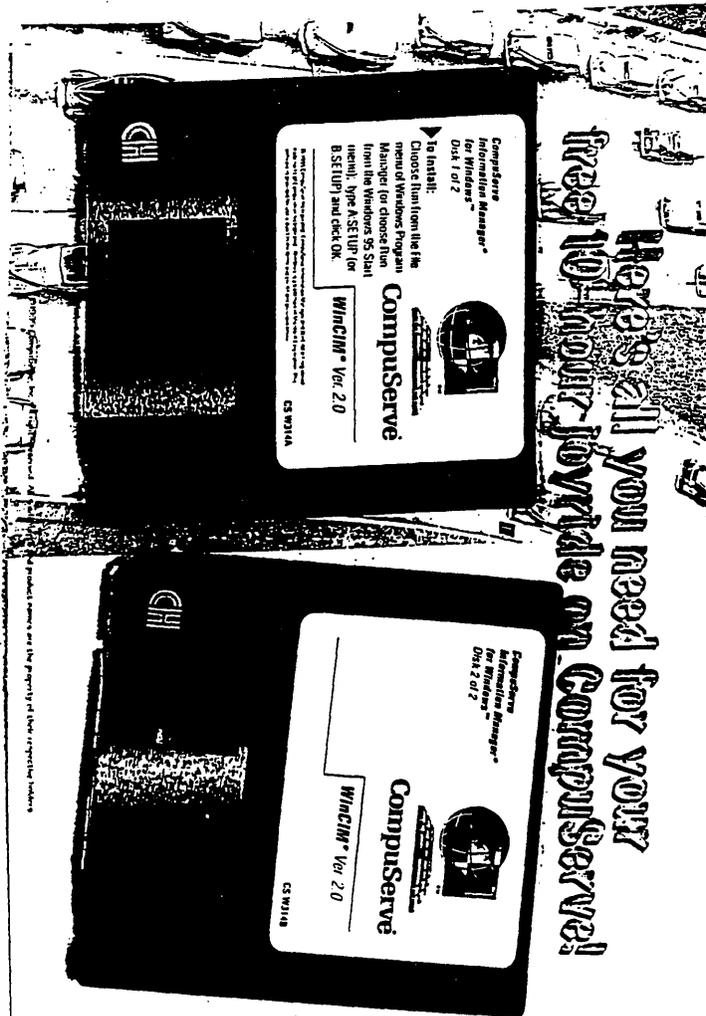
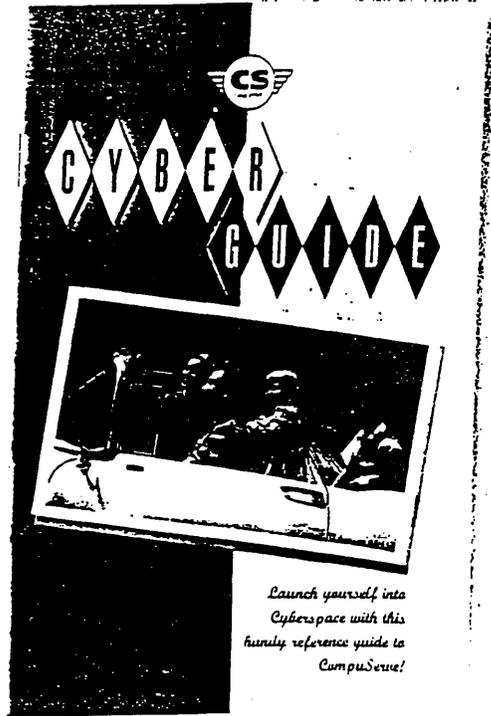


EXHIBIT A



Complaint

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EXHIBIT A

We've got a world of fun for everyone!

No online service has more to offer you — and every member of your family — than CompuServe®. No matter what your age or how big your family is — you'll find an incredible variety of things to do and see when you go online with us.

We make getting started easy. And once you're online, you'll find that getting around is easy too. And in this handy Cyberguide, you'll find some useful tips about installing our free CompuServe software, using the service, and "surfing" the internet.

You'll also find some useful phone numbers for getting help, as well as facts, trivia, and bits of info you may find useful as you begin exploring Cyberspace with CompuServe. So keep it handy when you're ready to hop online!

First things first.

1. Install your software. Your free software disks are attached to a "disk carrier card" that includes easy-to-follow steps for

installing your CompuServe software. During the installation process, you'll be walked through a series of screens and asked to enter your name, address, phone number, and other information. You can press the "F1" key on your keyboard at any time for information and hints about each screen.

2. Sign up to become a member of CompuServe. After installing the software, you can click on the "Sign Me Up" button when asked or click on the "Membership Sign Up" icon on your computer's desktop. You can always press the "F1" key for helpful hints on the sign-up process. At this point, you'll need the Agreement Number and Serial Number listed on the disk carrier card. Enter the appropriate information when prompted.

If you have any questions at all or need additional help, feel free to call 1-800-336-6623.

3. Go online. You're now ready to connect to CompuServe. Just double-click the CompuServe Information Manager icon to begin. Then click the "Connect" button. The software does the rest. It's that easy.

EXHIBIT A

Start exploring!

As a new member you'll find all sorts of useful menus and shortcuts for getting around CompuServe, exploring the Internet, and finding help when you need it.

Our Browse menu can take you to some of our most popular spots at the click of the mouse. And for a quick intro to CompuServe, nothing beats the Welcome Center, which you can access by clicking on the Go (Traffic Light) icon and typing in "Welcome" for instant access to user tips, the Help Forum, and more.

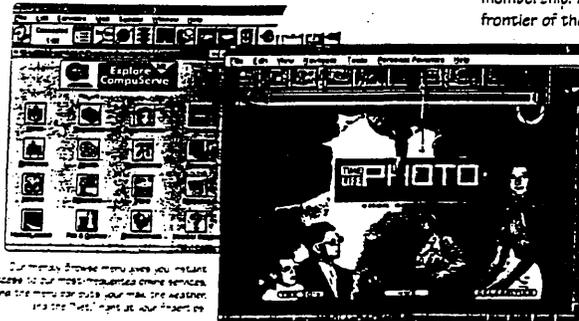
Surfing the Internet

Internet traffic is skyrocketing. You can find out why by going online with CompuServe. We make it incredibly easy for you to "surf" the Internet by giving one-button access with our built-in World Wide Web browser.* With just a



little practice, you can be trading pics and info with folks from down under, across the Atlantic, or down the block.

So open up your eyes (and ears) to the world waiting on CompuServe. Take advantage of your 10 free hours and first month's free membership. And start exploring the new frontier of the Internet.



Our Browse menu gives you instant access to our most popular online services, and the menu can take you to the weather and the "Hot" spots at your favorite...

Our built-in Web browser makes getting around the Internet incredibly easy. Search, go forward or back, size text, and more with the handy menu bar buttons.

*The Internet is not available in all areas. CompuServe's Internet Explorer Manager™ is available only for users with Macintosh and are CompuServe's members. See CompuServe's Web browser help for more information.

Complaint

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EXHIBIT A



Hey, what's that mean?

The computer revolution and the rush to Cyberspace has brought with it an almost unending list of special terms and its own private lingo. Making sense of this new vocabulary can be tough, here's a rundown of some of the more common terms and what they mean.

Browser — a software program that lets you navigate to the Internet and makes it easy to use. It's like the Netscape Web Browser, which is the most popular of the so-called WWW (World Wide Web) browsers.

Cyberspace — the area you visit and explore via your computer's mouse and keyboard. It's like the Internet, the World Wide Web, and online services, but the term "Cyberspace" was coined by William Gibson in his 1984 novel, *Countdown*.

Email — short for electronic mail, it's how people exchange their digital computer messages. It's like the post office of the Internet.

Forum — any one of the more than 100 websites, areas or Cyberspace.

Freeware — software available free of charge. It's like free-ware in Cyberspace's member firm, sites and in the Internet.

FTP — short for File Transfer Protocol, which is a standardized text-based method for sending electronic files over the phone lines from one computer to another.

FAQ — short for Frequently Asked Questions. FAQs are generally found in shared resources areas, the Cyberspace Forum sites and online services at a distance.

Homepage — a method for displaying and presenting information that includes text, text, pictures and interactive sound and images — and which allows users to browse for "hits" through a series of interconnected topics. Users determine how they move through cyberspace by clicking on a link or icon, image, or button and can take them immediately to the next term regardless of where it resides.

Internet — best described as a "network of networks." The Internet is made up of over 25,000 interconnected networks. Originally established in 1969 when Defense Department researchers used computers at four American universities, the Internet has become the world's largest research and is

Internet — a specific "address" or destination on the Internet, as managed by either an individual or an organization. The quality of Websites varies widely and with Cyberspace you can find and maintain a copy of your favorite sites for free or for a fee.

Navigator — proprietary software that's instructed how to charge you an online fee to use a website for "free" to cover the cost of development and a subscription. It's the name of software on Cyberspace as well as on the Internet.

WWW — short for World Wide Web, information Manager for Windows.

World Wide Web — the hypertext, hypermedia-based portion of the Internet used for browsing; often shortened to WWW.

Frequently called numbers

Need help installing your software?
Call 1-800-336-6823

Need a different format for installation discs?
Call 1-800-368-3343

Need to reach Customer Service?
Call 1-800-848-8990



Complaint

EXHIBIT A

Why CompuServe?

There are literally dozens of online services and internet providers to choose from. You're probably wondering which one is right for you. Or maybe you think that they're all pretty much alike.

You could take a chance. Or you could go with a proven leader — CompuServe. Our premier status is based on facts, not a lot of hype. CompuServe gives you —

- > more members worldwide than any other service (that includes Prodigy and AOL)
- > more services — more than 3,000 in all
- > professional databases — over 1,000!
- > Net browser — CompuServe's exclusive Net browser comes built-in.
- > support for 28.8 speed modems (most services offer only up to 14.4) for faster, more economical file downloading and image retrieval.
- > support for Windows 95, Windows 3.1, Macintosh, DOS, and OS/2.
- > toll-free telephone support.
- > free monthly CompuServe Magazine for members.



"Sincerely Yours" Cyberstyle

Here frequency and other special notes with a combination of keyboard characters depicting how the writer feels. (Think of your hand to the left when reading them to get the visual idea.) These are taken from "The Graphical Smiley Dictionary," which you can find on CompuServe.

- :- Smile :- Crying :- Tongue Out :- OJ OJ
- :- Winking :- Happy and Crying :- Surprised :- Laughing
- :- Squinting :- Screaming :- Kiss :- Dumb

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Complaint

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EXHIBIT A



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EXHIBIT A

That's one of the first questions people ask when they hear about our new member offer. But frankly we can't think of a better way of introducing you to everything CompuServe has to offer.

With so many services and so many things to do, you could spend hundreds of hours online with CompuServe and still have plenty left to explore. And while we can't offer you unlimited free access, your 10 free hours and first month's free membership will give you a good idea if CompuServe is right for you.

If CompuServe isn't what you're looking for, no problem. You can cancel at any time — no questions asked. I guarantee it.



Tom Cullivan
Director, Customer Promotions
CompuServe

EXHIBIT A

Oh boy, now I can play games and get free disks!

I can no longer hang out on vacation, I'll even receive my own FREE DISK!

Wow! Street works well! How I can be my own banker.

I can't wait to join the "Society & Math" team! There'll be a "champion" and best body at each Annual!

I can't wait for starters. Come on inside!

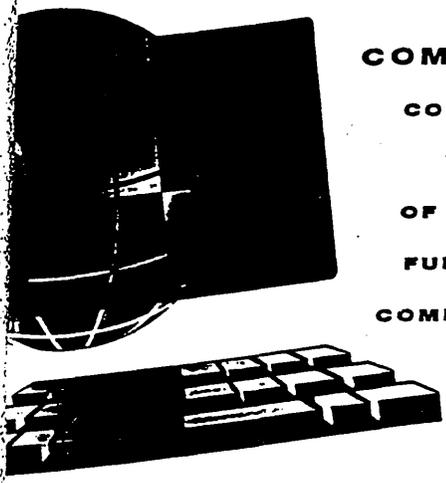
WOW!

10 hours of FREE fun for the whole family.

Free disks and details inside.

[Empty box for name]

A-15



GET **CONNECTED** TODAY

FREE!

COMPUSERVE
CONNECTS YOU
TO A WORLD
OF EDUCATION,
FUN, BUSINESS
COMMUNICATION
AND MORE.

OVER 3,000 SERVICES INCLUDING THE INTERNET

Complaint

125 F.T.C.

EXHIBIT B



GET **CONNECTED** TODAY

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COMPUSERVE
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AND MORE.

Complaint

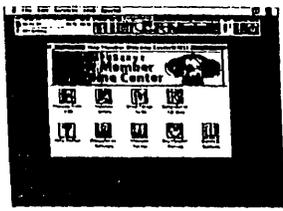
EXHIBIT B

EXPLORE COMPUSERVE FOR ONE MONTH FREE!

For a monthly membership fee of \$9.95 US, you and your family have access to a phenomenal world of education, entertainment and communication. And it's easy to begin. All you need is your home computer, your regular phone line and a modem. Plus, to help you get started, we'll give you one **FREE** month of membership (a \$9.95 US* value) plus 10 **FREE*** hours your first month to explore virtually everything we offer. After that, you receive 5 **FREE*** hours each month to try nearly 3,000 products and services.* And additional online time is just \$2.95 US* per hour. Try any of our fortunes...Surf the Internet and the World Wide Web...Send e-mail... Check out the weather...Set up travel reservations. It's all wide open. And all completely up to you.

WELCOME TO COMPU SERVE.

Be sure to drop by the New Member Welcome Center — a wise first stop on your trip online. Click on the GO (traffic light) button and enter WELCOME to get there.



SA Y IT WITH ELECT RONS.

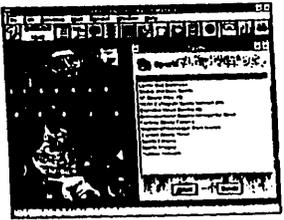
Get your message across in no time, for next to nothing at all. Because basic e-mail and CD are both included within your free hours. So next time you have something to say, go on CompuServe and say it with electrons.

SURF THE WEB OR THE INTERNET.

You've probably heard of Internet and the Web. Maybe you think they have a bit to offer but you're afraid to connect. And if you do connect, how do you find your way around? With CompuServe, it's all easy. We let you explore everything the "Net" and the "Web" offer. Just point and click.

FIND YOUR OWN PLACE.

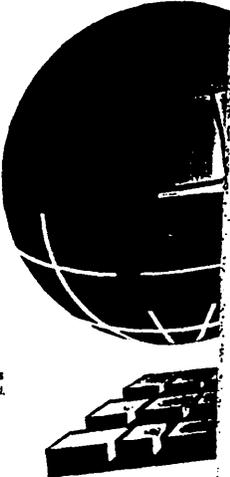
Want to meet people like you? How about people like you've never met before? Wherever and whatever you're looking for, you'll find it in our "Forum" areas. They're where people go to talk about issues. Visit with friends. Or find the answers to questions. So whether you're into home improvement or home business, you'll find a place for you and your family.



Complaint

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EXHIBIT B



CompuServe
AN H&R BLOCK COMPANY

World headquarters in Columbus, Ohio, USA
800-848-8990 or 614-529-1340

Offices also in Bristol, UK 0800 289458 or (+44) (117)976 0680;
Paris, France 36-63-81-31 or (+33)(1) 4714 2160; Munich,
Germany 0130 86-46-43 or (+91) 89166 535-222; and Argentina,
Australia, Chile, Hong Kong, Hungary, Israel, Japan, Mexico,
New Zealand, South Africa, South Korea, Taiwan, and Venezuela.

Have questions? If you need help signing up to CompuServe, call us
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EXHIBIT B

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B-7

EXHIBIT C

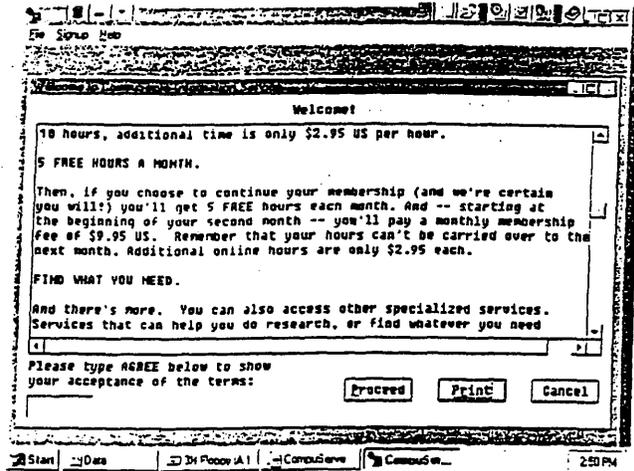


Exhibit C-1

Complaint

EXHIBIT C

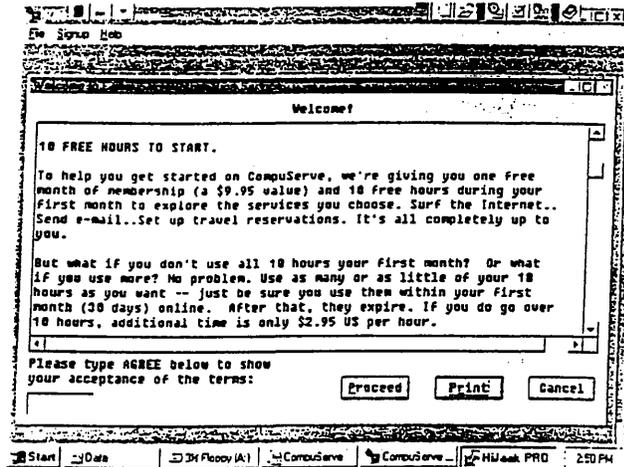


Exhibit C-2

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Electronic Fund Transfer Act and its implementing Regulation E; 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 Acts and Regulation, 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 CompuServe, Inc. is an Ohio corporation with its principal place of business or office at 5000 Arlington Centre Boulevard, Columbus, Ohio.
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 terms shall have the meanings set forth below, unless specifically stated otherwise:

1. "*Account*" means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held either directly or indirectly by a financial institution, as defined below, and established primarily for personal, family, or household purposes.

2. "*Financial institution*" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer.

3. "*Consumer*" means a natural person or other entity that may be billed for online services; provided that, for purposes of paragraphs IV and VI of this order, "consumer" shall only mean a natural person.

4. "*Electronic Fund Transfer*," as defined by the Electronic Fund Transfer Act, 15 U.S.C. 1693a(6), means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephone, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account, except that it does not mean a transaction made using a debit card or debit card account which a consumer has identified as a credit card or credit card account.

5. "*Online Service*" shall mean a respondent-controlled access, information, communication, or transaction service which is made available to consumers as a paid service via connection by computers, modems, or other means, to a proprietary or non-proprietary network of telecommunication or computer facilities.

6. Unless otherwise specified, "*respondent*" shall mean CompuServe, Inc., its successors and assigns, and its officers, agents, servants, divisions, and employees.

7. "*Respondent-controlled*" shall mean respondent makes the management decisions affecting compliance with the provisions of this order.

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 respondent, directly or through any respondent-controlled corporation, subsidiary or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not misrepresent, expressly or by implication, the terms or conditions of any trial offer of any Online Service.

II.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not represent, expressly or by implication, that the Online Service is offered "free," "without risk," "without charge," "without further obligation," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the Online Service unless respondent discloses clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service.

Provided, that for purposes of this paragraph II, "clearly and prominently" shall mean with respect to any representation, described in the foregoing paragraph and made in respondent's detailed instructional materials (*e.g.*, starter kits, guidebooks) distributed to consumers, a disclosure in a type size and in a location that are sufficiently noticeable so that an ordinary consumer could notice, read, and comprehend it.

Provided, further, that for purposes of this paragraph II, "clearly and prominently" shall mean, as to any representation described above in this paragraph, apart from any representation covered by the preceding proviso, and made in the context of any advertisement or promotion of the Online Service through any media, including radio, television or other broadcast media, direct mail, interactive network (except as provided in paragraph IV below), or print media (including promotion packages attached thereto), a statement directing consumers to a location where the disclosure required herein will be available (*e.g.*, "For conditions and membership details," followed by: "load up trial software" or "see registration process" or words of similar effect.) In the case of an audio statement, the statement shall be delivered in a volume and cadence sufficient for an ordinary

consumer to notice, hear, and comprehend it. In the case of a video statement, the statement shall be of a size and shade and shall appear for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In the case of print media, the statement shall be in a type size and in a location sufficient for an ordinary consumer to notice, read, and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

III.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall disclose, clearly and prominently, during the final registration process, and prior to the consumer incurring any financial obligation or financial liability to respondent, the terms of all mandatory financial obligations to respondent which will be incurred by the consumer as a result of using such Online Service, including but not limited to the following:

A. The financial terms and conditions of any plan or practice (e.g., trial offer) by which consumers enroll in or renew enrollment in such Online Service and by which, accordingly, respondent charges the consumer; provided, that if such plan or practice exists, respondent must also disclose clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service and provide at least one reasonable means by which the consumer may effectively cancel his or her enrollment by a date certain and thereby avoid further charges; and

B. Any mandatory membership, enrollment, or usage fees (e.g., monthly or hourly usage charges).

Provided, however, that for purposes of this paragraph III, a disclosure is "clearly and prominently" made if it is of a size and shade, and appears for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. In addition to the foregoing, such disclosure shall not be avoidable by consumers. Provided, further,

that such disclosure shall not be deemed avoidable for purposes of this order based solely on an ordinary consumer's failure to read it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

IV.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any consumer account, shall not:

A. Fail to obtain consumer authorization before initiating any Electronic Fund Transfer from any consumer account as required by Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(a), and Section 205.10(b) of Regulation E, 12 CFR 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

B. Fail to provide any consumer with advance notice of Electronic Fund Transfers from the consumer's account varying in amount from previous transfers as required by Section 907(b) of the Electronic Fund Transfer Act, 15 U.S.C. 1693e(b), and Section 205.10(d) of Regulation E, 12 CFR 205.10(d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 CFR 205, Supp. I.

V.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for five (5) years after the last date of dissemination of any representation covered by paragraphs I - III of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying business records demonstrating compliance with the terms and provisions of this order, except as provided for in paragraph VI of this order, including, but not limited to:

A. All advertisements, promotional materials, and instructional materials distributed or accessible to consumers containing the representation;

B. For five (5) years after the date of receipt or generation, all written complaints from consumers, governmental or consumer protection organizations and responses thereto; provided, however, that in lieu of maintaining all electronic mail or similar communications, respondent may comply with this provision by maintaining a representative sample of such communications.

VI.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, for two (2) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying all business records which demonstrate respondent's compliance with paragraph IV of this order; provided, however, that in lieu of maintaining all electronic mail or similar communications, respondent may comply with this provision by maintaining a representative sample of such communications.

VII.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, senior managers (*e.g.*, vice-presidents or above), and agents (including, without limitation, advertising agencies) 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, and its successors and assigns, shall prepare a summary of this order, and shall distribute a copy of that summary to all current and future managers with responsibilities or duties affecting compliance with the terms of this order.

VIII.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, 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 dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a parent or respondent-controlled subsidiary or respondent-controlled 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.

IX.

It is further ordered, That respondent, directly or through any respondent-controlled corporation, subsidiary, or other device, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on March 16, 2018, 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.

Commissioner Azcuenaga not participating.

IN THE MATTER OF

RECKITT & COLMAN PLC

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

Docket C-3306. Consent Order, Sept. 26, 1990--Set Aside Order, Mar. 24, 1998

This order reopens and sets aside a 1990 consent order with Reckitt & Colman, (113 FTC 827), thus removing the Commission's prior approval requirement for acquiring the assets of or the rights related to any rug cleaning product businesses in the United States.

ORDER SETTING ASIDE ORDER

On December 5, 1997, Reckitt & Colman plc ("R&C"), the respondent named in the above-referenced consent order ("order") issued by the Commission on September 26, 1990, filed its Petition to Reopen and Modify Consent Order ("Petition") in this matter. R&C asks that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the order to eliminate the prior approval provision set forth in paragraph V of the order, or, in the alternative, substitute a prior notification requirement for the prior approval requirement. The thirty-day public comment period on the Petition ended on January 13, 1998. No comments were received. For the reasons discussed below, the Commission has determined to grant R&C's Petition.

The complaint in this matter alleges that R&C's agreement with American Home Products Corporation ("AHP") to acquire the Boyle-Midway Division of AHP violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in the rug cleaning products business in the United States.²

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

² Complaint ¶¶ IV, V, and VI.

The order required R&C to divest "R&C's Assets to be Divested," as defined in paragraph I.I of the order.³ On December 4, 1990, the Commission approved R&C's application to divest the "R&C's Assets to be Divested" to Joh. A. Benckiser GmbH. Under the order, R&C is prohibited for a ten-year period from acquiring without the prior approval of the Commission any stock or related assets of any concern engaged in the "rug cleaning products business" in the United States.⁴

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.⁵ 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."⁶

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, engage in an otherwise unreportable anticompetitive merger."⁷ As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as

³ Order ¶¶ I.I and II.

⁴ Order ¶ V.

⁵ Prior Approval Policy Statement at 2.

⁶ *Id.*

⁷ *Id.* at 3.

the structural characteristics of the relevant markets, the size and other 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."⁸ 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.⁹

The presumption is that setting aside the general prior approval requirement of paragraph V is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. R&C completed the divestiture required by the order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. C-3306 and set aside the order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on September 26, 1990, be, and it hereby is, set aside as of the effective date of this order.

⁸ *Id.* at 4.

⁹ *Id.*

Set Aside Order

125 F.T.C.

IN THE MATTER OF

RECKITT & COLMAN PLC

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3571. Consent Order, April 4, 1995--Set Aside Order, March 24, 1998*

This order reopens and sets aside a 1995 consent order with Reckitt & Colman, (119 FTC 380), thus removing the Commission's prior approval requirement for acquiring the assets of or the rights related to any carpet deodorizer businesses in the United States.

ORDER SETTING ASIDE ORDER

On December 5, 1997, Reckitt & Colman plc ("R&C"), the respondent named in the above-referenced consent order ("order") issued by the Commission on April 4, 1995, filed its Petition to Reopen and Modify Consent Order ("Petition") in this matter. R&C asks that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the order to eliminate the prior approval provision set forth in paragraph VI of the order, or, in the alternative, substitute a prior notification requirement for the prior approval requirement. The thirty-day public comment period on the Petition ended on January 13, 1998. No comments were received. For the reasons discussed below, the Commission has determined to grant R&C's Petition.

The complaint in this matter alleges that R&C's agreement with Eastman Kodak Company ("Kodak"), L&F Products, Inc. ("L&F"), a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F, to acquire the household products, professional products and personal products businesses of L&F violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended,

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

15 U.S.C. 18, by lessening competition and tending to create a monopoly in the carpet deodorizer products business in the United States.²

The order required R&C to divest the "Carpet Deodorizer Assets" and "Rug Cleaning Assets," as defined in paragraphs I.H and I.J, respectively, of the order.³ On February 23, 1995, the Commission approved R&C's application to divest the "Rug Cleaning Assets" to Playtex Products, Inc. On August 21, 1995, the Commission approved R&C's application to divest the "Carpet Deodorizer Assets" to Block Drug Co., Inc. Under the order, R&C is prohibited for a ten-year period from acquiring without the prior approval of the Commission any stock or related assets of any concern engaged in the "Carpet Deodorizer Products" business in the United States.⁴

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.⁵ 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."⁶

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

² Complaint ¶¶ V, VI, and VII.

³ Order ¶¶ I.H and I.J, II and III.

⁴ Order ¶ VI.

⁵ Prior Approval Policy Statement at 2.

⁶ *Id.*

attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."⁷ 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 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."⁸ 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.⁹

The presumption is that setting aside the general prior approval requirement of paragraph VI is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. R&C completed the divestitures required by the order. Accordingly, nothing to overcome the presumption having been presented, and because the only remaining obligation under the order is the prior approval requirement in paragraph VI and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. C-3571 and set aside the order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on April 4, 1995, be, and it hereby is, set aside as of the effective date of this order.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.*

IN THE MATTER OF

HAROLD A. HONICKMAN, ET AL.

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

Docket 9233. Consent Order, July 25, 1991--Set Aside Order, March 31, 1998

This order reopens and sets aside a 1991 consent order (modified in July 1992 and March 1993) with Harold A. Honickman, (115 FTC 623), thus removing the Commission's prior approval requirement for acquiring the assets of or the rights related to any bottling operation in the New York metropolitan area.

ORDER SETTING ASIDE ORDER

On November 5, 1997, Harold A. Honickman ("Honickman") filed a Petition To Modify Consent Order ("Petition") in Docket No. 9233 ("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 ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the order to terminate the prior approval provision set forth in paragraph II of the order. The Petition was placed on the public record for thirty days and no comments were received. The Commission has determined to terminate the prior approval provision of the order by setting aside the order.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.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,

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

² Prior Approval Policy Statement at 2.

"Commission orders in such cases will not include prior approval or prior notification requirements."³

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, engage in an otherwise unreportable anticompetitive merger."⁴ 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."⁵ 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.⁶

There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that Honickman would attempt the same or essentially the same acquisition that gave

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.*

rise to the original complaint. In addition, it appears likely that future acquisitions that may have adverse competitive consequences within the relevant market would be HSR reportable. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order because deleting the prior approval requirement, in effect, would eliminate all of Honickman's future obligations under the order.⁷

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened, and that the order be, and it hereby is, set aside as of the effective date of this order.

Commissioner Azcuenaga recused.

⁷ See, e.g., S.C. Johnson & Son, Inc., Docket No. C-3418, Order Setting Aside Order (January 4, 1996).

Complaint

125 F.T.C.

IN THE MATTER OF

TRW INC.

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-3790. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order requires, among other things, the Ohio-based corporation to divest, to an acquirer approved by the Commission and the Dept. of Defense, BDM's SETA service contract with the BMDO and all of BDM's assets associated with the performance of that contract within 120 days from the date TRW consummates its proposed acquisition of BDM. The consent order also requires TRW to provide technical assistance to the acquirer for a period of one year.

Appearances

For the Commission: *Nicholas Koberstein, Yolanda Gruendel, Ann Malester and William Baer.*

For the respondent: *Tom D. Smith, Jones, Day, Reavis & Pogue, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, TRW Inc. ("TRW"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of BDM International Inc. ("BDM"), 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 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. RESPONDENT

1. Respondent TRW is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal executive offices located at 1900 Richmond Road, Cleveland, Ohio.

II. ACQUIRED COMPANY

2. BDM is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 1501 BDM Way, McLean, Virginia.

III. JURISDICTION

3. TRW and BDM 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 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 November 20, 1997, TRW and BDM entered into an Agreement and Plan of Merger whereby TRW will acquire all of the issued and outstanding common shares of BDM for approximately \$942 million (the "Acquisition").

V. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the acquisition are: (a) the research, development, manufacture and sale of a ballistic missile defense system for the United States Department of Defense ("BMD System"); and (b) the provision of systems engineering and technical assistance services to the United States Ballistic Missile Defense Organization ("SETA Services").

6. The United States is the relevant geographic area in which to analyze the effects of the acquisition in both relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

7. The market for the research, development, manufacture and sale of a BMD System is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent is a member of one of only two teams competing to supply a BMD System to the United States Department of Defense.

8. The market for SETA Services is highly concentrated whether measured by the HHI or by concentration ratios. BDM has been the only provider of SETA Services since 1994.

9. Respondent, through the Acquisition, would be engaged in both the research, development, manufacture and sale of a BMD System and the provision of SETA Services.

VII. BARRIERS TO ENTRY

10. New entry into the market for the research, development, manufacture and sale of a BMD System would be difficult and unlikely. The time required to develop the necessary expertise to manufacture a BMD System would far exceed two years. The cost to develop the necessary technology to manufacture a BMD System would be prohibitively high.

11. New entry into the market for the provision of SETA Services would be untimely. The Department of Defense intends to award a BMD System procurement contract within the next six months. It would not be possible for a firm to develop the necessary expertise to provide SETA Services in that time.

VIII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the market for a BMD System in the United States 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. Respondent may gain access to competitively sensitive non-public information concerning the other BMD System manufacturers, so that actual competition between respondent and the other BMD System manufacturers will be reduced; and

b. Respondent may be in a position to disadvantage the other BMD System manufacturers, so that actual competition between respondent and the other BMD System manufacturers will be reduced.

IX. VIOLATIONS CHARGED

13. 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.

14. The Agreement and Plan of Merger 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 respondent of all of the outstanding voting common stock of BDM International Inc. ("BDM"), 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 to Hold Separate and an Agreement Containing 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 Agreements 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 Agreement Containing Consent Order and Agreement to Hold Separate and placed such Agreements 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 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 TRW Inc. ("TRW") 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 located at 1900 Richmond Road, Cleveland, Ohio.

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 "*TRW*" means TRW Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by TRW Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*BDM*" means BDM International Inc., a Delaware corporation with its principal place of business at 1501 BDM Way, McLean, VA, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by BDM International Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

D. "*Ballistic Missile Defense Organization*" means the agency of the Department of Defense that is chartered by the Secretary of Defense under Department of Defense Directive 5134.9 and mandated by Congress to develop ballistic missile defense systems.

E. "*SETA Services Operations*" means all assets, properties, business and goodwill, tangible and intangible, held by BDM and used in the provision of SETA Services to the Ballistic Missile Defense Organization under contract HQ0006-95-C-0006, including, without limitation, the following:

1. All rights, obligations and interests in contract HQ0006-95-C-0006 between the Ballistic Missile Defense Organization and BDM, or any subcontract of a contract between any entity and the Ballistic Missile Defense Organization where such subcontract is between BDM and such entity;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and systems, software, software licenses, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
4. All rights, title and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
5. All rights, title 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;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files;
8. All data developed, prepared, received, stored or maintained under contract HQ0006-95-C-0006, or any predecessor contract or subcontract to support the operations of the Ballistic Missile Defense Organization;
9. All items of prepaid expense; and
10. All employment contracts.

F. "*SETA Services*" means systems engineering and technical assistance services provided by BDM to the Ballistic Missile Defense Organization pursuant to HQ0006-95-C-0006 or any predecessor contract.

G. "*Proposed acquisition*" means TRW's proposed acquisition of all the voting securities of BDM pursuant to an Agreement and Plan of Merger dated November 20, 1997.

H. "*Non-public BMDO information*" means any information not in the public domain furnished by any company or the Ballistic Missile Defense Organization to BDM in its capacity as provider of SETA Services under contract HQ0006-95-C-0006 or any predecessor contract or subcontract.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within one hundred and twenty (120) days from the date the proposed acquisition is consummated, the SETA Services Operations, and shall also divest such additional ancillary assets as are necessary to assure the continued ability of the acquirer to provide SETA Services.

B. Respondent shall divest the SETA Services Operations only to an acquirer that receives the prior approval of the Commission and the Department of Defense and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA Services in the same manner as provided by BDM at the time of the proposed divestiture, at no increased cost to the Ballistic Missile Defense Organization, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the SETA Services Operations, respondent shall take such actions as are necessary to ensure the continued provision of SETA Services, to maintain the viability and marketability of the assets used to provide SETA Services, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets used to provide SETA Services, except for ordinary wear and tear.

D. Upon reasonable notice from the acquirer or from the Ballistic Missile Defense Organization to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA Services in substantially the same manner and quality as provided by BDM prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA Services. Respondent shall convey all know-how necessary to perform SETA Services in substantially the same manner and quality employed or achieved by BDM prior to divestiture. However, respondent shall not be required to continue providing such assistance for more than one year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of a purchase agreement between respondent and a proposed acquirer of the SETA Services Operations, respondent shall provide the acquirer with a complete list of all current full-time, non-clerical, salaried employees of BDM engaged in the provision of SETA Services on the date of the purchase agreement. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the SETA Services Operations.

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

G. Respondent shall provide all current employees identified in paragraph II.E of this order with financial incentives to continue in their employment positions pending divestiture of the SETA Services Operations, and to accept employment with the acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by BDM until the date of the divestiture, and vesting of all pension benefits.

H. For a period of two (2) years commencing on the date of the individual's employment by the acquirer, respondent shall not re-hire any of the individuals identified in paragraph II.E of this order who accept employment with the acquirer.

I. Prior to divestiture, respondent shall not transfer any of the individuals identified in paragraph II.E of this order whose employment responsibilities involve access to non-public BMDO information to any other positions.

J. Respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made part hereof as Appendix I.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the SETA Services Operations within one hundred and twenty (120) days from the date the proposed

acquisition is consummated, the Commission may appoint a trustee to divest the SETA Services Operations. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph 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(1) 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 a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission and the Department of Defense, the trustee shall have the exclusive power and authority to divest the SETA Services Operations.

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

4. The trustee shall have nine (9) 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 nine-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the

divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission and the Department of Defense.

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

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the SETA Services Operations.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public BMDO information, provide, disclose, or otherwise make available to any entity any non-public BMDO information.

B. Respondent shall use any non-public BMDO information only in its capacity as provider of technical assistance to the acquirer, pursuant to paragraph II.D of this order, unless respondent obtains the prior written consent of the proprietor of the non-public BMDO information.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it

intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, a 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.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five 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 any such matters.

VIII.

It is further ordered, That, notwithstanding any other provision of this order, this order shall terminate on April 6, 2008.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate is by and between TRW Inc. ("TRW"), a corporation organized and existing under the laws of the State of Ohio, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, TRW has proposed to acquire one hundred percent of the voting securities of BDM International Inc. ("BDM"); 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, TRW has entered into an Agreement Containing Consent Order ("Consent Agreement"), which requires, among other things, TRW to divest the SETA Services Operations, as defined; and

Whereas, if the Commission accepts the 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 the status of the SETA Services Operations 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, TRW entering into this Agreement to Hold Separate shall in no way be construed as an admission by TRW that the proposed acquisition constitutes a violation of any statute; and

Whereas, TRW understands that no act or transaction contemplated by this Agreement to Hold Separate 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 to Hold Separate.

Now, therefore, upon the understanding that the Commission has not yet determined whether it will challenge the proposed acquisition, 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, TRW agrees as follows:

1. TRW 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 TRW signs the Consent Agreement.

2. TRW agrees that from the date the proposed acquisition is consummated until the earlier of the dates listed in subparagraphs 2.a - 2.b, it will comply with the provisions of paragraph 3 of this Agreement to Hold Separate:

a. Three (3) 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;

b. The day after the divestiture required by the Consent Order has been completed.

3. To ensure the complete independence and viability of the SETA Services Operations and to assure that no competitive information is exchanged between the SETA Services Operations and TRW, TRW shall hold the SETA Services Operations separate and apart on the following terms and conditions:

a. TRW will appoint, within three (3) days of the date the proposed acquisition is consummated, an individual to manage and maintain the SETA Services Operations who will make no changes to the SETA Services Operations other than changes made in the ordinary course of business. This individual ("the Manager") shall manage the SETA Services Operations independently of the management of TRW's other businesses. The Manager shall not be involved in any way in the operations or management of any other TRW business.

b. The Manager shall have exclusive control over the SETA Services Operations, with responsibility for the management of the SETA Services Operations and for maintaining the independence of that business.

c. TRW shall not exercise direction or control over, or influence directly or indirectly the Manager relating to the operation of the SETA Services Operations; provided, however, that TRW may exercise only such direction and control over the Manager and the SETA Services Operations as is necessary to assure compliance with this Agreement to Hold Separate and with all applicable laws.

d. TRW shall maintain the marketability, viability, and competitiveness of the SETA Services Operations and shall not sell, transfer, encumber them (other than in the normal course of business or to assure compliance with the Consent Agreement), or otherwise impair their marketability, viability or competitiveness.

e. Except for the Manager and support service employees involved in the SETA Services Operations, such as Human Resources, Legal, Tax, Accounting, Insurance, and Internal Audit employees, TRW shall not permit any other TRW employee, officer, or director to be involved in the management of the SETA Services Operations. Employees of the SETA Services Operations shall not be involved in any other TRW business.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to divest assets, TRW, other than employees involved in the SETA Services Operations, or support service employees involved in the SETA Services Operations, shall not receive or have access to, or the use of, non-public BMDO information, or any material confidential information about the SETA Services Operations or the activities of the Manager or support service employees involved in the SETA Services Operations, not in the public domain.

g. TRW shall circulate to all its employees involved with the SETA Services Operations or any Ballistic Missile Defense Organization program, and appropriately display, a copy of this Agreement to Hold Separate and the Consent Agreement.

h. If the Manager ceases to act or fails to act diligently, a substitute Manager shall be appointed.

i. The Manager shall have access to and be informed about all companies who inquire about, seek or propose to buy the SETA Services Operations. TRW may require the Manager to sign a confidentiality agreement prohibiting the disclosure of any material

confidential information gained as a result of his or her role as a Manager to anyone other than the Commission.

j. The Manager shall report in writing to the Commission every thirty (30) days concerning his or her efforts to accomplish the purposes of this Agreement to Hold Separate.

4. TRW shall 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 Agreement to Hold Separate to the Ballistic Missile Defense Organization.

5. TRW waives all rights to contest the validity of this Agreement to Hold Separate.

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

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

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

7. This Agreement to Hold Separate shall not be binding until accepted by the Commission.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree with my colleagues that the final decision and order properly addresses the anticompetitive implications of the proposed transaction, and I concur in the Commission's decision except to the extent that the order makes the Department of Defense a participant with the Commission in giving antitrust approval to any divestiture under the order.

As I said in my concurring statement in *Litton Industries, Inc./PRC*, Docket No. C-3656 (May 7, 1996), with due deference to the Department of Defense and in full recognition that it has the power to decide the firms with which it will deal for goods and services vital to the national security, no persuasive argument has been presented to suggest that the Department has or should have a role in deciding the competitive implications of a particular divestiture under Section 7 of the Clayton Act. No showing has been made that this case is unique, that national security issues or concerns relating to the integrity of the Ballistic Missile Defense Organization's Lead Systems Integrator Program, to the extent they may be affected by this order, could not have been addressed, as they apparently have been in other defense-related transactions,¹ without inclusion of the Department of Defense as a necessary participant in a decision committed by statute to the Commission.

The need to obtain technical assistance in reviewing commercial transactions in sophisticated markets is not uncommon. The importance of obtaining advice and assistance is especially acute in cases involving issues of national security, a subject that is in the province of the Department of Defense and other security agencies. The Commission might well find it necessary to consult with the Department of Defense both to assess the viability of a proposed buyer of the BDM assets to be divested and to ensure that a proposed transaction is not inconsistent with national security. I would have preferred, however, to accommodate that need in this case by means other than making the Department of Defense a partner with the Commission in interpreting and applying a final order of the Commission.

¹ See *Lockheed Corporation*, C-3576 (May 9, 1995); see also *ARKLA, Inc.*, 112 FTC 509 (1989).

IN THE MATTER OF

UROLOGICAL STONE SURGEONS, INC., ET AL.

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

Docket C-3791. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the three Illinois-based firms and two doctors from agreeing or attempting to agree to fix prices, discounts, or other terms of sale or contract for lithotripsy professional services (treatment for kidney stones); requires the respondents to terminate third-party payer contracts that include the challenged fees at contract renewal time; and also requires them to notify the Commission at least 45 days before forming or participating in an integrated joint venture to provide lithotripsy professional services.

Appearances

For the Commission: *Nicholas Franczyk, Karen Dodge, John Hallerud, David Narrow, C. Steven Baker, David Pender, Robert Leibenluft, Mark Whitener and William Baer.*

For the respondents: *Richard Raskin, Sidley & Austin, Chicago, IL.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Urological Stone Surgeons, Inc. ("USS"), Stone Centers of America, L.L.C. ("SCA"), Urological Services, Ltd. ("USL"), and Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., individually, and as officers, directors, and shareholders of USS, as owners and officers of USL, and as shareholders of SCA, hereinafter sometimes referred to as respondents, have violated and are violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

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

A. "*Extracorporeal shock wave lithotripsy*" or "*lithotripsy*" means the treatment of kidney stones without surgery by projecting, against the patient's body, high-energy shock waves that pulverize the kidney stones into particles which are then eliminated through the urinary tract. "*Lithotripter*" means a machine used to generate such shock waves.

B. "*Urologist*" means a physician licensed to practice medicine who entirely or substantially limits his or her practice to the specialized practice of urology, which includes the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

C. "*Urologist professional services*" means any services provided by a urologist relating to the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

D. "*Lithotripsy professional services*" means any urologist professional services associated with the provision of extracorporeal shock wave lithotripsy.

E. "*Lithotripsy machine services*" means the provision of extracorporeal shock wave lithotripsy, including, but not limited to, the supplying of the lithotripter, operation of the lithotripter, and providing accompanying services to the patients, but excluding lithotripsy professional services and anesthesia services associated with extracorporeal shock wave lithotripsy.

F. "*USS*" means Urological Stone Surgeons, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USS, their successors and assigns, and their directors, officers, employees, agents, and representatives.

G. "*USL*" means Urological Services, Ltd., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USL, their successors and assigns, and their directors, officers, employees, agents, and representatives.

H. "*SCA*" means Stone Centers of America, L.L.C., its predecessors, subsidiaries, divisions, groups and affiliates controlled by SCA, their successors and assigns, and their directors, officers, employees, agents, and representatives.

I. "*Respondent urologists*" means Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

J. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust, or other entity.

K. "*Third-party payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Third-party payer includes,

but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; and employer or other person providing or administering any self-insured health benefits program.

L. "*Contracted services*" means provision of lithotripsy to patients pursuant to a written contractual agreement with a purchaser or third-party payer of lithotripsy services, in which the amount and terms of reimbursement for such services are specified in the contractual agreement.

M. "*Global fee or bill for lithotripsy*" means a method of billing or charging for lithotripsy whereby the charges for its component services, including lithotripsy machine services, lithotripsy professional services, and anesthesia services, are billed and/or paid as a single, combined charge, whether or not the component services are separately itemized in the bill.

RESPONDENTS

PAR. 2.A. Respondent USS 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 1875 West Dempster Street, Park Ridge, Illinois. There are approximately 35 shareholders of USS, including respondent urologists, all of whom are urologists licensed to practice medicine in the State of Illinois and engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. USS's shareholders comprise approximately 15 percent of the urologists in the Chicago metropolitan area.

B. Respondent SCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1875 West Dempster Street, Park Ridge, Illinois. SCA is jointly owned by USS, the respondent urologists, and approximately 66 additional urologists, all of whom are licensed to practice medicine in the State of Illinois and are engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. SCA's shareholders comprise approximately 45 percent of the urologists in the Chicago metropolitan area.

C. Respondent USL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1875 West Dempster Street, Park Ridge, Illinois. USL is owned by respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

D. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are urologists, licensed to practice medicine in the State of Illinois, and engaged in the business of providing urologist professional services, including lithotripsy professional services, to patients. Their business address is 1875 West Dempster Street, Suite 365, Park Ridge, Illinois. The respondent urologists are officers, directors, and shareholders of USS; owners and officers of USL; and shareholders in SCA.

JURISDICTION

PAR. 3. The acts and practices of the respondents, including those alleged herein, are in or affect commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

RESPONDENTS' BUSINESS ACTIVITIES

PAR. 4. USS, SCA, USL, the respondent urologists, and other unnamed urologists, are engaged in the provision of lithotripsy under the name Parkside Kidney Stone Center ("Parkside"). Parkside operates two lithotripsy facilities. Since February 1986, Parkside has operated a lithotripsy facility in Park Ridge, Illinois; USS provides lithotripsy machine services at Parkside's Park Ridge facility. Since February 1995, Parkside has operated a second lithotripsy facility in LaGrange, Illinois; SCA provides lithotripsy machine services at Parkside's LaGrange facility. The respondent urologists, and other unnamed urologists, have jointly invested in the purchase and operation of the two lithotripsy machines that Parkside operates. USL provides billing and collection services for all lithotripsy provided at Parkside's two facilities, including lithotripsy professional services. The respondent urologists and approximately 140 other unnamed urologists, including the other urologists who are shareholders in USS or SCA, each provide lithotripsy professional services to their own patients at Parkside's facilities.

PAR. 5. Except to the extent that competition has been restrained as alleged herein, the urologists who provide lithotripsy professional services at Parkside, including the respondent urologists and the other shareholders of USS and SCA, have been in competition with other urologists who provide lithotripsy professional services at Parkside.

PAR. 6. Of all lithotripsy procedures performed at the six to eight providers of lithotripsy machine services operating in the Chicago metropolitan area during the past several years, approximately two-thirds of the procedures are, and for several years have been, performed at Parkside. Currently, this amounts to more than 2500

lithotripsy procedures per year performed at the Parkside facilities. Approximately 65 percent of the urologists in the Chicago metropolitan area use Parkside to provide lithotripsy to some or all of their patients needing lithotripsy. Of those urologists using Parkside to provide lithotripsy, approximately 80 percent use Parkside exclusively.

RESPONDENTS' ACTS AND PRACTICES

PAR. 7. The respondent urologists and other unnamed urologists who are their competitors and who provide lithotripsy professional services at Parkside, including the shareholders of USS and SCA, agreed to fix the prices they would charge for such services.

PAR. 8. In furtherance of the agreement described in paragraph seven:

A. On or about March 18, 1985, USS informed its prospective investors, all of whom were urologists, that lithotripsy patients will pay or would be charged a set price, estimated at \$2,000, for lithotripsy professional services, and that USS or its agents would bill and collect for such services performed at Parkside.

B. On or about April 15, 1985, USS entered into an agreement with a third party to perform the day-to-day management and operation of Parkside. The agreement provided, in part, that USS will "use its best efforts to set forth suggested fee structure for [lithotripsy professional services at Parkside, that the] fee will be suggested to be \$2,000," and that such prices would be subject to annual increases to reflect the changes in the costs of medical services in the metropolitan Chicago area.

C. The respondent urologists and other unnamed urologists, including the shareholders of USS and SCA, agreed to use respondent USL as their common billing agent. Each urologist providing lithotripsy professional services at Parkside was required to sign an agreement with USL which: (1) states that it is "being signed between [USL] and all physicians providing . . . services [at Parkside];" (2) prohibits the physician from independently billing patients for any services billed by USL; and (3) requires the urologist to "accept as payment in full for such services the sum paid . . . by USL."

D. On or about the day Parkside opened its first Chicago area lithotripsy facility for business in Park Ridge, Illinois, respondent USL produced and disseminated to the urologists fee schedules that included, among other things, a \$2,000 charge for lithotripsy professional services.

E. On or about April 1, 1987, and each year thereafter until 1993, Parkside's charges, including the charges for lithotripsy professional services, were increased in accordance with the April 15, 1985, agreement described above, and revised fee schedules were distributed to the urologists who provided lithotripsy professional services at Parkside.

F. In February, 1995, Parkside opened a second Chicago area lithotripsy facility, located in LaGrange, Illinois. Lithotripsy services provided at this facility were and continue to be billed for and reimbursed in the same manner and at the same prices as those provided at Parkside's Park Ridge facility. Investors in SCA are prohibited from having an ownership interest, either directly or indirectly, in any other entity that owns or operates a lithotripter within a 30-mile radius of LaGrange, Illinois, and may not compete, directly or indirectly, with SCA within such 30-mile radius.

G. Until about April 1, 1995, respondent USL always or almost always billed the amounts listed in the fee schedules for lithotripsy professional services provided at Parkside, including lithotripsy professional services performed in connection with contracted services.

H. On or about April 1, 1995, respondent USL revised the billing policy for lithotripsy services provided at Parkside by requiring each urologist providing lithotripsy professional services at Parkside to determine that charge independently. Since that date, USL has billed each individual urologist's charge for lithotripsy professional services. The individually determined charges for lithotripsy professional services by urologists using the Parkside facilities have varied greatly in amount since Parkside revised its billing policy.

I. Although USL has billed the individual urologist's charge for lithotripsy professional services since about April 1, 1995, urologists providing lithotripsy professional services at Parkside pursuant to contracted services agreements that provide for a global fee or bill for lithotripsy continue to receive a uniform amount of reimbursement from each such contracted purchaser or third-party payer. Urologists providing lithotripsy professional services at Parkside pursuant to contracted services agreements that provide for reimbursement based on percentage discounts off the urologists' fees or charges have a uniform percentage discount applied to their fees or charges for urologist professional services by each such contracted purchaser or third-party payer. Such uniform payment and discount provisions for lithotripsy professional services are negotiated jointly by, for, or on behalf of respondents, and for or on behalf of other urologists using

Parkside, with each purchaser or third-party payer that has an agreement with Parkside for contracted services.

PAR. 9. By engaging in the acts and practices alleged herein, USS, SCA, USL, the respondent urologists, and other unnamed urologists have combined or conspired to fix, and have fixed, the prices for lithotripsy professional services performed at Parkside.

PAR. 10. The individual respondents and the other unnamed urologists who invested in Parkside financially integrated for the purposes of purchasing and operating Parkside's lithotripsy machines. However, it was not reasonably necessary to achieving the benefits of this legitimate joint venture activity for respondents to fix or set the fees for urologist professional services, as described in paragraphs seven through nine of this complaint. Furthermore, the respondent urologists and other unnamed urologists who provide lithotripsy professional services at Parkside have not substantially integrated their professional practices so as to justify respondents' acts or practices in fixing or setting fees for urologist professional services, as described in paragraphs seven through nine of this complaint.

EFFECTS OF RESPONDENTS' ACTS AND PRACTICES

PAR. 11. The acts and practices of the respondents, as alleged herein, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among urologists in the provision of lithotripsy professional services; and

B. By fixing or increasing the prices that are paid to urologists who provide lithotripsy professional services.

VIOLATIONS OF THE FTC ACT

PAR. 12. The acts and practices of the respondents alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, are continuing and will continue or recur 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 respondent 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 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, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent USS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

2. Respondent SCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

3. Respondent USL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 1875 West Dempster Street, Park Ridge, Illinois.

4. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are officers, directors, and shareholders of respondent USS, co-owners and officers of respondent USL, and shareholders of respondent SCA. Respondents Donald M. Norris, M.D., and Marc A. Rubenstein, M.D., are urologists engaged in the business of providing medical services to patients for a fee. Their

principal office and place of business is 1875 West Dempster Street, Suite 365, Park Ridge, Illinois.

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 in 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. "*Extracorporeal shock wave lithotripsy*" or "*lithotripsy*" means the treatment of kidney stones without surgery by projecting, against the patient's body, high-energy shock waves that pulverize the kidney stones into particles which are then eliminated through the urinary tract. "*Lithotripter*" means a machine used to generate such shock waves.

B. "*Urologist*" means a physician licensed to practice medicine who entirely or substantially limits his or her practice to the specialized practice of urology, which includes the diagnosis and treatment of diseases or medical conditions of or affecting the urogenital system.

C. "*Lithotripsy professional services*" means any urologist professional services associated with the provision of extracorporeal shock wave lithotripsy.

D. "*Lithotripsy machine services*" means the provision of extracorporeal shock wave lithotripsy, including, but not limited to, the supplying of the lithotripter, operation of the lithotripter, and providing accompanying services to the patients, but excluding lithotripsy professional services and anesthesia services associated with extracorporeal shock wave lithotripsy.

E. "*USS*" means Urological Stone Surgeons, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USS, their successors and assigns, and their directors, officers, employees, agents, and representatives.

F. "*USL*" means Urological Services, Ltd., its predecessors, subsidiaries, divisions, groups and affiliates controlled by USL, their successors and assigns, and their directors, officers, employees, agents, and representatives.

G. "*SCA*" means Stone Centers of America, L.L.C., its predecessors, subsidiaries, divisions, groups and affiliates controlled

by SCA, their successors and assigns, and their directors, officers, employees, agents, and representatives.

H. "*Respondent urologists*" means Donald M. Norris, M.D., and Marc A. Rubenstein, M.D.

I. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust, or other entity.

J. "*Third-party payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Third-party payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; and employer or other person providing or administering self-insured health benefits programs.

K. "*Global fee or bill for lithotripsy*" means a method of billing or charging for lithotripsy whereby the charges for its component services, including lithotripsy machine services, lithotripsy professional services, and anesthesia services, are billed and/or paid as a single, combined charge, whether or not the component services are separately itemized in the bill.

L. "*Integrated joint venture*" means a joint venture where the participants either: (a) share substantial financial risk that provides incentives for the participants to cooperate in controlling costs and improving quality by managing the provision of services by network participants; (b) implement an active and ongoing program to evaluate and modify practice patterns by the network's participants and create a high degree of interdependence and cooperation among the participants to control costs and ensure quality, so that the joint venture involves sufficient integration with the potential to achieve significant efficiencies; or (c) otherwise sufficiently integrate so that the joint venture has the potential to achieve significant efficiencies.

II.

A. *It is further ordered*, That each respondent, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination with any other respondent or any other urologist: (1) to fix, establish, stabilize, set, tamper with, or negotiate the prices, discounts, or any other aspect or term relating to prices charged or billed to, or to be charged or billed to, or paid or reimbursed by, or to be paid or reimbursed by, any patient, purchaser, or third-party payer for

lithotripsy professional services (including prices established through the use of any global fee or bill for lithotripsy); and (2) concerning any other term of sale or contract for lithotripsy professional services to or with any patient, purchaser, or third-party payer.

B. *It is further ordered*, That respondents USS, SCA, and USL shall terminate any agreement or contract with any third-party payer for the provision of lithotripsy professional services that does not comply with paragraph II.A of this order at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a third-party payer to terminate such agreement or contract.

Provided that nothing in this order shall be construed to prohibit any respondent from performing pursuant to any existing agreement or contract with any third-party payer for the provision of lithotripsy professional services until the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a third-party payer to terminate such agreement or contract.

Provided further that nothing in this order shall be construed to prohibit either respondent urologist from entering into an agreement or combination with any other physician with whom the respondent urologist practices in partnership or in a professional corporation, or who is employed by the same person as the respondent urologist, to deal with any patient, purchaser, or third-party payer on collectively determined terms.

Provided further that nothing in this order shall be construed to prohibit respondents USS, SCA, USL or respondent urologists from forming, facilitating the formation of, or participating in an integrated joint venture and dealing through such integrated joint venture with any patient, purchaser, or third-party payer on collectively determined terms regarding the provision of, or contracts or arrangements for the provision of, lithotripsy professional services, or of urology services including lithotripsy professional services.

III.

It is further ordered, That respondents USS, SCA, and USL shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order in this matter to each of their current shareholders, officers, and directors, and to each other agent, representative, or employee of USS, SCA, or USL whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

B. For a period of four (4) years from the date this order becomes final, and within thirty (30) days of the date the person assumes such position, distribute a copy of the complaint and order in this matter to each new shareholder, officer, and director of USS, SCA, or USL, and to each other agent, representative, or employee of USS, SCA, or USL whose activities are affected by this order, or who have responsibilities with respect to the subject matter of this order;

C. For a period of four (4) years from the date this order becomes final, distribute a copy of the complaint and order in this matter to each urologist who provides lithotripsy professional services in connection with USS, SCA, or USL within thirty (30) days from the date such urologist commences providing lithotripsy professional services in connection with USS, SCA, or USL; and

D. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order in this matter, together with the NOTICE in the Attachment to this order, to each third-party payer with whom respondent USS, SCA, or USL has an agreement or contract for the provision of lithotripsy professional services that does not comply with paragraph II.A of this order.

IV.

It is further ordered, That each respondent shall file a verified written report with the Commission within sixty (60) days after the date this order becomes final, annually thereafter for four (4) years on the anniversary of the date the order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent has complied and is complying with paragraphs II and III of this order.

V.

It is further ordered, That:

A. Respondents USS, SCA, and USL shall notify the Commission at least thirty (30) days prior to any proposed change in any corporate 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 under this order; and

B. For ten years after the date this order becomes final, respondents USS, SCA, USL, and respondent urologists shall notify the Commission in writing at least forty-five (45) days prior to forming or participating in an integrated joint venture and dealing through such integrated joint venture with any patient, purchaser or third-party payer on collectively determined terms regarding the provision of, or contracts or arrangements for the provision of, lithotripsy professional services or of urology services including lithotripsy professional services.

VI.

It is further ordered, That each respondent shall, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, permit duly authorized Commission representatives:

A. Access during respondent's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in respondent's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to respondent's reasonable convenience, to interview respondent, and officers, directors, employees, agents, or other representatives of respondent, who may have counsel present, regarding such matters.

VII.

It is further ordered, That this order shall terminate on April 6, 2018.

Commissioner Thompson and Commissioner Swindle not participating. Commissioner Azcuenaga concurring in part and dissenting in part.

ATTACHMENT TO ORDER

NOTICE

Urological Stone Surgeons, Inc. ("USS"), Stone Centers of America, L.L.C. ("SCA"), and Urological Services, Ltd. ("USL"), doing business as Parkside Kidney Stone Center ("Parkside"), are prohibited by an order issued by the Federal Trade Commission from entering into any arrangement, including any agreement or contract with purchasers or third-party payers of lithotripsy services, whereby competing urologists agree among themselves concerning any aspect

of the prices, discounts, or other terms of sale or reimbursement of their professional services related to the provision of lithotripsy.

Purchasers and third-party payers who have entered into such contracts with Parkside have not engaged in any improper or unlawful conduct by signing such contracts, and are not covered by the order issued by the Federal Trade Commission. However, this order may affect such contracts with Parkside. If you currently have an agreement or contract with Parkside for the provision of lithotripsy services that includes any provisions establishing uniform prices, discounts, or other terms of sale or reimbursement for the professional services of urologists related to the provision of lithotripsy, the order permits you, at your discretion, to immediately terminate the agreement or contract by notifying the contracting party (USS, SCA, or USL) in writing. If you choose not to terminate the agreement or contract by this procedure, Parkside is required by the order to terminate the agreement or contract upon its stated termination or renewal date (including any date set therein for automatic renewal). However, the order does not prohibit Parkside from negotiating new agreements or contracts with you, so long as they do not involve the joint setting of any aspect of the prices, discounts, or other terms of sale or reimbursement of urologists' professional services related to the provision of lithotripsy.

Thus, the order does not prohibit Parkside from negotiating or entering into new contracts with you for the provision of lithotripsy machine services and anesthesia services related to lithotripsy, where you independently arrange with urologists for provision of their professional services for lithotripsy. In addition, Parkside is not prohibited from conveying information, offers, and responses between purchasers or payers and individual urologists providing their professional services related to the provision of lithotripsy, so long as these activities do not involve any explicit or implicit agreements among urologists regarding the prices, discounts, or other terms of sale or reimbursement of their professional services. This may be done, for example, by using a "messenger model" arrangement as discussed in the August 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and the U.S. Department of Justice.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I agree that an order requiring the respondents to cease and desist from fixing the price of professional lithotripsy services is warranted, but the requirement that the respondents, for ten years, give the Commission 45 days notice before "forming or participating in an integrated joint venture" that sets prices for lithotripsy services is unjustified and unnecessary.¹ The prior notice requirement departs from the Commission's policy adopting a presumption against prior approval and prior notice provisions in merger and joint venture orders.² An exception to the policy may be appropriate, if there is a credible risk that prior notice is necessary to prevent repetition of the unlawful conduct. Given the express prohibition in the order of the allegedly unlawful conduct, the potential liability for civil penalties for a violation, and the periodic reports of compliance that may be required under the order, no such necessity appears. I dissent from the prior notice requirement.

¹ The prior notice requirement is inconsistent with the weight of Commission precedent. Similar cases in the health care field typically have not imposed any notice requirements or have required notice within 30 days after certain joint venture activity. *See, e.g.*, *Physician Group, Inc.*, Docket C-3610 (Aug. 11, 1995); *Trauma Associates of North Broward, Inc.*, Docket C-3541 (Nov. 1, 1994); *Southbank IPA, Inc.*, 114 FTC 783 (1991); *Preferred Physicians, Inc.*, 110 FTC 157 (1988); *Medical Staff of Doctors' Hospital of Prince George's County*, 110 FTC 476 (1988). But *see* *Montana Associated Physicians, Inc.*, Docket C-3704 (Jan. 13, 1997) (20-year prior approval); *College of Physicians-Surgeons of Puerto Rico*, File No. 971-0011 (filed D. Puerto Rico Oct. 2, 1997), Commissioner Azcuenaga concurring in part and dissenting from perpetual prior approval requirement.

² Prior Approval Policy Statement (June 1955), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Complaint

125 F.T.C.

IN THE MATTER OF

FOOTE, CONE & BELDING ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT, REGULATION M AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3792. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the Illinois-based advertising agency of Mazda Motor of America from misrepresenting in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, capitalized cost, reduction, or other amounts that reduce the capitalized cost of the vehicle (or that no such amount is required).

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Elroy H. Wolff, Sidley & Austin, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Foote, Cone & Belding Advertising, Inc., a corporation ("respondent" or "FCB"), 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 Foote, Cone & Belding Advertising, Inc. is a Delaware corporation with its principal office or place of business at 101 East Erie Street, Chicago, Illinois.

2. Respondent, at all times relevant to this complaint, was an advertising agency of Mazda Motor of America, Inc. ("Mazda"). 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 prepared and disseminated, or has caused to be prepared and disseminated, consumer lease advertisements ("lease advertisements") for Mazda vehicles, including but not necessarily limited to the attached FCB Exhibits A through D. FCB 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 Protégé. 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 Protégé] \$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 Protégé 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.](FCB 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.](FCB Exhibit B).

C. [Audio:] "Its Mazda Jump . . . on Summer."

[Video:] "ZERO DOWN LEASES 36 MONTHS"

[cut to Protégé badge. Mazda Protégé 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.](FCB 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." (FCB 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 knew or should have known that the representation set forth in paragraph five was, and is, false and 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, 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.

10. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph nine was, and is, deceptive.

11. 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

12. Respondent's lease advertisements, including but not necessarily limited to FCB 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.

13. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to FCB 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 FCB Exhibit D, are not clear and conspicuous because they appear in small type.

14. 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.

Commissioner Thompson and Commissioner Swindle not participating.

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Complaint

EXHIBIT A

FCB FOOTE, CONE & BELDING
 4 Hutton 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-Protege/626/Mlata-Trk-L-30
 ORIGINAL ISCI:
 NEW ISCI: JQDB 0832

Page 1 of 3

VIDEOAUDIO

- | | |
|--|---|
| <p>1. OPEN ON MAN JUMPING THROUGH A RAIN OF PENNIES.
 SUPERS: 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.
 SUPER: 36 MO. LEASES.
 SUPER: ENDS APRIL 1ST
 DISC: Closed-end leases to qualified lessees. Approval of Mazda American Credit & 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.
 DISC: (cont) and 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</p> <p>4. CUT TO PROTEGE RUNNING WITH GRAPHIC OF A PENNY SPINNING INTO FRAME.</p> <p>5. SUPER: 5189 A MO.</p> | <p>1. SINGERS: Mazda...One penny down.</p> <p>2. VO: One penny down. Great leases. Very little time.</p> <p>3. VO: On Protege.</p> <p>4. SINGERS: A penny (down).</p> <p>5. VO: And one eighty-nine.</p> |
|--|---|

Complaint

125 F.T.C.

EXHIBIT A

FCB FOOTE, CONE & BELDING
 4 Hudson Centre Drive, Santa Ana, CA 92707
 (714) 662-6500

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

As Produced: 3/10/96

Page 2 of 3

VIDEO:AUDIO:

- | | | | |
|-----|--|-----|-----------------------------------|
| 6. | CUT TO B2300 BADGE. CUT TO BOY JUMPING THROUGH RAIN OF PENNIES. | 6. | <u>VO:</u> The B2300 SE. |
| 7. | CUT TO RUNNING FOOTAGE OF TRUCK WITH GRAPHIC OF A PENNY SPINNING INTO FRAME.
<u>DISC:</u> (cont) = \$459.25. Purchase option at lease end = \$9,471.60. Offer on '96 Miata w/ pwr. steering & mass. 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>VO:</u> and one ninety-nine. |
| 9. | CUT TO 626 BADGE. | 9. | <u>VO:</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.
<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.
<u>SUPER:</u> \$209 A MONTH | 11. | <u>VO:</u> and two-o-nine. |
| 12. | RUNNING FOOTAGE OF MIATA. | 12. | <u>VO:</u> Miata. |
| 13. | CUT TO GIRL WITH HAT. | 13. | <u>SINGERS:</u> Mazda! |

528

Complaint

EXHIBIT A

FCB FOOTE, CONE & BELDING
 4 Hutton Centre Drive, Santa Ana, CA 92707
 (714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

As Produced: 3/10/96

JOB#: MAZD-DTP-T3626
 PRODUCT: ~~Lessee~~ Penny Down
 LENGTH: :30
 TITLE: Penny Down-Protège/626/Miata/Trk-L-30
 ORIGINAL ISCI:
 NEW ISCI: JQDB 0632 Page 3 of 3

VIDEO:AUDIO:

14. CUT TO GIRL WITH HAT IN MIATA.
 CUT TO MIATA RUNNING FOOTAGE
 WITH GRAPHIC OF SPINNING PENNY.
SUPER: \$219 A MO.

15. CUT TO PROTEGE DRIVING AWAY
LOGO: MAZDA
 PASSION FOR THE ROAD™

16.

17. CUT TO FALLING PENNIES WITH
 MAN HOLDING ON TO ONE.
SUPER: ENDS APRIL 1.

14. VO: A penny and two nineteen.

15. SOLO: Passion for the road ...
SINGERS: Put your penny down!

16.

17. VO: Ends April 1st.

Complaint

125 F.T.C.

EXHIBIT B



FOOTE, CONE & BELDING

4 Hudson Centre Drive, Santa Ana, CA 92707
(714) 662-6500

JOB#: MAZD-NTP-TJ632

PRODUCT: '96 626 DX

LENGTH: :30

TITLE: Passion -626 DX-0 Down/209 L-30

CLIENT: MAZDA MOTOR OF AMERICA

ORIGINAL ISCI: JCDB 0816

NEW ISCI: JQNE J840

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.
<u>SUPER: 626</u> | 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.
<u>DISC:</u>
See dealer for limited-warranty details. Based on MSRP. | 5. | SFX: (THUNDER CRASH)
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: MAZDA</u>
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 BRANDED BUILDING WITH CAT EYES APPEARING IN FOREGROUND. | 9. | SONG: Passion for the Road. |

528

Complaint

EXHIBIT B



FOOTE, CONE & BELDING
4 Hunton Centre Drive, Santa Ana, CA 92707
(714) 662-6500

CLIENT: MAZDA MOTOR OF AMERICA

JOB#: MAZD-NTP-T3632
PRODUCT: '96 626 DX
LENGTH: :30
TITLE: Passion -626 DX-0 Down/209 L-3'

ORIGINAL ISCI: JQDB 0816

NEW ISCI: JQNB 0840

Page 2 of 2

AS PRODUCED: 3/28/96

VIDEOAUDIO

- | | | | |
|-----|---|-----|--------------------------------|
| 10. | QUICK CUTS OF RUNNING FOOTAGE OF 626. | 10. | VO: Lease a 626 ... |
| 11. | CUT TO TITLES.
<u>SUPER:</u> From \$0 DOWN \$209 A MO. 36 MONTHS. | 11. | zero down, two-o-nine a month. |
| 12. | CUT TO 626 DRIVING ACROSS DESERT.
<u>DISC:</u> 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.
<u>DISC:</u> (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.
<u>SUPER:</u> 626
<u>DISC:</u> (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.
<u>SUPER:</u> 626
<u>DISC:</u> (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. | 15. | SONG: Passion for the Road. |

Complaint

125 F.T.C.

EXHIBIT C



FOOTE, CONE & BELDING
4 Hunton Centre Drive, Santa Ana, CA 92707
(714) 662-6500

JOB#: MAZD-DTP-T3631
PRODUCT: 626, Protege, B2300 SE-5
LENGTH: :30
TITLE: Jump-626/Prot/SE-5-L-30

CLIENT: MAZDA MOTOR OF AMERICA

TYPE OF SCRIPT:

NATIONAL
 REGIONAL

ORIGINAL ISCI:

NEW ISCI: JQNB 0900

Page 1 of 4

As Produced: 5/9/96

<u>VIDEO</u>		<u>AUDIO</u>	
1.	OPEN ON BIG MAZDA LOGO. LOGO ZOOMS IN, AWAY FROM CAMERA.	1.	<u>MUSIC UP</u> <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> MAZDA JUMP ON SUMMER	4.	<u>ANNCR VO:</u> ...On Summer.
5.	CAR PUSHES THROUGH EVENT TITLE. <u>SUPER:</u> ZERO DOWN LEASES 36 MONTHS	5.	<u>ANNCR VO:</u> Zero down leases.
6.	<u>SUPER:</u> 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 PROTEGE BADGE.	8.	<u>ANNCR VO:</u> On Protege.
9.	MAZDA PROTEGE RUNNING FOOTAGE. <u>SUPER:</u> ZERO DOWN LEASES	9.	<u>ANNCR VO:</u> Zero.

528

Complaint

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/Prote/SE-5-L-30

ORIGINAL ISCI:
NEW ISCI: JQNB 0900

Page 2 of 4

As Produced: 5/9/96

VIDEOAUDIO

- | | |
|--|--|
| <p>10. PROTEGE RUNNING FOOTAGE.
<u>SUPER:</u>
\$189 A MONTH WELL-EQUIPPED
<u>DISC:</u> Closed-end leases to qualified lessees. Approval of Mazda American Credit & insurance required. Offer on '96 Protege 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 &</p> | <p>10. <u>ANNCR VO:</u> and one eighty-nine.</p> |
| <p>11. CUT TO MAN</p> | <p>11. <u>SINGERS:</u>
JUMP! JUMP! JUMP!</p> |
| <p>12. CUT TO B2300 BADGE.</p> | <p>12. <u>ANNCR VO:</u>
B2300 SE-5.</p> |
| <p>13. MAZDA B2300 RUNNING FOOTAGE.
<u>SUPER:</u>
50 DOWN PYMT.</p> | <p>13. <u>ANNCR VO:</u>
Zero.</p> |
| <p>14. B2300 RUNNING FOOTAGE.
<u>SUPER:</u>
\$199 A MONTH FULLY LOADED SE-5
<u>DISC:</u> (cont) Prof. Equip. Grp., MSRP \$14,505. Assumes \$1,388 dealer contribution. 36 mo. pymts = \$7,193.16. Initial fees = \$449.31. Purchase option at lease end = \$7,740.65. Offer on '96 626 DX w/ Conv. Pkg., MSRP \$17,540. Assumes \$1,325 dealer contribution. 36 mo. pymts = \$7,883.20. Initial fees = \$439.89. Purchase option at lease end = \$8,397.</p> | <p>14. <u>ANNCR VO:</u> and one ninety-nine.</p> |

Complaint

125 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, Protege, 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>
SIX-TWO-SIX. |
| 17. CUT TO WOMAN DOING HIGH FIVE. | 17. <u>SINGERS:</u> MAZDA ... |
| 18. 626 RUNNING FOOTAGE.
<u>SUPER:</u>
50 DOWN PYMT. | 18. <u>ANNCR VO:</u>
Zero. |
| 19. 626 RUNNING FOOTAGE.
<u>SUPER:</u>
\$209 A MONTH WELL-EQUIPPED.
<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>
and two-o-nine. |
| 20. MAZDA LOGO COMES UP OVER DESERT ROAD.
<u>SUPER:</u>
MAZDA
PASSION FOR THE ROAD | 20. <u>SINGERS:</u>
...PASSION FOR THE ROAD. |
| 21. <u>SUPER:</u> MAZDA
NUMBER | |

528

Complaint

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 4 of 4

VIDEOAUDIO

- | | |
|--|---|
| 22. CLOSE UP OF WOMAN JUMPING INTO AIR TOWARDS CAMERA. | 22. <u>ANNCR VO:</u>
Jump on it. |
| 23. <u>SUPER:</u>
ZERO DOWN LEASES
36 MONTHS | 23. <u>SINGERS:</u>
Jump |
| 24. <u>SUPER:</u>
ENDS JUNE 3RD. | 24. <u>ANNCR VO:</u> Zero down i...
ends June 3rd. |
| 25. TITLE JUMPS IN SYNC WITH MUSIC. | 25. <u>SINGERS:</u> JUMP! |

EXHIBIT D

THE NEW YORK TIMES, FRIDAY, MARCH 13, 1992



MAZDA PENNY DOWN

GREAT LEASES OR BUY
4.8% / 48 MOS.



MAZDA PROTEGE

BUY	1¢	4.8%	48
	DOWN	APR	MOS.

AND \$1000 CASH BACK*

LEASE	1¢	\$189	36
	DOWN	MO.	MOS.

Protege LX sport sedan. Power windows and locks, cruise control, cassette stereo, plus the best basic warranty in its class* — all for the price of a stripped-down Corolla. Buy now, with no payments for 90 days.



626 LX sport sedan.

BUY	1¢	4.8%	48
	DOWN	APR	MOS.

AND \$1000 CASH BACK*

LEASE	1¢	\$199	36
	DOWN	MO.	MOS.

Standard with power everything, cassette stereo, cruise control, air conditioning, plus the best basic warranty in its class* — all for the price of a base Altima. Buy now, with no payments for 90 days.



MAZDA MIATA

BUY	1¢	4.8%	48
	DOWN	APR	MOS.

AND \$1000 CASH BACK*

LEASE	1¢	\$219	36
	DOWN	MO.	MOS.

Miata. The world's best-selling sports car. 1.8L engine. Classic roadster looks. 5-speed, short-throw shifter. And an unbeatable basic warranty.* Buy now, with no payments for 90 days.

AND UP TO

\$1000

CASH BACK

OFFERS END APRIL 1ST!



PASS ON THE POWER

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 Foote, Cone & Belding Advertising, Inc. is a Delaware corporation with its principal office or place of business located at 101 East Erie Street, Chicago, 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

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 signing or delivery*" 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. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

3. Unless otherwise specified, "*respondent*" as used herein shall mean Foote, Cone & Belding Advertising, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*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 involving motor vehicles 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) and 62 Fed. Reg. 15,364 (April 1, 1997)(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 signing or delivery, 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 signing or delivery 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 signing or delivery.

C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery 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 signing or delivery;
3. Whether or not 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, 3009-473 (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 and 62 Fed. Reg. at 15,368 (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 signing or delivery") 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 Foote, Cone & Belding Advertising, 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 Foote, Cone & Belding Advertising, Inc., and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers,

directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising; and

B. For a period of ten (10) years from the date of service of this order, distribute a copy of this order to all future principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising, within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

It is further ordered, That respondent Foote, Cone & Belding Advertising, 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 Foote, Cone & Belding Advertising, 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 April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

GREY ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT, REGULATION M,
TRUTH IN LENDING ACT, REGULATION Z AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3793. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the New York-based advertising agency of Mitsubishi Motor of America from misrepresenting in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, capitalized cost, reduction, or other amounts that reduce the capitalized cost of the vehicle (or that no such amount is required). The consent order also prohibits the respondent, in any closed-end credit advertisement involving motor vehicles, from misrepresenting the existence and amount of any balloon payment or annual percentage rate.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Leonard Orkin, Kay, Collyer & Boose, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Grey Advertising, Inc., a corporation ("respondent" or "Grey"), 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 Grey Advertising, Inc. is a Delaware corporation with its principal office or place of business at 777 Third Avenue, New York, New York.
2. Respondent, at all times relevant to this complaint, was an advertising agency of Mitsubishi Motor of America, Inc. ("Mitsubishi"). 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 prepared and disseminated or has caused to be prepared and disseminated consumer lease advertisements ("lease advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Grey Exhibits A through C. Grey Exhibits A and B are television lease advertisements (attached in video and storyboard format). Grey 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 GALANT 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.] (Grey 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.] (Grey 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. . . ."] (Grey 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 knew or should have known that the representation set forth in paragraph six was, and is, false and misleading.

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 II: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

10. 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.

11. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph ten was, and is, deceptive.

12. 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

13. Respondent's lease advertisements, including but not necessarily limited to Grey 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.

14. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Grey 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 Grey Exhibit C, are not clear and conspicuous because they appear in small type.

15. 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

16. Respondent has prepared and disseminated or has caused to be prepared and disseminated credit sale advertisements ("credit advertisements") for Mitsubishi vehicles, including but not necessarily limited to the attached Grey Exhibits C, D, and E. Grey Exhibits D and E are television credit advertisements (attached in video and storyboard format). Grey 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.] (Grey 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.] (Grey Exhibit E).

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"

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. . . ."] (Grey Exhibit C).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT IV: MISREPRESENTATION IN CREDIT ADVERTISING

17. Through the means described in paragraphs five and sixteen, 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."

18. 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 seventeen was, and is, false or misleading.

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

20. 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

21. 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.

22. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph twenty-one was, and is, deceptive.

23. 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

24. Respondent's credit advertisements, including but not necessarily limited to Grey 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.

25. The credit disclosures in respondent's television credit advertisements, including but not necessarily limited to Grey 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 Grey Exhibit C, are not clear and conspicuous because they appear in small print.

26. 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.

Commissioner Thompson and Commissioner Swindle not participating.

EXHIBIT A

AS PRODUCED TELEVISION

Grey Advertising Inc.
One Pacific Plaza
1711 Center Avenue, Suite 400
Huntington Beach, CA 92647
(714) 372-6600

CLIENT: MMSA		PRODUCT: Galant	
TITLE: Galant Summer of Thunder Lease MGMCM-1570		JOB NUMBER:	
DATE: 7/26/95	PAGE NUMBER: 1	REVISION: 1	LENGTH:
COPYWRITER: I STONE	FILM: <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

Video

SUMMER OF THUNDER

SUPER:
GALANT S PREFERRED
EQUIPMENT PACKAGE

SUPER:
MITSUBISHI GALANT S
\$0 DOWN
\$249 A MONTH, 36 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 (POG 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

Audio

Mitsubishi's Summer of Thunder continues...

with our best offer ever on a Galant S with the Preferred Equipment Package.

Lease for zero down, and just two forty-nine a month for thirty-six months,

Complaint

125 F.T.C.

EXHIBIT A

TELEVISION

Advertising Inc.
One Pacific Plaza
7771 Center Avenue, Suite 400
Huntington Beach, CA 92647
(714) 372-0000

CLIENT: MUSA		PRODUCT: Galant	
TITLE: Galant Summer of Thunder Lease MCM-1570		JOB NUMBER: 415-10-824	
DATE: 7/26/95	PAGE NUMBER: 2	REVISION:	LENGTH: 30
COPYWRITER: J. Stone	FILM: (X)Yes ()No	TAPE: ()Yes (X)No	AS REC. (X)Yes ()No

SUPER:
\$0 DOWN
\$249 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.

Complaint

EXHIBIT A

G2

TELEVISION

G2 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 MGMV-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 Thinking
in Automobiles™.

Complaint

125 F.T.C.

EXHIBIT B

AS PRODUC

30 Advertising, Inc.
 1711 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/No)

Video

Audio

(MUSIC UNDER)

Morbse of clouds expands

This summer's hottest event - just got hotter

Graphic type treatment of Thunder with clouds back drop

Mitsubishi's Summer of Thunder heats up with an electrifying offer on an Eclipse ES

REV. 03/83 2

548

Complaint

EXHIBIT B

32 Advertising, Inc.
7711 Center Avenue, Suite 410
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: (Y)Yes (N)No	TAPE: (Y)Yes (N)No	AS REC. (Y)Yes (N)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 \$13,747 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

125 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: ()Yes ()No	TAPE: ()Yes ()No	AS REC: ()Yes (x)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

EXHIBIT C

©C THURSDAY, JUNE 15, 1995 - USA TODAY

MITSUBISHI'S SUMMER OF THUNDER

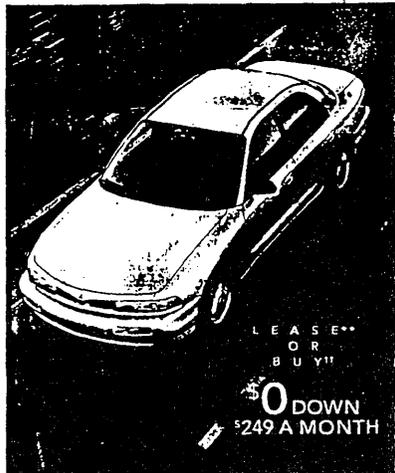
\$0
 DOWN PLUS
\$500
 CASH BACK

 SAVE OVER \$1,100
 ON A GALANT S*

NOW, LEASE FOR 36 MONTHS OR BUY A GALANT S, WITH AUTOMATIC TRANSMISSION AND THE PREFERRED EQUIPMENT PACKAGE, AND ENJOY:

- AIR CONDITIONING
- POWER WINDOWS AND DOOR LOCKS
- CRUISE CONTROL
- SIX-SPEAKER STEREO CASSETTE
- AND MUCH MORE.

YOU SAVE \$600 ON THIS SPECIAL PACKAGE. PLUS, YOU GET \$500 CASH BACK. TOTAL SAVINGS: \$1,100. ALSO, ASK YOUR DEALER ABOUT 2.9% FINANCING! BUT HURRY IN, BECAUSE THE SUMMER OF THUNDER AND THESE HOT DEALS WON'T LAST FOREVER.



G A L A N T
MITSUBISHI
 The New Thinking In Automobiles

DISCLAIMER: *MSRP. **MSRP. EXcludes taxes, title, license, and dealer fees. Actual dealer price may vary. ©1995 Mitsubishi Motors Corp. All rights reserved. Mitsubishi Motors of America, Inc. is a registered trademark of Mitsubishi Motors Corp. All other trademarks are the property of their respective owners.

Complaint

125 F.T.C.

EXHIBIT D

G2 Advertising, Inc.
 1711 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. (POG
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 total
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.

548

Complaint

EXHIBIT D

☒

TELEVISION

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 ()No

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 SUPER: Always wear safety belts.	...MY FAVORITE THINGS."
3/4 Overhead front beauty shot, driver side. SUPER: \$199 a mo. \$750 down./ Auto. transmission Air conditioning.	. The affordable Galant ES offer. Perhaps the most...
LOGO: Mitsubishi The New Thinking in Automobiles.™ 1-800-55MITSU	... favorite thing of all.

Complaint

125 F.T.C.

EXHIBIT E

TELEVISIC

CG Advertising
 One Pacific Plaza
 7711 Center Avenue, Suite 400
 Huntington Beach, CA 92647
 (714) 372-6600

CLIENT: AIMS		PRODUCT: ECLIPSE	
TITLE: Eclipse ad others R4 MGM-2414		JOB NUMBER: 415-02-713	
DATE: 3/24/93	PAGE NUMBER: 1	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

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 to
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 any
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.

EXHIBIT E

G2

MITSUBISHI CREDIT

TELEVISION

Grey Advertising
 One Pacific Plaza
 7711 Center Avenue, Suite 400
 Huntington Beach, CA 92647
 (714) 372-6600

CLIENT: MMSA		PRODUCT: ECLIPSE	
TITLE: Eclipse ad 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 \$11,927 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 Grey Advertising, Inc. is a New York corporation with its principal office or place of business at 777 Third Avenue, New York, New York.

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

ORDER

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 signing or delivery*" 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. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

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 Grey Advertising, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

5. "*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 involving motor vehicles 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) and 62 Fed. Reg. 15,364 (April 1, 1997)(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 signing or delivery, 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 signing or delivery 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 signing or delivery.

C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery 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 signing or delivery;
3. Whether or not 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, 3009-473 (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 and 62 Fed. Reg. at 15,368 (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 signing or delivery") 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 closed-end credit involving motor vehicles in or affecting commerce, as "advertisement" and "closed-end 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 payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:

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." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. 1606 and 1664(d), as amended, or Sections 226.22 and 226.24(c) of Regulation Z, 12 CFR 226.22 and 226.24(c), as amended.)

V.

It is further ordered, That respondent Grey Advertising, 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 Grey Advertising, Inc., and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease and/or motor vehicle closed-end credit advertising; and

B. For a period of ten (10) years from the date of service of this order, distribute a copy of this order to all future principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease and/or motor vehicle

closed-end credit advertising, within thirty (30) days after the person or entity assumes such position or responsibilities.

VII.

It is further ordered, That respondent Grey Advertising, 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 Grey Advertising, 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 April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

RUBIN POSTAER AND ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE CONSUMER LEASING ACT, REGULATION M AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3794. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the California-based advertising agency of American Honda Motor Co. from misrepresenting in any motor vehicle lease advertisement the total amount due at lease signing or delivery, the amount down, and/or the down payment, capitalized cost, reduction, or other amounts that reduce the capitalized cost of the vehicle (or that no such amount is required).

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky and David Medine.*

For the respondent: *Stephen P. Durschlag, Winston & Strawn, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Rubin Postaer and Associates, Inc., a corporation ("respondent" or "Rubin Postaer"), 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 Rubin Postaer and Associates, Inc. is a California corporation with its principal office or place of business at 1333 Second Street, Santa Monica, California.

2. Respondent, at all times relevant to this complaint, was an advertising agency of American Honda Motor Co., Inc. ("Honda"), and prepared and disseminated advertisements to promote consumer leases of Honda vehicles, 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 prepared and disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for Honda vehicles, including but not necessarily limited to the attached Rubin Postaer Exhibits A through C. Rubin Postaer Exhibits A and B are television lease advertisements (attached hereto in video and storyboard format). Rubin Postaer 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.] (Rubin Postaer 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.] (Rubin Postaer 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. . . ."] (Rubin Postaer 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 knew or should have known that the representation set forth in paragraph five was, and is, false and 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 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.

10. Respondent knew or should have known that the failure to disclose adequately material terms set forth in paragraph nine was, and is, deceptive.

11. 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

12. Respondent's lease advertisements, including but not necessarily limited to Rubin Postaer 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.

13. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Rubin Postaer 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 Rubin Postaer Exhibit C, are not clear and conspicuous because they appear in small type.

14. 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.

Commissioner Thompson and Commissioner Swindle not participating.

EXHIBIT A

Rubin Postaer 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
\$289/30 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 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..

(Second screen):

reg. fee & tax. Total monthly payments
\$289 - applicable tax. Opt. eq.
purchase at lease end for \$12,548.50 + tax

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.

Complaint

125 F.T.C.

EXHIBIT A

& 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.

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Complaint

EXHIBIT B

Rubin Postaer Exhibit B

VIDEO

(Open with view of white stream
and view of Accord LX)

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.

[Super]:
\$239 a Month, 36 Months,
\$1500 Down.

Now we've made the process of driving
your own Accord just as streamlined.

(View Disclosure*)

Lease an Accord LX for just \$239 a month.
Leadership leasing from Honda.

We Won. You Win. A Car Ahead.

We Won. You Win.

*[First screen]:
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

Complaint

125 F.T.C.

EXHIBIT B

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 Rubin Postaer and Associates, Inc. is a California corporation with its principal office or place of business located at 1333 Second Street, Santa Monica, 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 signing or delivery*" 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. The total amount due at lease signing or delivery may 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that fees may vary by state or locality are disclosed.

3. Unless otherwise specified, "*respondent*" as used herein shall mean Rubin Postaer and Associates, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*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 involving motor vehicles 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) and 62 Fed. Reg. 15,364 (April 1, 1997)(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 signing or delivery, 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 signing or delivery 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 signing or delivery.

C. State the amount of any payment or that any or no initial payment is required at lease signing or delivery 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 signing or delivery;
3. Whether or not 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, 3009-473 (Sept. 30, 1996) ("revised CLA"), as amended, and Section 213.7(d)(2) of revised Regulation M, 61 Fed. Reg. at 52,261 and 62 Fed. Reg. at 15,368 (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 signing or delivery") 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 Rubin Postaer and Associates, 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 Rubin Postaer and Associates, Inc., and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers,

directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising; and

B. For a period of ten (10) years from the date of service of this order, distribute a copy of this order to all future principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising, within thirty (30) days after the person or entity assumes such position or responsibilities.

VI.

It is further ordered, That respondent Rubin Postaer and Associates, 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 Rubin Postaer and Associates, 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 April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

SENSORMATIC ELECTRONICS CORPORATION

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

Docket C-3795. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the Florida-based manufacturer of electronic article surveillance equipment from entering into any agreement that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against engaging in truthful, non-deceptive advertising, comparative advertising or promotional and sales activities. In addition, the consent order nullifies the agreement, between Sensormatic Electronics Corporation and Checkpoint Systems, Inc., to restrict advertising and promotional claims about each other's products or services.

Appearances

For the Commission: *William Lanning, Michael McNeely and William Baer.*

For the respondent: *Randy Smith, Crowell & Moring, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sensormatic Electronics Corporation (hereinafter "Sensormatic"), a manufacturer of electronic article surveillance (hereinafter "EAS") equipment, 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 at 951 Yamato Road, Boca Raton, Florida.

PAR. 2. Respondent Checkpoint Systems, Inc. (hereinafter "Checkpoint"), a manufacturer of EAS equipment, is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Pennsylvania, with its principal place of business at 101 Wolf Drive, P.O. Box 188, Thorofare, New Jersey.

PAR. 3. Respondents Sensormatic and Checkpoint are now, and for some time have been, engaged in the manufacture, advertisement, sale, distribution, installation, and maintenance of EAS systems. EAS systems are electronic devices used by retailers and others to deter and detect shoplifting and internal theft, and for other security-related purposes. An EAS system may contain many electronic components including sensors, deactivation equipment, disposable labels or tags, source tags or labels, and other electronic parts.

PAR. 4. Sensormatic and Checkpoint are the two largest manufacturers and sellers of EAS systems in the United States and the world, and together have sold over 70% of the EAS systems purchased worldwide.

PAR. 5. Entry into certain segments of the EAS market is difficult because of patent protection that exists for the technology of many components of EAS systems.

PAR. 6. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Except to the extent that competition has been restrained as alleged herein, Sensormatic and Checkpoint have been, and are now, in competition between themselves and with others as manufacturers of EAS equipment.

PAR. 8. In January of 1993, Checkpoint caused an advertisement to be placed in Billboard magazine wherein it alleged that components of Sensormatic's Ultra*Max EAS system damaged recorded media. Included in the advertisement were depictions of: audio cassettes, compact discs, reel to reel tape, and video cassettes. Thereafter, Sensormatic initiated a lawsuit in February of 1993 against Checkpoint alleging that said advertisement was false and deceptive because, among other things, the advertisement contained depictions of compact discs.

PAR. 9. Shortly after Sensormatic filed the aforementioned suit, executives of Sensormatic and Checkpoint met to discuss the settlement of the lawsuit and other business matters, including matters arising out of Sensormatic's acquisition of Checkpoint's European distributor, Sensormatic's performance under that distributorship agreement, advertising issues, and the cross-licensing of specified technologies under certain circumstances.

PAR. 10. During March, April, May, and June of 1993, high-ranking officials of Checkpoint and Sensormatic, including the Chief

Executive Officers of the respondents, met, discussed, engaged in telephone conferences, and exchanged correspondence for the purpose of entering into an agreement to settle the aforementioned lawsuit, to terminate Sensormatic as Checkpoint's European distributor, to refrain from negative advertising, and to agree to an optional cross-license of technology under certain circumstances.

PAR. 11. On or about June 27, 1993, Checkpoint and Sensormatic executed a written agreement that included provisions relating to the agreement to settle the aforementioned lawsuit, to terminate Sensormatic as Checkpoint's European distributor, to refrain from negative advertising, and to agree to an optional cross-license of technology under certain circumstances.

PAR. 12. The advertising provision of the June 27, 1993 agreement, in part, binds the parties to refrain from:

negative advertising or other negative selling, promotional activities or other communications with respect to the other party or the other party's products and services. The terms 'negative advertising' and 'other negative selling, promotional activities or other communications' are defined to mean the knowing use of (i) materially false statements about the other party or the other party's products or services, or (ii) statements that the other party's products or services cause or may cause harm to customers, consumers or merchandise or that the other party is engaging or has engaged in illegal or improper conduct. The foregoing shall not be deemed to prohibit either party from otherwise communicating the features, benefits, characteristics, functions, specifications, or performance of their respective products.

PAR. 13. The advertising provision of the June 27, 1993 agreement has also been construed to restrict comparative advertising on the features and functions of the respondents' products and the services offered by the respondents.

PAR. 14. On or about July 7, 1993, Checkpoint's CEO, A.E. Wolf, issued a memorandum to all of Checkpoint's employees explaining the advertising provisions of the June 27, 1993 agreement. Checkpoint's CEO wrote, "Basically, what it [the agreement] means is that the two parties agree to compete on a positive rather than a negative basis. Simply what that means is that we will promote the positive aspects of our own products, services and companies rather than the negative aspects of the other party."

PAR. 15. On or about July 19, 1993, Sensormatic's Vice President of Retail Sales, Dennis Gillette, issued a memorandum to Sensormatic's United States and Canadian employees explaining the advertising restrictions contained in the agreement. Gillette noted:

The [advertising] agreement allows both Sensormatic and Checkpoint to continue informing customers of the features, benefits, characteristics, functions and specifications of its products, but neither Checkpoint nor Sensormatic may convey negative information about the other party or the other party's products or services. For example, we can continue to tell customers that UltraMax products don't cause false alarms and is the only false alarm-free system but we cannot tell them that Checkpoint products do cause false alarms [emphasis in original].

This memorandum was subsequently distributed to the relevant Sensormatic employees worldwide in September 1993.

PAR. 16. Sensormatic attempted to enforce the advertising provision of the agreement in December 1993 when its attorneys alleged that a "Commentary" article authored by Checkpoint's CEO, entitled "EAS: Sound Quality Is First Concern," was published in Billboard magazine. The article did not mention Sensormatic, but expressed the opinion that some EAS technologies could degrade the quality of audio cassettes. While Sensormatic's attorneys did not claim that the information was either false or misleading, they claimed that the publication of the article violated the advertising provision of the June 27, 1993 agreement.

PAR. 17. Prior to the execution of the advertising provision of the June 27, 1993 agreement, Sensormatic and Checkpoint competed by promoting the technological attributes of their systems and pointing out the inadequacies of their competitors' systems in promotional materials and advertisements.

PAR. 18. Since the agreement of June 27, 1993, comparative advertising by Sensormatic and Checkpoint has been restricted.

PAR. 19. The advertising provision of the June 27, 1993 agreement is an agreement not to compete on an important element of competition. Retailers and other EAS customers have an interest in obtaining information relevant to their purchasing decisions. Certain information about EAS product performance is also relevant to consumers, such as potential harm to products and information about possible interactions between certain medical devices and EAS equipment. The agreement deprives retailers, other EAS customers and consumers of comparative information about the characteristics of EAS systems that they would find helpful.

PAR. 20. The conduct engaged in by Sensormatic and Checkpoint described in paragraphs eight through eighteen constitutes an agreement among competitors to refrain from making truthful, non-deceptive claims, including comparisons, criticisms, or disparaging statements in advertising.

PAR. 21. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of

Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

Commissioner Thompson and Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the 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 respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 Sensormatic Electronics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 951 Yamato Road, Boca Raton, Florida.

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

ORDER

I.

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

A. "*Respondent*" means Sensormatic Electronics Corporation.

B. "*Sensormatic Electronics Corporation*" means Sensormatic Electronics Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Sensormatic Electronics Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Checkpoint Systems, Inc.*" means Checkpoint Systems, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Checkpoint Systems, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. "*EAS system*" means electronic article surveillance equipment, including, but not limited to, sensors, deactivation equipment, labels or tags, source tags or labels, and any other component parts or related products.

II.

It is further ordered, That within three (3) days after the date this order becomes final, respondent shall declare null and void Section 4, the "Negative Advertising" provision, of the June 27, 1993 agreement between Checkpoint Systems, Inc. and respondent.

III.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any EAS system, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, continuing, carrying out, or acting in furtherance of any agreement or combination, either express or implied, that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises

against engaging in truthful, non-deceptive advertising, comparative advertising, and promotional and sales activities; and

B. Encouraging, advising, pressuring, assisting, inducing, or attempting to induce any non-governmental person or organization to engage in any action prohibited by this order.

IV.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors and officers;

B. For a period of three (3) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director or officer of respondent, provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs IV.A and B of this order to sign and submit to its respective employer named as a respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject the respondent to civil penalties for violation of the order.

V.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with EAS competitors relating to any aspect of advertising, and records pertaining to any action taken in connection with any activity covered by parts II, III, IV, and V of this order; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in corporate 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.

VI.

It is further ordered, That this order shall terminate on April 6, 2018.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

CHECKPOINT SYSTEMS, INC.

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

*Docket C-3796. Complaint,*¹ April 6, 1998--Decision, April 6, 1998*

This consent order prohibits, among other things, the New Jersey-based manufacturer of electronic article surveillance equipment from entering into any agreement that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against engaging in truthful, non-deceptive advertising, comparative advertising or promotional and sales activities. In addition, the consent order nullifies the agreement, between Sensormatic Electronics Corporation and Checkpoint Systems, Inc., to restrict advertising and promotional claims about each other's products or services.

Appearances

For the Commission: *William Lanning, Michael McNeely, and William Baer.*

For the respondent: *Frank Newell, Montgomery, McCracken, Walker & Rhoad, Philadelphia, PA.*

DECISION AND ORDER

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

¹ * Complaint previously published at 125 FTC 587 (1998).

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

1. Respondent Checkpoint Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at 101 Wolf Drive, Thorofare, New Jersey.

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*" means Checkpoint Systems, Inc.

B. "*Checkpoint Systems, Inc.*" means Checkpoint Systems, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Checkpoint Systems, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Sensormatic Electronics Corporation*" means Sensormatic Electronics Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Sensormatic Electronics Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. "*EAS system*" means electronic article surveillance equipment, including, but not limited to, sensors, deactivation equipment, labels or tags, source tags or labels, and any other component parts or related products.

II.

It is further ordered, That within three (3) days after the date this order becomes final, respondent shall declare null and void Section 4, the "Negative Advertising" provision, of the June 27, 1993 agreement between Sensormatic Electronics Corporation and respondent.

III.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any EAS system, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, or carrying out any agreement, either express or implied, that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against engaging in truthful, non-deceptive advertising, comparative advertising, and promotional and sales activities; and

B. Encouraging, advising, pressuring, assisting, inducing, or attempting to induce any non-governmental person or organization to engage in any action prohibited by this order.

IV.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors and officers;

B. For a period of three (3) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director or officer of respondent, provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs IV.A and B of this order to sign and submit to its respective employer named as a respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject the respondent to civil penalties for violation of the order.

V.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of three (3) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with EAS competitors of respondent relating to any aspect of advertising, and records pertaining to any action taken in connection with any activity covered by parts II, III, IV, and V of this order; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in corporate 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.

VI.

It is further ordered, That this order shall terminate on April 6, 2018.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

ROGER J. CALLAHAN

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

Docket C-3797. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the California-based respondent from making claims, in radio and television infomercials, about Dr. Callahan's Addiction Breaking System and its ability to reduce an individual's compulsive desire to eat and any claims that the product cures addictions and compulsions, such as smoking, eating, and using alcohol or heroin. In addition, the consent order requires the respondent to pay \$50,000 in consumer redress.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew and C. Steven Baker.*

For the respondent: *Curtis W. Morris, Lamb, Morris and Lobello, San Dimas, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Roger J. Callahan, individually ("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 Roger J. Callahan has manufactured, advertised, offered for sale, sold, and distributed products to the public, including Dr. Callahan's Addiction Breaking System. Individually or in concert with others, he participated in the acts or practices alleged in this complaint. His principal office or place of business is 45350 Vista Santa Rosa, Indian Wells, California.

2. Respondent entered into an agreement with Mega Systems, Inc., a corporation which creates and distributes program-length radio and television commercials which run for 30 minutes or less and fit within normal radio and television broadcasting time slots. The television commercials were and are broadcast on network, independent and cable television stations throughout the United States. The radio commercials were and are broadcast on network and independent radio stations throughout the United States. In at least one of Mega Systems, Inc.'s program-length television commercials,

respondent acted as the guest and promoted Dr. Callahan's Addiction Breaking System.

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 created and disseminated advertisements for Dr. Callahan's Addiction Breaking System, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

A. Trudeau: "He [Dr. Callahan] has been a best-selling author whose revolutionary treatment for losing weight and quitting smoking takes less than three minutes with 95 percent success. If you smoke and want to quit, or if you want to lose weight once and for all, today's show could be an answer to your prayers."

"[T]he treatments that you discovered, that you invented get rid of addictions like food addictions so people can lose weight easily without trying to diet. They can just lose the weight because they reduce the urge to overeat. You can reduce smoking, alcoholism, any type of compulsion, depression, jealousy."

Callahan: "It's revolutionary because it works with a high success rate that's never before been possible."

Trudeau: "[I]f you have any addiction, whether it be for food, if you're overweight, if you have a smoking addiction, if your children are addicted to drugs -- any compulsion, anything whatsoever, we recommend you call the 800 number..."

Callahan: "What we mean is that their addictive urge, that uncontrollable urge is gone, completely gone, and they feel fine."

"And when we eliminate the anxiety, they don't need the heroin; they don't need the alcohol. The withdrawal is gone." (Television Infomercial Script.)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that for all or virtually all users:

A. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss.

B. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System cures addictions and compulsions, including but not limited to, smoking, eating, and using alcohol or heroin.

6. In truth and in fact:

A. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss.

B. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System does not cure addictions and compulsions, including but not limited to, smoking, eating, and using alcohol or heroin. Indeed, Dr. Callahan's Addiction Breaking System simply consists of a video tape in which Dr. Callahan demonstrates a series of tapping one's face, chest, and hand, rolling one's eyes, and humming.

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 he 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. 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

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EXHIBIT A

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: DR. CALLAHAN'S ADDICTION BREAKING
TECHNIQUE TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 28

MSI/SALBERG COMPLAINT EXHIBIT G
TRUDEAU COMPLAINT EXHIBIT F
CALLAHAN COMPLAINT EXHIBIT A

EXHIBIT A

P R O C E E D I N G S

1
2 ANNOUNCER: The following is a paid commercial program
3 brought to you by Mega Systems.

4 MR. TRUDEAU: Thanks again for joining me. I'm Kevin
5 Trudeau, and this is another edition of "A Closer Look."

6 Millions of people are addicted to food and are
7 overweight, constantly struggling with diet after diet, exercise
8 program after exercise program, yet more people are fat today
9 than ever before. Millions, too, are addicted to cigarettes and
10 can't quit, and probably millions more suffer from some kind of
11 addiction, compulsion, or phobia.

12 My guest today is Dr. Roger Callahan, an expert in the
13 field of addictions, phobias, stress, and traumas. He has been
14 featured on virtually every major TV and radio talk show,
15 including "Donahue" and CNN. He has been a best-selling author
16 whose revolutionary treatment for losing weight and quitting
17 smoking takes less than three minutes with 95 percent success.
18 If you smoke and want to quit, or if you want to lose weight once
19 and for all, today's show could be an answer to your prayers.

20 Dr. Callahan, thanks for being my guest today.

21 DR. CALLAHAN: Kevin, a pleasure to be with you.

22 MR. TRUDEAU: You know, I have to tell the viewing
23 audience how I met you because it was a fascinating story. As
24 you know, we do a series of infomercials like this where we
25 market different products, and I saw your ad in an airline

EXHIBIT A

2

1 magazine for the five-minute phobia cure. And I thought, you
2 know, that would be a great product for us to market if it works,
3 and I called you on the phone to discuss it with you, find out
4 your background; and I learned all about your, you know,
5 expertise and the books you've authored with the major book
6 publishers and your experience on CNN and "Donahue" and so forth.

7 And you said, Kevin, not only will we get rid of
8 phobias, but the treatments that you discovered, that you
9 invented get rid of addictions like food addictions so people can
10 lose weight easily without trying to diet. They can just lose
11 the weight because they reduce the urge to overeat.

12 You can reduce smoking, alcoholism, any type of
13 compulsion, depression, jealousy. And I was fascinated. I said
14 really, can you get rid of smoking? He said, Oh, yeah. I said
15 well, doctor, I smoke cigars, about six cigars a day, if you
16 remember this conversation -- I was calling you on the phone.

17 DR. CALLAHAN: Yes, I do, yeah.

18 MR. TRUDEAU: And I said I had gone to, for the last
19 six years, the top people in various fields trying to get rid of
20 --

21 DR. CALLAHAN: You mentioned some names to me, and they
22 were, indeed, the top people.

23 MR. TRUDEAU: The top people in hypnotists. I bought
24 subliminal tapes. I bought other types of tapes. I'd been to,
25 you know, different types of therapies -- biofeedback. I got

EXHIBIT A

3

1 accupressure, acupuncture. I, I got the patch. I got an ear
2 clip that uses some type of Chinese thing. I got magnets --
3 everything to try to quit. I bought little devices to try to cut
4 down, and nothing worked. And worse, I was just more stressful
5 trying to quit.

6 And you said, "Well, Kevin, the next time you have an
7 urge to smoke a cigar, you call me." So I called you on the
8 phone a few days later because for the first two days I didn't
9 want to call you. I was afraid you were going to take the cigar
10 away from me.

11 So I called you on the phone and said, "Doctor, I really
12 have to smoke a cigar right now. And I remember this because it
13 wasn't that I wanted to; I had to.

14 DR. CALLAHAN: Yes.

15 MR. TRUDEAU: And a lot of people that are watching, if
16 you have an addiction to cigarettes or food, you know it's true
17 If you want Haagen Daz Ice Cream, if you want pizza, if you want
18 hamburgers or French fries, or if you want a cigarette, you get
19 to that point, as you know, it's a have to: you have to smoke.

20 DR. CALLAHAN: Yeah. That's the keynote of addiction.

21 MR. TRUDEAU: Right.

22 DR. CALLAHAN: It's an irresistible, uncontrollable
23 urge --

24 MR. TRUDEAU: -- to do it.

25 DR. CALLAHAN: -- which is destructive in some way.

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EXHIBIT A

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1 MR. TRUDEAU: Oh, sure.

2 DR. CALLAHAN: And hurtful.

3 MR. TRUDEAU: And I said-- you said on a scale of one

4 to ten, where is it? And I says it's about a nine and a half.

5 You said fine. You gave me and walked me through the treatments

6 --

7 DR. CALLAHAN: Right.

8 MR. TRUDEAU: -- on the phone. It took less than five

9 minutes. It's a simple treatment you just do. Very simple, very

10 easy. And the urge reduced from a nine and a half to a one or

11 zero. It was gone.

12 DR. CALLAHAN: Yeah. That's right.

13 MR. TRUDEAU: I said, Doctor, I swear to you, I'm not

14 going to smoke this cigar, but I'm convinced it will come back,

15 the urge, if not tonight, tomorrow. And you said fine, if it

16 comes back, call me.

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: I said that's a deal. Six months passed,

19 and I never had the urge to smoke a cigar. I never smoked a

20 cigar.

21 DR. CALLAHAN: Right.

22 MR. TRUDEAU: It was incredible. Now, this is not

23 uncommon. You see this all the time in your practice.

24 DR. CALLAHAN: Yeah. We see that all the time. More

25 frequently, a person will have to repeat the simple treatment.

EXHIBIT A

5

1 Once they learn how to do the treatment, --

2 MR. TRUDEAU: Right.

3 DR. CALLAHAN: -- it only takes a minute or less.

4 MR. TRUDEAU: Yeah. It seems, it seems --

5 DR. CALLAHAN: Because once you know it and once the
6 person learns how to do it, they can do it without thinking about
7 it, and it takes less than a minute.

8 MR. TRUDEAU: Now, this is a revolutionary approach to
9 addictions.

10 DR. CALLAHAN: Oh, yes, yes. It's revolutionary in the
11 sense that nothing in psychology could have explained or
12 predicted this. It's revolutionary because it works with a high
13 success rate that's never before been possible.

14 And what we're doing, Kevin, is we're actually --when
15 we do the treatment, we're actually getting to the fundamental
16 causal level of the problem. It's not like just distraction or
17 reducing the symptom. We're actually getting at the core base of
18 the problem. I had to study quantum physics to really understand
19 that in more detail.

20 MR. TRUDEAU: Now, I remember you were on CNN --

21 DR. CALLAHAN: Yes.

22 MR. TRUDEAU: -- because with people who are
23 overweight, they have this uncontrollable urge to eat, whether it
24 be chocolate or candy bars or, you know, hamburgers, french
25 fries. People watching know they have addictions to Haagen Daz

Complaint

125 F.T.C.

EXHIBIT A

6

1 ice cream. You know, we eat too much food.

2 DR. CALLAHAN: Right.

3 MR. TRUDEAU: And, again, they eat when they are not
4 hungry.

5 DR. CALLAHAN: Yes.

6 MR. TRUDEAU: I mean, you authored the book, "Why Do I
7 Eat When I'm Not Hungry?" Right?

8 DR. CALLAHAN: That's right.

9 MR. TRUDEAU: But you were on CNN, and you had a very
10 interesting experience you were sharing with me.

11 DR. CALLAHAN: Yes. It was my third time on CNN. The
12 previous two times I helped some people with anxiety problems,
13 very quickly, who called in for help. This time the anchor said,
14 I hear you've been developing something with addiction. Well,
15 see if you can help me right now. I'm dying for some chocolate.

16 And the anchor who was with her joked and says, Yes.
17 She's going to eat her pencil. And she really looked desperate,
18 and it was serious. At first, I didn't know if she was joking
19 because they were laughing. And she says, no, it's very serious.
20 So I took her through the treatment. She was in Georgia, and I
21 was in a studio in L.A. And in about two minutes, because she
22 didn't know what they were all about -- two or three minutes --
23 her urge was not only gone, but you've seen a clip of that, you
24 know --

25 MR. TRUDEAU: Yes.

EXHIBIT A

7

1 DR. CALLAHAN: She does something like this, which is
2 very interesting. She says -- and we're telling her all the
3 while to think how good the chocolate would be. We're not trying
4 to turn her off.

5 MR. TRUDEAU: That's right.

6 DR. CALLAHAN: She said at the end of the treatment,
7 "Ooh, I don't even want any." Remember that?

8 MR. TRUDEAU: That's right.

9 DR. CALLAHAN: Isn't that interesting? We get that
10 every once in a while. Also, she became very relaxed. Her whole
11 being changed. Her manner changed because that, that power that
12 was driving that urge coming from a very deep level of being, was
13 simply dissipated. It was gone, not there anymore.

14 MR. TRUDEAU: And now you also find that when people
15 give themselves the treatment, because it just takes less than
16 five minutes, that their face sometimes changes, the stress
17 reduction goes down so much.

18 DR. CALLAHAN: That's right. Their face changes. I
19 had one patient who was addicted to pain pills, and it was very
20 serious because she was getting pain pills from a number of
21 different doctors, -- you know, one doctor would never give her
22 that many -- and she found that it made her relax, the only thing
23 that made her relax, but it was a terribly dangerous thing she
24 was doing. And I treated her. After the second meeting, by
25 telephone -- we treated her by telephone -- after second session.

EXHIBIT A

8

1 she didn't want, she didn't want any anymore, and about a week
2 later she called up and she said, you know, this is really
3 interesting. My friends are coming up to me and asking if I had
4 plastic surgery, I look so much better. She looked younger. All
5 the strain and stress and everything was gone out of her face.

6 We have people, too, who are very pale and they are low
7 on energy. After treatment, color comes into their face. They
8 feel so much better. So we know that a lot of physiologic and
9 chemical changes result as a function of this simple treatment.
10 It's a very deep, basic thing.

11 MR. TRUDEAU: Now, we were talking about smoking, and I
12 had a friend of mine, Jack Freeman, who is -- he's from
13 Charlotte, North Carolina. We had went to Las Vegas, and he, for
14 15 years, this guy smoked two and a half packs of cigarettes a
15 day.

16 Now, imagine, he's on the plane from Charlotte to
17 Chicago for about two hours without a cigarette. He gets off the
18 plane, and the plane was a little delayed because we were running
19 late. He says, Kevin, I have to smoke a cigarette. I said,
20 well, you can't. We have to just get right on this plane.
21 They're going to leave.

22 We hop on. Now we get another three hours to Las
23 Vegas. This guy is in the plane climbing the walls. Now, when
24 someone doesn't have a cigarette, what's going on there? Let's
25 talk about that phenomenon just for a moment.

EXHIBIT A

9

1 DR. CALLAHAN: I wrote a book called -- it's published
2 in Germany -- called "The Anxiety Addiction Connection" because I
3 found there is an addiction between anxiety and addictions. And
4 all addictions, Kevin, whether it's to nail biting, hair pulling,
5 heroine, cocaine, pain pills, cigarettes, chocolate, -- you name
6 it -- all addictions are a result of anxiety, and they are an
7 attempt to -- a wrong attempt, a tragic attempt to mask or
8 tranquilize the anxiety. And it just doesn't work. It doesn't
9 take care of the problem.

10 MR. TRUDEAU: So that's what people go on diets for?
11 If they try to stop cold smoking they are climbing the walls and
12 they are irritable?

13 DR. CALLAHAN: Yes, that's right. That's what it is.
14 They are having an anxiety attack. Even heroin withdrawal, I
15 found, is actually an anxiety attack.

16 MR. TRUDEAU: Really? Not physiological?

17 DR. CALLAHAN: No. Well, there are physiological
18 elements, but they are very minor, very minor. What I was
19 trained, and most professionals still believe, that in the heroin
20 addiction the problem is mainly physiologic. It's not at all.
21 There is a lot of evidence now to show that. It's not at all.

22 MR. TRUDEAU: Well, this fellow, Jack, when he was, you
23 know, climbing the walls on the plane, I walked him through the
24 treatments. We're sitting right next to him on the plane.

25 DR. CALLAHAN: Yeah.

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EXHIBIT A

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1 MR. TRUDEAU: And within two to three minutes, the urge
2 went from a ten -- actually, he said it was an 11 -- went from an
3 11 down to a zero, and he said I don't want the cigarette. I
4 have no urge. Then he goes, I can't believe it.

5 DR. CALLAHAN: Yeah.

6 MR. TRUDEAU: The meal came, and we started talking,
7 and he was eating. They were cleaning up all the plates, and he
8 had not finished his meal yet; he was still eating. He noticed
9 he was the last guy done eating, and he didn't even eat his
10 entire meal. And he grabbed me, and he says, Kevin that's the
11 slowest I've ever eaten in my life.

12 DR. CALLAHAN: Oh, yeah.

13 MR. TRUDEAU: Now, isn't that interesting? It seemed
14 to change everything.

15 DR. CALLAHAN: Yes. What happened is -- and they all
16 report this after the addiction treatment. They unanimously
17 almost will say, you know, I feel very relaxed.

18 MR. TRUDEAU: Right.

19 DR. CALLAHAN: I feel very calm inside. And that's
20 what it was. He didn't have that frantic kind of a need to push
21 and shove the meal down. So it's better for his digestion also.

22 MR. TRUDEAU: Oh, sure.

23 DR. CALLAHAN: But, you know, there is something very
24 important for people -- you said at the opening, if they want to
25 quit smoking.

EXHIBIT A

11

1 MR. TRUDEAU: Right.

2 DR. CALLAHAN: Let me tell you something: Some of them
3 don't want to quit smoking. I recommend those who don't want to
4 quit smoking but have to fly across country or attend meetings
5 where they are not allowed to smoke, do this treatment and watch
6 what it can do for them. And they find that it's not going to
7 drive them crazy to be without their cigarettes, they may change
8 their mind about it.

9 MR. TRUDEAU: They may want to.

10 DR. CALLAHAN: But even if they never want to, at least
11 they are going to have more control over it. It's not going to
12 be running them, not controlling them. They can regain control.

13 MR. TRUDEAU: That's funny, because we both know a
14 major celebrity, who will be nameless, who just yesterday just
15 did the treatment because "I don't want to quit; I like smoking."
16 I said, well, do this treatment anyways, and then smoke the
17 cigarette. We did the treatment. He didn't want to smoke it.
18 He says you know something? Maybe I do want to really quit.

19 DR. CALLAHAN: Sure.

20 MR. TRUDEAU: Because he was afraid, as you mentioned,
21 to try to quit because he thought it was going to be very
22 difficult and stressful and so forth.

23 DR. CALLAHAN: Oh, yeah. I know how difficult it is
24 when I quit 30-some years ago. It was terrible. I went through
25 hell. And there are people who -- most smokers have tried it.

Complaint

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EXHIBIT A

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1 and they find that, Jesus, I'd rather die of lung cancer or heart
2 disease than end up in a mental hospital. That's the way it
3 stands for them.

4 MR. TRUDEAU: Right, right. For those of you watching
5 who do want information on Dr. Callahan's techniques, it's a
6 videotape where you, in just about 15 minutes, explain and show
7 the treatment, how to apply it.

8 I highly recommend it. I've seen this in-action. It's
9 probably the most revolutionary thing you can do, if you have any
10 addiction, whether it be for food, if you're overweight, if you,
11 have a smoking addiction, if your children are addicted to drugs
12 -- any compulsion, anything whatsoever, we recommend you call the
13 800 number and get information on the video because it really
14 could change your life. And it's something that I feel very
15 passionate about because I've seen the results for myself and in
16 my own life.

17 Now, let's talk about weight loss. We've talked about
18 smoking, but people out there -- and I'm one of them -- we like
19 to eat food. You know, I --

20 DR. CALLAHAN: Almost all of us are.

21 MR. TRUDEAU: It's a very pleasurable experience.

22 DR. CALLAHAN: Yeah. And it really is, yeah.

23 MR. TRUDEAU: And sometimes you eat to the point -- and
24 I think people can relate to this -- you eat when you're not
25 hungry. You just go past that point.

EXHIBIT A

13

1 DR. CALLAHAN: Or it's so good, and you can't resist
2 it. See, that's the key element. If you could resist it, then
3 you don't have any problem.

4 MR. TRUDEAU: Right.

5 DR. CALLAHAN: And there are very few people like that,
6 they can just resist it. "Oh, I'll lose a few pounds. I'll just
7 leave this out and leave that out," and they don't have any
8 trouble, but most of us have trouble; and that's what we mean by
9 addiction.

10 MR. TRUDEAU: It seems that a lot of these diets that
11 people try would work if you followed through on them, --

12 DR. CALLAHAN: Yeah.

13 MR. TRUDEAU: -- but people, quote, cheat, or they
14 can't -- because they are just being driven -- at ten o'clock at
15 night they open up the refrigerator and out comes the Haagen Daz.

16 DR. CALLAHAN: The editor who bought my book, "Why Do I
17 Eat When I'm Not Hungry?" -- she was at Doubleday at the time --
18 she and her husband are very nice people, and they love good
19 food. In fact, they go over to Italy -- they go to Bologna and
20 study the special gourmet cooking that they have there and so
21 forth, and she always has been over 30-some pounds, and she'd
22 always go crazy when she was there because it was so good and she
23 could not resist it.

24 Well, she read the book, of course, that she bought.
25 She later left Doubleday, so that's relevant for the rest of this

EXHIBIT A

14

1 story because at the International Book Fair, my agent was there,
2 -- I think it was at Brussels -- and he said that she was telling
3 everybody that for the first time she could go to Bologna and
4 only eat smaller amounts. She didn't have to eat so much. The
5 drive was gone, that extra urge. That addictive urge was gone,
6 so she was raving about it to everybody.

7 MR. TRUDEAU: She could really enjoy the food --

8 DR. CALLAHAN: But she could still enjoy good food --

9 MR. TRUDEAU: -- without feeling guilty --

10 DR. CALLAHAN: -- without feeling guilty.

11 MR. TRUDEAU: -- and actually reduce weight because she
12 could eat normally without having that urge.

13 DR. CALLAHAN: Exactly. Isn't that wonderful?

14 MR. TRUDEAU: It's fascinating. Now, you had mentioned
15 about some of the talk shows you've been on radio, because you've
16 been on many --

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: -- and you treat people right over the
19 phone in a few minutes.

20 DR. CALLAHAN: They call -- we tell them to call -- you
21 know, I'll tell you why I do this. It's very simple. When I
22 wrote my first book, it was a Book-of-the-Month Club selection on
23 romantic love, and like every other author, I just went on show
24 after show and just discussed the concepts in the book.

25 But when I wrote the "Five-minute Phobia Cure," I knew

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1 nobody in their right mind would believe me or even should
2 believe me because it's so outrageous, it's so revolutionary. So
3 I told all the producers, get people who have these problems, and
4 let me show you.

5 So when I was appearing on the radio shows and I had
6 just discovered the addiction treatment, I told the listening
7 audience because I wanted to show people what we could do, so
8 they didn't just have to take my word for it. You know, in the
9 privacy of your office, you can make any claim you want. Nobody
10 knows the difference.

11 MR. TRUDEAU: Sure, you can. Right, right, right.

12 DR. CALLAHAN: So I wanted to show the world that we
13 really had something quite real and powerful. And so we had -- I
14 urged anyone calling in who had any addictive urge for anything
15 -- we've had people call in for -- who needed to shoot up with
16 heroin, they needed to take the extra alcoholic drank, they were
17 -- the first one who called was on the way to the refrigerator,
18 she said, and she heard me say that. She stopped, picked up the
19 phone, and called.

20 She says, I'm on my way to the refrigerator right now.
21 I'm in there to get my favorite desert, that ice cream with
22 chocolate on it. She said, I can't resist that stuff. Is there
23 anything you can do for me?

24 In a matter of about a minute and a half, in her case,
25 she didn't want it, didn't need it. Now, listen to this: 104

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EXHIBIT A

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1 people in a row -- I kept the records on this -- called before we
2 ran into the first person that we couldn't help within the time
3 constraints of the show.

4 MR. TRUDEAU: Now --

5 DR. CALLAHAN: That was over a lot of shows. That
6 wasn't one show. That was about 30 or 40 shows.

7 MR. TRUDEAU: Right. Well, that brings me to the next
8 question: Does this treatment work for everyone 100 percent of
9 the time?

10 DR. CALLAHAN: No, no; of course, not. There are some
11 people that it won't work for at all: their problems are too
12 complicated. Also, let's make it clear --

13 MR. TRUDEAU: But that's a very small percentage.

14 DR. CALLAHAN: It's a small percentage, and they can
15 usually be helped with individual treatment --

16 MR. TRUDEAU: Right.

17 DR. CALLAHAN: -- which we do by telephone.

18 MR. TRUDEAU: Which you still do over the phone, right?

19 DR. CALLAHAN: Yeah. We and our staff can check them
20 through their voice, and we can treat them by phone.

21 MR. TRUDEAU: But it helps most of them, and what we
22 mean by "help" is we don't mean we cure their addiction in a
23 couple of minutes.

24 MR. TRUDEAU: Right.

25 DR. CALLAHAN: What we mean is that their addictive

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1 urge, that uncontrollable urge is gone, completely gone, and they
2 feel fine.

3 MR. TRUDEAU: Right.

4 DR. CALLAHAN: And there is no resistance. They don't
5 have to fight it. Now, they may have to repeat that treatment
6 over and over until -- the beautiful thing is for the first time
7 in their life, the cause, the deep cause of the problem is being
8 addressed during this treatment, believe it or not.

9 MR. TRUDEAU: Right.

10 DR. CALLAHAN: The real cause.

11 MR. TRUDEAU: Which brings me to the next point: What
12 is the root cause that we're dealing with? I mean, you talked
13 about energy patterns running through the body, you know, with
14 meridians from the ancient arts.

15 DR. CALLAHAN: It's very, very difficult to explain
16 this, Kevin, because it does relate to quantum physics. There is
17 information -- God, how do I, how do I briefly tell you this?

18 The quickest thing I can tell you is that they are
19 anxious. When we do the treatment, they are not anxious. And
20 when we eliminate the anxiety, they don't need the heroin, they
21 don't need the alcohol. The withdrawal is gone.

22 MR. TRUDEAU: Is that why when someone tries to quit
23 one addiction, another one replaces it?

24 DR. CALLAHAN: Sure. Without treating the addiction --
25 Alcoholics Anonymous, which has been up until recently the best

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1 form of treatment for alcoholism, what do they do? They go there
2 and they get addicted to sugar, coffee, all kind of things, which
3 are better addictions, by the way, because the alcohol was
4 probably ruining their life, --

5 MR. TRUDEAU: Right.

6 DR. CALLAHAN: -- but, nevertheless, they still remain
7 highly addicted to these other things.

8 MR. TRUDEAU: Well, let's talk about the alcohol. You
9 had mentioned a story where you live in Palm Springs, someone
10 came into the grocery store that recognized you from TV.

11 DR. CALLAHAN: Yeah. I live in Indian Wells, which is
12 right near Palm Springs, and I was going to the supermarket one
13 day, and somebody slapped me on the shoulder. I looked around,
14 and I see this smiling face.

15 And he says, Dr. Callahan. I says, yeah. Hi, how are
16 you? He says, I saw you on television. He says, I saw you a
17 year and a half ago, and you were doing something about
18 addictions on there. I says, yeah, yeah, I remember that. And
19 he says, you know, I've tried that. I've been an alcoholic for,
20 like, 20 years, tried a lot of different programs. Nothing
21 helped me.

22 He says, I just followed the directions that you did on
23 that program, and I feel so great, I want you to know I haven't
24 had a drink in a year and a half. He said, I'm so grateful to
25 you. Now, that's the kind of thing that makes somebody feel

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19

1 good.

2 MR. TRUDEAU: It's amazing because I read some books
3 for different addictions and overweight.

4 DR. CALLAHAN: Yeah.

5 MR. TRUDEAU: And it seems that it's always about some
6 type of psychological problem, some type of stress, something
7 they are trying to cover up or hide.

8 DR. CALLAHAN: Yeah.

9 MR. TRUDEAU: And I know the feeling. I mean, I've
10 been there like a lot of people where you just want to eat, and
11 you're not hungry; and you say, you know, I just have to eat this
12 food.

13 DR. CALLAHAN: In November, the American Psychological
14 Association -- that's my professional organization -- came out
15 with a newspaper article reporting that the science director --
16 that's the group -- the head of the research and so forth
17 representing the organization -- found that really the people
18 trying to help other people with problems aren't doing very well.

19 They are not really helping much. So the problems
20 usually always come back, and so you see, but that's not applying
21 to this work. They are not aware of this yet. This gets to the
22 heart of their problem, eliminates in most cases, very quickly.

23 MR. TRUDEAU: For those of you watching, again, who do
24 want information on Dr. Callahan's technique, it's a video which
25 can eliminate or help reduce the urge of any addiction that you

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20

1 may have. If you are overweight and you've been trying to lose
2 weight, this could be -- and I believe it may be the answer that
3 you've been looking for. If you've been trying to quit smoking
4 and really want to, try this.

5 You have nothing to lose by trying it. I've used the
6 techniques myself. I've tried them on my friends. The results
7 have been nothing more than miraculous or spectacular. You have
8 the video, "Hope without Reason."

9 DR. CALLAHAN: "Hope with Reason," yeah.

10 MR. TRUDEAU: "Hope with Reason."

11 DR. CALLAHAN: And, you know, how about the story about
12 the makeup lady?

13 MR. TRUDEAU: Oh, yeah. Every time that we would run
14 into someone we would use the technique --

15 DR. CALLAHAN: She was curious about what we did, and
16 so I said, do you want to experience it? She said, Yeah. This
17 happened about 20 minutes ago.

18 MR. TRUDEAU: Right.

19 DR. CALLAHAN: And she said -- I asked her, Is there
20 anything in your past that -- you know, most of us have things in
21 our past, some kind of pain or trauma.

22 MR. TRUDEAU: Everyone does. Sure. Yeah.

23 DR. CALLAHAN: Right. And I said I don't want to know
24 what it is, but think about it, and how high do you go? She went
25 all the way to the top of the scale for tan. How long have you

EXHIBIT A

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1 had this? Seven years.

2 Well, she's only 29 years old, so she's had this almost
3 a third of her life. Every time she would think of this during
4 the last seven-year period, she'd be in great pain and misery.
5 In a matter of maybe a minute and a half, we got her to a one,
6 which I use as the lowest end of the scale, no trace of it.

7 MR. TRUDEAU: Right.

8 DR. CALLAHAN: And she walked around later, saying, I
9 feel so good. I feel like a load or burden. But, you see, until
10 my discoveries, nothing like that was possible.

11 MR. TRUDEAU: Right.

12 DR. CALLAHAN: And so, check back with her and see how
13 long it endures. We expect that to last forever.

14 MR. TRUDEAU: What other doctors right now -- I know a
15 lot of doctors, therapists from -- whether they be psychiatrists,
16 psychologists --

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: -- are coming to you to learn these so
19 they can treat their own patients.

20 DR. CALLAHAN: Oh, yes.

21 MR. TRUDEAU: What are other people, therapists saying?

22 DR. CALLAHAN: Oh, gosh. We have all kinds of -- for
23 example, at our last training session in June, this last June,
24 Dr. -- what's his name? -- from Massachusetts -- well, put his
25 quote up and let them see it because he said something really

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1 spectacular, and I want his name on there.

2 MR. TRUDEAU: Yeah.

3 DR. CALLAHAN: He said he's been a psychiatrist for 30
4 years, but since he's been doing my procedure, -- this is really
5 terrific -- he said for the first time in 30 years, he has the
6 satisfaction of actually helping his patients. Now, we get
7 things like that from all over.

8 We had people from Europe, from Canada, and doctors all
9 over the country who -- Dr. Fred Gallo, for example, from
10 Pennsylvania, is very, very excited because he's been able to
11 eliminate depression with these techniques which we developed
12 some time ago. And he's just thrilled about it because he had
13 always thought that depression was a chemical problem.

14 MR. TRUDEAU: Right.

15 DR. CALLAHAN: You have to do something with the
16 chemistry. When we do the treatments, Kevin, the chemistry
17 changes.

18 MR. TRUDEAU: The actual ---

19 DR. CALLAHAN: Sure, because we're working on a more
20 fundamental level than the chemistry. We're working at the
21 input-of-information level into the body. The chemistry and the
22 thoughts come later. I used to work just with thoughts.

23 MR. TRUDEAU: Right.

24 DR. CALLAHAN: They are almost irrelevant.

25 MR. TRUDEAU: It's amazing. Now, people can learn the

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1 treatments within less than ten or fifteen minutes.

2 DR. CALLAHAN: Well, on the video we take them through
3 the step-by-step recipes that we've developed that will help most
4 people.

5 MR. TRUDEAU: Now, when you see these physiological
6 changes, -- we talked about the stress reduction, we talked about
7 the urges going away - is there any other physiological or health
8 benefits that you know are associated with the treatments?

9 DR. CALLAHAN: Oh, yeah, because there is a lot of --

10 MR. TRUDEAU: Does energy levels increase, for example?

11 DR. CALLAHAN: Oh, yes. Well, there is a lot of
12 physiologic health benefits simply from eliminating psychological
13 problems. It's been known for many, many years that most
14 patients that go to their general practitioners or doctors
15 actually -- at least half of them mainly have something
16 psychological behind their problem.

17 MR. TRUDEAU: You know, I was reading in a trade
18 journal that the 900 lines, the psychic lines, --

19 DR. CALLAHAN: Yeah.

20 MR. TRUDEAU: -- the number-one reason people call is
21 because they are feeling bad, some type of depression --

22 DR. CALLAHAN: Yeah.

23 MR. TRUDEAU: -- which usually leads them to overeat,
24 and they are looking for relationships, they are looking for
25 love, and they have some type of love pain. And they continue to

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1 call over and over again to try to get some type of relief from
2 this bad feeling. And these treatments that you give that you
3 teach people how to administer to themselves in just a matter of
4 minutes can alleviate that problem --

5 DR. CALLAHAN: Yes, in most people.

6 MR. TRUDEAU: -- and not just -- maybe they have to
7 apply it a few more times, --

8 DR. CALLAHAN: Yeah.

9 MR. TRUDEAU: -- but how long does it last?

10 DR. CALLAHAN: Well, it will vary from one person to
11 the next. It's really shocking that in a small number of them,
12 one treatment is all they need. My first case, you know, was
13 with a Snicker bar addiction. This patient came to me because
14 her doctor told she was developing a heart problem. She needed
15 to lose about 40 pounds.

16 She went back six months later. She hadn't lost a
17 pound. And she explained to her doctor it's because of the
18 Snicker bar. I got to have Snicker bars all the time. She
19 carried a bunch of them in her purse for emergencies. And so she
20 came to me and said -- I had already helped her with a serious
21 anxiety problem -- and she said, do you think you could help me
22 with this? I said, let's find out. So we had her think about
23 Snicker bars, treated her. It took about two or three minutes,
24 at most. That was 14 years ago, and I keep checking with her.
25 She hasn't wanted another Snicker bar since.

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1 MR. TRUDEAU: It's amazing --

2 DR. CALLAHAN: That's what happens.

3 MR. TRUDEAU: -- because when you do the treatment,
4 like when you mentioned about the CNN, you don't try to hide what
5 the person -- you say, here, look at it, --

6 DR. CALLAHAN: Yeah.

7 MR. TRUDEAU: -- smell it.

8 DR. CALLAHAN: Think about how good it is:

9 MR. TRUDEAU: Think how wonderful it is. And I've seen
10 people like with Haagen Daz Ice Cream who are about to just jump
11 right in -- and the ice cream is great, as we know, but say, I
12 don't want it. Now, the other thing that you had mentioned which
13 was fascinating is that people can still eat chocolate, they can
14 still eat Haagen Daz, but now they are in control. They can eat
15 it, or they can still smoke the cigarette, --

16 DR. CALLAHAN: Yeah.

17 MR. TRUDEAU: -- but they are now in control.

18 DR. CALLAHAN: Yeah. People can eat and smoke and do
19 all kinds of things without being addicted. What we are after is
20 eliminating the addiction.

21 MR. TRUDEAU: Do you find that when people use the
22 treatments for being overweight that there is -- that they lose
23 weight very quickly without any stress whatsoever?

24 DR. CALLAHAN: Well, it's much easier for them,
25 obviously. For example, this first patient I was telling you

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1 with the Snicker bars, all she had to do was leave out the
2 Snicker bars, and she started keeping everything else the same
3 and started dropping a pound, two pounds a week.

4 MR. TRUDEAU: So now people don't have -- for the first
5 time don't have to, quote, go on a diet.

6 DR. CALLAHAN: Yeah.

7 MR. TRUDEAU: They can just eliminate the addiction to
8 food that they know they shouldn't be eating?

9 DR. CALLAHAN: That's right, yes.

10 MR. TRUDEAU: And they can eat normally, be
11 happy --

12 DR. CALLAHAN: Exactly.

13 MR. TRUDEAU: -- and have no deprivation.

14 DR. CALLAHAN: Right.

15 MR. TRUDEAU: Which is a key. When people try to go on
16 diets, I know, they always feel like they are being deprived of
17 something that they really want.

18 DR. CALLAHAN: Oh, yeah.

19 MR. TRUDEAU: But you're saying --

20 DR. CALLAHAN: And they can't wait to get off the diet.

21 MR. TRUDEAU: You're saying you eliminate the want.

22 DR. CALLAHAN: We eliminate that excessive addictive
23 urge, yes. That's right.

24 MR. TRUDEAU: And if you are overweight -- I think
25 every person who has had this type of addiction to food feels

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1 that -- they know that they've been overweight. Let's talk about
2 sports. You mentioned an Olympic swimmer.

3 DR. CALLAHAN: Uh-huh.

4 MR. TRUDEAU: What type of result --

5 DR. CALLAHAN: Oh, yeah. We had -- an Olympic swimmer
6 was sent to me by a psychologist who he was working with because
7 he knew I had developed a phenomenon. It's a very interesting
8 thing I call "psychological reversal." It's sort of a
9 self-sabotaging thing that can happen to any of us.

10 MR. TRUDEAU: I think a lot of us can relate to that.

11 DR. CALLAHAN: That's right. And he's an excellent
12 athlete. He's just superb, and he was on the -- one of the major
13 teams. And -- but he had trouble just getting over the edge:
14 every time that he was observed and so forth, he couldn't perform
15 up to his maximum ability. We fixed his reversal. Boom, he
16 suddenly did well and played in the Olympics.

17 MR. TRUDEAU: So this can reduce stress if people are
18 in real-life situations, maybe businessmen are going into
19 meetings and their stress is going up?

20 DR. CALLAHAN: We help a lot of golfers. You know, in
21 the Palm Springs area there's more golf courses per capita than
22 anywhere in the world, so we get a lot of golfers who are
23 interested, and they have the yips. You know, they do well when
24 nobody is looking, but putting, you know, the short game really
25 suffers from anxiety, and it's a phobia. I treated. I treated a

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1 hall-of-fame athlete and two golf champions who had some of that
2 problem, and as soon as we treated them, wham, they took off.

3 MR. TRUDEAU: Yeah. We call it "choking under
4 pressure." Right?

5 DR. CALLAHAN: That's right. Yeah. I just was talking
6 to a person I know who owns archery -- manufactures archery
7 equipment, and he was telling me that it's a big problem there,
8 too, that a lot of people drop out because they get the yips when
9 they are shooting at a target. They get nervous, apprehensive,
10 phobic.

11 MR. TRUDEAU: Sure. Dr. Callahan, time is running out
12 and I really appreciate you being my guest. It's a fascinating
13 subject. Hopefully, we'll have time to have you on again to talk
14 more about it.

15 DR. CALLAHAN: Good.

16 MR. TRUDEAU: If you are overweight, if you've been
17 trying to quit smoking and you can't, please call the 800 number.
18 This is something that I personally can endorse and recommend.
19 I've used it myself. I've seen my friends use it. We both have.
20 And the results have been nothing but spectacular. Call the 800
21 number.

22 Thanks again for being with me and watching. I'm Kevin
23 Trudeau, and this has been another edition of "A Closer Look."

24 ANNOUNCER: The preceding has been a paid commercial
25 program brought to you by Mega Systems.

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Roger J. Callahan's principal office or place of business is 45350 Vista Santa Rosa, Indian Wells, California.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

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

evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean Roger J. Callahan, individually and his agents, representatives and employees.

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

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Dr. Callahan's Addiction Breaking System or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss;

B. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise;
or

C. Such product cures addictions and compulsions, including but not limited to, smoking, eating, and using alcohol or heroin.

For purposes of this Part, "substantially similar product" shall mean any product or program purported to treat addictions or compulsions that is substantially similar in components, techniques, composition and properties.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any weight loss product or program or any product or program purported to treat addictions or compulsions in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy 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:

A. Respondent Roger J. Callahan shall pay to the Federal Trade Commission by electronic funds transfer the sum of fifty thousand dollars (\$50,000) 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.

B. The funds paid by respondent Roger J. Callahan, 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 Dr. Callahan's Addiction Breaking System. 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. Respondent 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.

IV.

It is further ordered, That respondent Roger J. Callahan 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 his 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 respondent Roger J. Callahan, for a period of ten (10) years after the date of issuance of this order, shall

notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondent Roger J. Callahan 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 he has complied with this order.

VII.

This order will terminate on April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

TRU-VANTAGE INTERNATIONAL, L.L.C.

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

Docket C-3798. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the Illinois-based respondent from making claims, in radio and television infomercials, about Howard Berg's Mega Reading System and its ability to successfully increase an individual's reading speed to above 800 words per minute while substantially comprehending and retaining the material.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew* and *C. Steven Baker*.

For the respondent: *David Bradford, Jenner & Block*, Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Tru-Vantage International, L.L.C., a limited liability company ("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 Tru-Vantage International, L.L.C., is an Illinois limited liability company, with its principal office or place of business at 7300 North Lehigh Avenue, Niles, Illinois.

2. Respondent has advertised, offered for sale, sold, and distributed products to the public, including but not limited to, Howard Berg's Mega Reading.

3. Respondent's advertisements include, but are not limited to, program-length television commercials which run for 30 minutes or less and fit within normal television broadcasting time slots. Respondent's television commercials were and are broadcast on network, independent and cable television stations throughout the United States. Several of the respondent's television commercials are identified as "Vantage Point with host Kevin Trudeau."

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.

5. Respondent has created, disseminated or has caused to be disseminated advertisements for Howard Berg's Mega Reading, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

Berg: I teach children not just how to read faster but to comprehend, retain and stay focused. . . . So, Mega Reading is a complete accelerated learning system that doesn't just teach you to read quickly.

Trudeau: Right.

Berg: On a skimming level.

Trudeau: Right.

Berg: But to comprehend, apply and use it. Even under test situations.

Berg: I'm working with companies like Pfizer, Mobil Oil, that have high tech reading. And they used it because it was easy to retain complicated information.

Trudeau: So, even the detailed complicated material, people can read quickly and grasp it and comprehend it and recall it.

Berg: Over long periods of time.

Berg: They hired me to train their editors not only in how to speed read but how to make books easier to comprehend, because my program teaches people how to understand text.

Trudeau: Right.

Berg: Not just blur through it.

Trudeau: Folks, if you want more information on Howard's program, Mega Reading program, it's a home study course that you can go through at your leisure and it will virtually release your own super reading speed, mega reading. You'll be able to read almost as fast as Howard. Virtually quadruple, five, ten times your reading speed right now.

Berg: I have a letter here from a girl who has brain damage.

Trudeau: Right.

Berg: Brain damage. She was in a car accident and half her brain stopped functioning. It was electrically dead.

Trudeau: Right.

Berg: And she writes. It says that on a coffee break in my word shop, she went three to 600 words per minute. This is someone with severe brain damage. So yes, it works for anyone. And you can't get worse than that.

Berg: At the end of the workshop, every child and parent had at least doubled except for one.

Trudeau: Uh-huh.

Berg: That child was reading at five seconds a page and I quizzed her.

Trudeau: Five seconds.

Berg: Five seconds a page. And the vice principal was there.

Trudeau: And they're reading it?

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Complaint

Berg: Comprehending it and retaining it.

Berg: Anybody. In fact, I had a blind student in Huntsville, Alabama.

Trudeau: Yeah.

Berg: I swear to you it's true.

Trudeau: Wait a minute. You can't read if you can't see.

Berg: She was reading in Braille.

Trudeau: Oh, okay.

Berg: And she took the program to learn the memory skills. Because a lot of people when they hear speed reading, they think fast reading. With Mega Reading it's not just fast reading, it's fast learning. Remember what Tommy said, it's a complete accelerated learning program. And what I teach them is storing, retrieving, recalling, focusing.

6. Through the means described in paragraph five, respondent has represented, expressly or by implication, that Howard Berg's Mega Reading is successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material.

7. In truth and in fact Howard Berg's Mega Reading is not successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph five, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph six, at the time the representation was made.

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

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.

Commissioner Thompson and Commissioner Swindle not participating.

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EXHIBIT A

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: HOWARD BERG'S MEGA READING
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 31

TRUDEAU COMPLAINT EXHIBIT L
TRU-VANTAGE COMPLAINT EXHIBIT A
BERG COMPLAINT EXHIBIT A

EXHIBIT A

1

1 MR. TRUDEAU: Thanks for watching. I'm Kevin Trudeau,
2 and this is another edition of Vantage Point. How would you like
3 to read 25,000 words a minute? How about reading an entire book
4 just like this in about twenty minutes instead of ten hours?
5 Imagine reading a newspaper or magazine in a fraction of the time
6 it would normally take. Well, my guest today can do just that as
7 well as comprehend and remember everything. Howard Berg is the
8 world's fastest reader. He's in the Guinness Book of World
9 Records. He's the founder of the Berg Reading Institute and
10 author of Mega Reading. He's been featured on virtually
11 thousands of radio and television shows as well as written about
12 in literally hundreds of newspapers and magazines all around the
13 world. Howard, thanks for being my guest today.

14 MR. BERG: Well, it's great to be here, Kevin.

15 MR. TRUDEAU: OK, you take a book like this, and how
16 long would it take you to read it?

17 MR. BERG: Well, top speed, five or six minutes.

18 MR. TRUDEAU: Five or six minutes.

19 MR. BERG: I've been tested. I was on "Regis and
20 Kathie Lee," and they gave me a book about that size.

21 MR. TRUDEAU: This would be a great book to read, by the
22 way, for somebody, obviously Warren Buffet is the world's
23 greatest investor.

24 MR. BERG: Yes, and they had me read a book, and they
25 told me I was going to talk about the book, but they changed the

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EXHIBIT A

42

1 game when I got there. Instead, they had the author come on as a
2 surprise to test me and see me if I had really learned the book.
3 And I got every question right, by not just reading it, but
4 retaining and comprehending and focusing.

5 MR. TRUDEAU: Now this was on "Regis and Kathie Lee,"
6 and the book was about, how long a book was it?

7 MR. BERG: Between 240 and 300 pages.

8 MR. TRUDEAU: And how long did it take you to read that
9 book?

10 MR. BERG: I read it like four times, so it took twenty
11 minutes. I was memorizing, I wasn't reading, I was memorizing it
12 for a test.

13 MR. TRUDEAU: Wait a minute, let me make sure I got
14 this straight. You took a book, it took you twenty minutes to
15 read it four times, to memorize it. Now, here's the question.
16 Obviously, you're the world's fastest reader. You're in the
17 Guinness Book of World Records. Is this something that everybody
18 can do, or is it just a gift that you have?

19 MR. BERG: Let me tell you, someone else asked me that
20 question. I was in Canada, and Dini Petty who's a national talk
21 show host in Canada said the same thing. She said, "Howard, it
22 sounds too good to be true that anyone could do it." I said,
23 "Dini, how about you pick a few audience members, and you and
24 them come to my workshop in Toronto, and we'll see what happens."
25 So Dini and her audience showed up. One of them was a student,

EXHIBIT A

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1 one of them was a professional. Dini forgot her glasses, so
2 someone had to run back and get them. It's good to have your own
3 talk show. And at the end of the workshop, Dini had slightly
4 doubled, and the two other people were close to quadrupling their
5 reading speed.

6 MR. TRUDEAU: That workshop is just a couple hours.

7 MR. BERG: Less than four hours. And they went on
8 national television in Canada. And Dini went on the air and
9 says, "Howard's really onto something. I think everyone in
10 Canada should be using this." And then off the air, she came up
11 to me, and she said, "I have a son, and I wanted to know if the
12 next time you're in Toronto, could my son please come to your
13 workshop, because I think every child should be getting these
14 skills. Because I know how much they helped me."

15 MR. TRUDEAU: So now your course actually releases a
16 person's natural ability to speed read.

17 MR. BERG: And it's easy, it's fun, and it's
18 systematic.

19 MR. TRUDEAU: We're going to test you right now. I
20 have over here, by the way, stacks of books, and we're going to
21 test Howard. The first book I have is by Jerry Spence, How To
22 Argue And Win Every Time, Jerry Spence. I love this guy, by the
23 way, he's fantastic. And I'm going to give you a little portion
24 of this book, Howard, and I want you to read it. We're going to
25 time Howard and see how fast it's going to take him. Then I'm

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EXHIBIT A

1 going to quiz him. This is an easy one, we'll start off as an
2 easy one. It's just about the author. A great book, it's about
3 the author. OK, now hold on, here's the page, put your finger in
4 there, don't open it yet. OK, now hold on because I'm going to
5 time you with my stopwatch. OK, ready?

6 MR. BERG: Yes

7 MR. TRUDEAU: Go.

8 MR. BERG: Good

9 MR. TRUDEAU: About --- little over four seconds.

10 MR. BERG: I haven't warmed up yet.

11 MR. TRUDEAU: Four seconds?. OK, now give me the book.

12 MR. BERG: OK

13 MR. TRUDEAU: Now you've read that?

14 MR. BERG: Yes, I have.

15 MR. TRUDEAU: OK. Well, I'm going to test you on a
16 couple questions on this thing.

17 MR. BERG: No problem.

18 MR. TRUDEAU: All right. First thing -- now, by the
19 way, I went through these books that I'm going to be giving
20 Howard and it took me eight hours yesterday. Because I went to
21 the book store, bought a whole bunch of books, and I said I'm
22 just going to buy random books and we're going to test you.
23 Okay.

24 Now, it talks about in here the different people that
25 he was the defense attorney for.

EXHIBIT A

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1 MR. BERG: Yes, it did.

2 MR. TRUDEAU: Give me a couple of the people.

3 MR. BERG: There were two. There was Randy Weaver

4 MR. TRUDEAU: Right.

5 MR. BERG: And Imelda Marcos.

6 MR. TRUDEAU: Correct. Where does he live?

7 MR. BERG: Jackson Hole, Wyoming.

8 MR. TRUDEAU: Correct. And he has a wife. What's his

9 wife's name?

10 MR. BERG: Emma Jean.

11 MR. TRUDEAU: Correct. Emma Jean.

12 MR. BERG: Yes.

13 MR. TRUDEAU: All right. Hold on, we're going to --

14 MR. BERG: A little slow.

15 MR. TRUDEAU: Well, a little slow. Okay. We're going

16 to make it a little bit tougher now. Here's an other book.

17 Here's another book. Math Magic by Scott Flansburg. Scott is a

18 good friend of mine. We're going to have Scott on the show.

19 He's the human calculator.

20 Now, this book teaches you how to do math calculations

21 in your head. Now, this is going to be a good test, folks. Now

22 -- because imagine this. What -- the techniques -- the

23 technology that Howard has -- Howard has that he teaches people

24 is how to read books and obviously knowledge is power but only if

25 you can remember it and use it.

Complaint

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EXHIBIT A

6

1 MR. BERG: And apply it.

2 MR. TRUDEAU: And apply it. Okay. So, I'm going to
3 give you a chapter. This is the entire chapter seven.

4 MR. BERG: Okay.

5 MR. TRUDEAU: I'm going to time you.

6 MR. BERG: Okay.

7 MR. TRUDEAU: Let's get this cleared out here. And
8 this is on multiplication tricks.

9 MR. BERG: Okay.

10 MR. TRUDEAU: You're going to read this. And then I'm
11 going to test your multiplication skills because this is going to
12 teach you how to do multiplication in your head.

13 MR. BERG: Do I get to use a calculator?

14 MR. TRUDEAU: No calculator.

15 MR. BERG: Okay.

16 MR. TRUDEAU: Okay. All right, hold on. Hold on, I'm
17 going to time you. I'll say go. Ready, set, go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: Okay.

21 MR. TRUDEAU: Twenty four seconds. Twenty four and a
22 half seconds.

23 MR. BERG: There was a lot of pages.

24 MR. TRUDEAU: A lot of pages. Now, you're telling me
25 you read that?

EXHIBIT A

7

1 MR. BERG: I learned it.

2 MR. TRUDEAU: You learned it?

3 MR. BERG: Yes, and so could you. That's the whole
4 point.

5 MR. TRUDEAU: All right. Well, let me test you on
6 this. This is on multiplication -- it's on multiplication
7 skills. Okay?

8 MR. BERG: Okay.

9 MR. TRUDEAU: Let me give you a couple of
10 multiplication tables here. Okay. 45 times 45?

11 MR. BERG: That would be 2,025.

12 MR. TRUDEAU: You just did that in your head?

13 MR. BERG: That's right. It teaches you how to do it.
14 That's the whole point.

15 MR. TRUDEAU: You don't have a calculator here by the
16 way? Can we -- Paul, make sure we get that -- I want to make
17 sure someone gives me a thumbs up if that's the right answer.
18 Let me give you another one here.

19 MR. BERG: It's right. Okay.

20 MR. TRUDEAU: 75 times 75?

21 MR. BERG: 5,625.

22 MR. TRUDEAU: I want Paul to make sure -- give me like
23 some -- we got a thumbs up there? He's right.

24 MR. BERG: Of course I'm right.

25 MR. TRUDEAU: And you learned that just now?

EXHIBIT A

8

1 MR. BERG: That's the whole point, Kevin. It's
2 something everyone should be doing. You know, the United States
3 has been rated in 49th position in literacy by the United
4 Nations. I think all our viewers should be concerned. They just
5 had a front page story in USA Today about how our education
6 system is failing to teach the students.

7 MR. TRUDEAU: Uh-huh.

8 MR. BERG: Time Magazine talked about the educational
9 crisis. Even the teachers unions are becoming concerned.
10 Governor Bush has just made the most highest priority in his
11 second term of office is teaching reading skills, because 25
12 percent of the children in Texas don't know how to read. This is
13 what it's about.

14 I teach children not just how to read faster but to
15 comprehend, retain and stay focused. Because face it, how many
16 times have you or the people at home take a test or gone to an
17 important meeting and got tense. You got frightened. You got
18 worried. And all that information that you stored and worked so
19 hard at learning was forgotten.

20 * So, Mega Reading is a complete accelerated learning
21 system that doesn't just teach you to read quickly.

22 MR. TRUDEAU: Right.

23 MR. BERG: On a skimming level.

24 MR. TRUDEAU: Right.

25 MR. BERG: But to comprehend, apply and use it. Even

EXHIBIT A

1 under test situations.

2 MR. TRUDEAU: And it just takes a few short hours to
3 learn. Correct?

4 MR. BERG: Couple of hours. That's it.

5 MR. TRUDEAU: Now, let me ask you a question. There's
6 been speed reading courses been around for years.

7 MR. BERG: That's true.

8 MR. TRUDEAU: Evelyn Wood is probably the most common
9 and I'm sure there's dozens of other speed reading courses.

10 MR. BERG: Yes, and some of them are quite good.

11 MR. TRUDEAU: But the biggest challenge most people
12 found is, number one, it took days, weeks, months of practice and
13 training.

14 MR. BERG: Absolutely. Hours a day.

15 MR. TRUDEAU: Right.

16 MR. BERG: With days, weeks and months. It's not just
17 days, weeks, and months, but hours a days each of those days.

18 MR. TRUDEAU: So, how is yours different than those in
19 that respect?

20 MR. BERG: First of all, the program takes less than
21 four hours to learn.

22 MR. TRUDEAU: That's it?

23 MR. BERG: That's it.

24 MR. TRUDEAU: One time?

25 MR. BERG: One time.

EXHIBIT A

10

1 MR. TRUDEAU: Like learning how to ride a bike.

2 MR. BERG: And you never forget how once you know how.
3 Once you release it, it's there.

4 MR. TRUDEAU: You're releasing someone's ability. So,
5 it's radically different than these other courses.

6 MR. BERG: Can you cross the street and look at the
7 traffic and know where you're going? Look at all the information
8 that your brain has to process in an instant. That same brain
9 should be reading a book just as effortlessly and that's what I
10 teach.

11 MR. TRUDEAU: Well, now -- so, these other courses that
12 have been out there, your program is a revolutionary -- it's
13 totally different.

14 MR. BERG: Let me tell you a story, Kevin.

15 MR. TRUDEAU: Yeah.

16 MR. BERG: The former president of Evelyn Wood, the
17 chairman of Evelyn Wood is Maurice Thompson, Jr. I have a letter
18 from him.

19 MR. TRUDEAU: Right.

20 MR. BERG: Tommy asked me to train him and his family
21 last September. The former president of Evelyn Wood asked me to
22 train his family. Now, this is the man who knows speed reading.

23 MR. TRUDEAU: Right.

24 MR. BERG: His son quadrupled -- I think he went from
25 two to 800 words a minute in less than four hours. And he

EXHIBIT A

11

1 mentioned how his grades immediately shot up from the previous
2 term. And would you like to read the comment he has on the
3 bottom. I'm really proud of this. This is the former president
4 of Evelyn Wood.

5 MR. TRUDEAU: It says, I feel you have moved one step
6 beyond speed reading --

7 MR. BERG: That's right.

8 MR. TRUDEAU: -- to speed learning. Bringing the
9 discipline to the 21st first century.

10 MR. BERG: Exactly. Now, I'm proud of that.

11 MR. TRUDEAU: So, what you're actually have is really a
12 revolutionary break through in what you've developed.

13 MR. BERG: Totally different. Now, other programs were
14 mechanical. That's why they took so long. They required
15 repetition. Like learning to type or playing an instrument, to
16 work.

17 MR. TRUDEAU: Right.

18 MR. BERG: And a lot of people found they loss their
19 speeds almost as quickly as they gained them.

20 MR. TRUDEAU: Right.

21 MR. BERG: I read 80 to 90 pages a minute at my top
22 speed. But I don't read 80 to 90 pages a minute every time I
23 open a book. Sometimes I want to relax. Sometimes I'm a little
24 tired, I want to read in bed.

25 MR. TRUDEAU: Right.

EXHIBIT A

12

1 MR. BERG: So, I have that option. With the other
2 programs because it was conditioned, it was all or nothing. If
3 you slowed down, that was the end of your speed. And most people
4 told me they only got a very superficial understanding, like a
5 skim.

6 I'm working with companies like Pfizer (Phonetic),
7 Mobil Oil, that have high tech reading. And they used it because
8 it was easy to retain complicated information.

9 MR. TRUDEAU: So, even the detailed complicated
10 material, people can read quickly and grasp it and comprehend it
11 and recall it.

12 MR. BERG: Over long periods of time.

13 MR. TRUDEAU: Now, how about students? Means straight
14 As with less study time?

15 MR. BERG: Not only do they get straight As with less
16 study time, but think about this, Kevin, they get better self
17 esteem. They begin to feel confident. Now, you spend over
18 15,000 hours when you go to school.

19 MR. TRUDEAU: Right.

20 MR. BERG: Think about that. And out of all of those
21 hours and the people at home think about it, too, how many of
22 those hours did they spend teaching you how to learn?

23 MR. TRUDEAU: Right.

24 MR. BERG: They call it an education system and they
25 never even teach you how to learn.

EXHIBIT A

13

1 MR. TRUDEAU: And people obviously in business because
2 you work with virtually dozens of major corporations and Fortune
3 500 companies.

4 MR. BERG: All over the country.

5 MR. TRUDEAU: So, people can make more money because
6 there's so much material to learn today, so much reading that
7 people have to grasp.

8 MR. BERG: I have an interesting letter here from
9 Pfeiffer. Pfeiffer is the leading publisher in the world on
10 human resource training materials.

11 MR. TRUDEAU: Okay.

12 MR. BERG: Every corporate trainer has heard of these
13 people.

14 MR. TRUDEAU: Right.

15 MR. BERG: They hired me to train their editors not
16 only in how to speed read but how to make books easier to
17 comprehend, because my program teaches people how to understand
18 text.

19 MR. TRUDEAU: Right.

20 MR. BERG: Not just blur through it.

21 MR. TRUDEAU: Right.

22 MR. BERG: And the head editor -- the managing editor
23 says here that this program that I gave him gave him a distinct
24 advantage to their publishing program.

25 MR. TRUDEAU: Hmm.

EXHIBIT A

14

1 MR. BERG: That's the managing editor of the world's
2 largest human resource publisher. Here's a letter from the York
3 Prep School. The head master is Ronnie Stewart. He's an Oxford
4 graduate. This man knows education.

5 MR. TRUDEAU: Right.

6 MR. BERG: You don't get better than Oxford. And
7 here's what it says. "Howard, just a note to let you know how
8 positive the feedback was of your lectures to the 11th and 12th
9 grades. So positive in fact, that whenever it's convenient for
10 you, I would love -- I like that word -- I would love for you to
11 come and do the ninth and tenth grades on a similar basis." And
12 we've already booked them.

13 ON SCREEN: For more info call: 1-800-283-9666. This
14 is a paid commercial program for Tru-Vantage International.

15 MR. TRUDEAU: That's great. Folks, if you want more
16 information on Howard's program, Mega Reading program, it's a
17 home study course that you can go through at your leisure and it
18 will virtually release your own super reading speed, mega
19 reading. You'll be able to read almost as fast as Howard.
20 Virtually quadruple, five, ten times your reading speed right
21 now. Call the number on your screen. And I've worked out a
22 special arrangement with Howard. He'll give you an over 50
23 percent discount off the regular price of the program. So, call
24 right now to get some more information on it.

25 Now, let's -- let's continue with the testing here. I

EXHIBIT A

15

1 got another book. How to Win Friends and Influence People by
2 Dale Carnegie. Great book. Everybody should read this book.
3 Now, let's see. I went through this last night and I got chapter
4 six. I want you to read the entire chapter six and give us a
5 quick synopsis of the chapter.

6 Okay. Now, I'm going to time you again. And folks,
7 the important thing is what Howard is saying is every single
8 person -- now, you've taught how many -- what thousands and
9 thousands of people?

10 MR. BERG: Thousands. Can I say something?

11 MR. TRUDEAU: Yeah.

12 MR. BERG: I have a letter here from a girl who has
13 brain damage.

14 MR. TRUDEAU: Right.

15 MR. BERG: Brain damage. She was in a car accident and
16 half her brain stopped functioning. It was electrically dead.

17 MR. TRUDEAU: Right.

18 MR. BERG: And she writes. It says that on a coffee
19 break in my word shop, she went three to 600 words per minute.
20 This is someone with severe brain damage. So yes, it works for
21 anyone. And you can't get worse than that.

22 MR. TRUDEAU: At what age, by the way? How old?

23 MR. BERG: The youngest student I ever had was eight.

24 I was in Toronto. I was doing a live workshop and the vice
25 principle of a school was there with his wife. His name was Ted.

EXHIBIT A

16

1 Ted said, "Howard, we would really love for you to come to our
2 elementary school. My wife and I just quadrupled."

3 MR. TRUDEAU: Right.

4 MR. BERG: And we think you can do this for our kids.
5 I said, how old are they? He said third, fourth grade. I said,
6 it's kind of young. Normally, in that age group I teach the
7 memory and learning skills. And I've done that all over the
8 country because a lot of kids aren't reading yet at that age.

9 MR. TRUDEAU: Right.

10 MR. BERG: He said, our students are reading and
11 reading well. Let's try it. I said, fine. And the parents
12 came. How many things did parents do today with their families?

13 MR. TRUDEAU: Right, right, right.

14 MR. BERG: Okay. At the end of the workshop, every
15 child and parent had at least doubled except for one.

16 MR. TRUDEAU: Uh-huh.

17 MR. BERG: That child was reading at five seconds a
18 page and I quizzed her.

19 MR. TRUDEAU: Five seconds.

20 MR. BERG: Five seconds a page. And the vice principal
21 was there.

22 MR. TRUDEAU: And they're reading it?

23 MR. BERG: Comprehending it and retaining it.

24 MR. TRUDEAU: All right. Well, we're going to test you
25 right now. Okay, this is chapter six.

EXHIBIT A

17

1 MR. BERG: Okay.

2 MR. TRUDEAU: Dale Carnegie's How to Win Friends.

3 Ready?

4 MR. BERG: Yes.

5 MR. TRUDEAU: Go.

6 (Whereupon, there was a brief pause while Mr. Berg was
7 reading the book.)

8 MR. TRUDEAU: This is amazing. You're reading it?

9 Okay, give it back. That was about 16 seconds.

10 MR. BERG: Right.

11 MR. TRUDEAU: Okay. Now, tell us -- just give me a
12 quick synopsis of that chapter.

13 MR. BERG: Well, the concept was make people feel
14 important and do it sincerely. And by the way, Kevin, you're
15 doing an excellent job with this show and I really mean that.

16 MR. TRUDEAU: Thank you very much. Okay, wait --
17 you're -- the name of that chapter by the way was, How To Get
18 People To Like You.

19 MR. BERG: By the way, one of my favorite uses of speed
20 reading is learning new skills such as I just showed you.

21 MR. TRUDEAU: Right.

22 MR. BERG: Learning how to use a computer or do better
23 with relationships. So, this -- (inaudible) -- anything

24 MR. TRUDEAU: To learning anything. Tell us a little
25 about that chapter.

Complaint

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EXHIBIT A

1 MR. BERG: Okay, it starts off he's in a post office
2 and he see's a postal employee that he's familiar with and the
3 guy looks very very depressed and down. And he starts talking to
4 the guy and finds out the guy feels that nobody really
5 appreciates what he's doing.

6 MR. TRUDEAU: Uh-huh.

7 MR. BERG: And so, he starts telling the guy how
8 important he is and how much he appreciates him. And the guy
9 just perks up and he says that's what it's all about. You want
10 people to like you. Let them know how important they are and it
11 improves their self esteem. And they relate that to you as the
12 cause.

13 MR. TRUDEAU: Uh-huh. Now, what -- there was a
14 principle discussed in this.

15 MR. BERG: Yes, the principle was make people feel
16 important and be sincere.

17 MR. TRUDEAU: Make people feel important and -- now,
18 you just said almost verbatim. It says make people feel
19 important and do it sincerely.

20 MR. BERG: Well, you may not get every word. You know,
21 when you're going a page and a half a second, you might miss an L
22 Y. Okay.

23 MR. TRUDEAU: And actually -- wait a minute. Wait, we
24 got to do another book now.

25 MR. BERG: Okay.

EXHIBIT A

19

1 MR. TRUDEAU: This book by the way, this is my book.
2 This is my book, Kevin Trudeau's, Mega Memory. Everybody should
3 read this book. Everybody go out and get this book. It's my
4 book Mega Memory. Now, it's the first -- you know we sold three
5 and a half million copies of my Mega Memory program.

6 MR. BERG: That's a lot.

7 MR. TRUDEAU: Yeah, and this is a great book. Just
8 says published by William Morrow. It's in all the Book stores.
9 Call, you can get it.

10 MR. BERG: Now, make the call.

11 MR. TRUDEAU: Now, make the call now. Now, I want you
12 to read just chapter one.

13 MR. BERG: Okay.

14 MR. TRUDEAU: On how to use this book, and then give us
15 a quick synopsis on this. Not that we don't trust you. Go.

16 (Whereupon, there was a brief pause while Mr. Berg was
17 reading the book.)

18 MR. BERG: Okay, that's 11 pages.

19 MR. TRUDEAU: About 16 seconds.

20 MR. BERG: Okay. And I'm getting closer to my speed.

21 MR. TRUDEAU: And you read this? You read this?

22 MR. BERG: Yes. It's first -- it sets the ground
23 rules.

24 MR. TRUDEAU: And anybody who gets this course from us
25 can do what you just did?

EXHIBIT A

20

1 MR. BERG: Thousands of people are doing what I just
2 did.

3 MR. TRUDEAU: All right, tell me about the book. I
4 know all about it because I just wrote it.

5 MR. BERG: Okay. I guess you would know. This is like
6 Regis and Kathy Lee all over.

7 MR. TRUDEAU: Yeah, the author. Exactly. Okay.

8 MR. BERG: Well, it starts off talking about what you
9 should do to develop your mega memory, about setting up a
10 specific time and place to do it, avoiding certain foods, how
11 much time you should be doing, how to prepare yourself. And
12 that's essentially what the first chapter is about. Getting set.

13 MR. TRUDEAU: Now, there was four things I mentioned.
14 The four steps you go through.

15 MR. BERG: Yes, there were. Let me think. First there
16 was unconscious incompetence, where you don't know what you're
17 doing.

18 MR. TRUDEAU: Right.

19 MR. BERG: You don't even know you don't know what
20 you're doing.

21 MR. TRUDEAU: Right.

22 MR. BERG: The second one was conscious incompetence,
23 where you know you don't know what you're doing.

24 MR. TRUDEAU: Right, right.

25 MR. BERG: Okay. And the third one -- the third one

EXHIBIT A

21

1 was conscious competence, where you know what you're doing
2 but you have to think about it. Sort of like when you're riding
3 a bike and you know you have to think how to stay on the bike.

4 MR. TRUDEAU: Right.

5 MR. BERG: And the fourth step was unconscious
6 competence, where it's at released skill and you're doing
7 instinctively. You don't have to think about it.

8 MR. TRUDEAU: That's the point I want to talk about.
9 Because your course gets people very quickly to that unconscious
10 competence level where it happens automatically.

11 MR. BERG: In hours. In hours.

12 MR. TRUDEAU: So, it's like learning how to ride a bike
13 or learning how to swim. You don't have to practice and practice
14 and practice. You're just releasing the skill.

15 MR. BERG: No. I have a story about that.

16 MR. TRUDEAU: Hold on for one second because I want to
17 tell people how to get this program.

18 MR. BERG: Okay. Okay.

19 MR. TRUDEAU: If people do want more information on
20 Howard's program The Mega Reading Home Study Course -- folks,
21 this works for everybody. Thousands of people have gone through
22 it. I highly endorse and recommend this program. Howard is the
23 world's fastest reader. There is nothing out there like it
24 anywhere in the world. It'll work for anyone about eight to ten
25 years and up. If you have a student in your life, you need to

EXHIBIT A

22

1 get it for them. If you're in business, if you read papers, if
2 you like to read novels --

3 MR. BERG: The Sunday paper.

4 MR. TRUDEAU: You'll learn this information, you'll
5 read it quickly and you'll be able to recall it. Call the number
6 on your screen. And again, we worked out a special arrangement
7 with Howard. You will get a 50 percent discount while we're on
8 the show. You can call right now and get more information on
9 this program. So, call the number.

10 MR. BERG: You mentioned how you don't have to
11 practice.

12 MR. TRUDEAU: Right.

13 MR. BERG: I have an interesting story. One of my
14 students called me and was really excited. A grandmother and she
15 learned how to do this at my live program and then she didn't use
16 for like six weeks.

17 MR. TRUDEAU: Right.

18 MR. BERG: And with any speed reading program if you
19 don't use it for six weeks, you can kiss it goodbye. It's over.

20 MR. TRUDEAU: Right.

21 MR. BERG: Her grandson came to her. He had a book
22 report and he needed her to help him. She read the book in 15
23 minutes. He got an A. She said, Howard, I don't know he did it.
24 I haven't use the program in six weeks. I opened the book and
25 like that it came right back to me. I said that's what it's

EXHIBIT A

23

1 about. You already have the ability. I'm just showing you how
2 to release it.

3 MR. TRUDEAU: Well, we're going -- we're going to test
4 you again. I keep testing you because this is really impressive
5 to me. All right, I got another book here. And I went to the
6 book store and picked these up. Rush Limbaugh, See I Told You
7 So. I like Rush by the way. We advertise a lot on his show.
8 Rush is a great guy.

9 MR. BERG: Um-hum.

10 MR. TRUDEAU: I have a personally autographed copy of
11 this book by the way.

12 MR. BERG: Do you?

13 MR. TRUDEAU: Yes, Rush sent to me. Okay. I want you
14 to read a chapter here. Let me see if I can find the chapter
15 about Rush. We went to Rush. Okay.

16 MR. BERG: Don't rush.

17 MR. TRUDEAU: Don't rush, don't rush. Now, by the way,
18 when I'm finding this chapter -- because I read things last
19 night. Okay?

20 MR. BERG: Yeah.

21 MR. TRUDEAU: Anybody can do this I mentioned?

22 MR. BERG: Anybody.

23 MR. TRUDEAU: And the age -- how old was the oldest
24 person that went through this?

25 MR. BERG: I had a woman at 83 years old and she's in

Complaint

125 F.T.C.

EXHIBIT A

24

1 Pasadena. And she took the program and I told them where I was
2 staying. The next day in my hotel I get a phone call and I say
3 oh, what's wrong. I said nobody calls me. Everybody learns it.

4 MR. TRUDEAU: Right.

5 MR. BERG: I say what's the problem. She says no
6 problem. I just called to tell you -- her name was Ruth. She
7 says, Howard, I went home after taking your program. I'm 83
8 years old and I read two 300 page books in under three hours.
9 I'm 83 years old.

10 MR. TRUDEAU: Wow.

11 MR. BERG: Do you know how happy I am? She says, I
12 don't know how much more time I have left, but there's so many
13 things I want to do and learn and you've just given me the tools
14 for doing it.

15 MR. TRUDEAU: You know, there are so many books out
16 there with so much material that -- newspapers, publications for
17 business people, you know, magazines, publications they have to
18 read, books and all these manuals. Learning computers. Thick
19 manuals.

20 MR. BERG: Thick manuals.

21 MR. TRUDEAU: You know, you were telling me that you
22 learned computers in one night.

23 MR. BERG: That's absolutely true. I bought at K-Pro
24 II (phonetic). Never saw or used a computer before. The first
25 night I hooked up everything.

EXHIBIT A

25

1 MR. TRUDEAU: Right.

2 MR. BERG: I learned Wordstar, DataStar, and Formstar
3 and published an article the next day. And that's the truth.
4 And I'll tell you a little funny story.

5 MR. TRUDEAU: And anybody can do this, right?

6 MR. BERG: Anybody can do it. And what happened was
7 the margins weren't perfect and I thought something was wrong.
8 And then someone said, do you know it takes 80 hours normally to
9 do what you did in three. And I said I guess I should feel a
10 little bit better then.

11 MR. TRUDEAU: Now, by the way, before -- well, I want
12 to do this test. I am going to have one more test. Okay. We
13 got one more. This is the chapter. Put your finger in there.
14 I'm going to get my little trusty -- this is for amazing on the
15 time. Ready?

16 MR. BERG: Yep.

17 MR. TRUDEAU: Go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: The pages are sticking. Okay. Well, that
21 slowed me down a bit.

22 MR. TRUDEAU: Okay, yeah. Still about 17 seconds.

23 MR. BERG: Okay, I apologize for that.

24 MR. TRUDEAU: Okay. All right. It's Rush's book.

25 Now, what was the gist of that book?

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EXHIBIT A

26

1 MR. BERG: The gist was that government's too big.
2 We've got to make it smaller and vote conservative republican.
3 Okay. But he really has a lot of points. He talks about welfare
4 and how about 27 or 28 cents out of every dollar gets to the
5 reciprocate because the rest of that is being spent on
6 administration. And that's an example how government waste is
7 not helping us.

8 MR. TRUDEAU: And that's -- when you were on Regis and
9 Kathy Lee, you had the author come in. You read the book.

10 MR. BERG: (Inaudible).

11 MR. TRUDEAU: And he gave you very tough questions.

12 MR. BERG: I still remember one of them. He asked me
13 what did he say about -- let's see. He asked me several
14 questions. He asked me what did he say about the Pirates of
15 Penzance. It was a trick question. The book was called Going to
16 Movies and it was a vignette. Every two pages was another movie.
17 So, it wasn't a story. It was hundreds of little movie
18 vignettes.

19 MR. TRUDEAU: Right.

20 MR. BERG: And I said, Craig, that's a trick question.
21 Because it wasn't -- there was chapter in there about a different
22 movie and the Pirates of Penzance was used as an example of how
23 if the director had used the techniques of Pirates of Penzance
24 intent instead of the techniques he had chosen, his movie would
25 have been a better picture. I said, so you're actually trying to

EXHIBIT A

27

1 trick me because that wasn't even what the chapter was about.

2 MR. TRUDEAU: So, anybody can do this?

3 MR. BERG: Anybody. In fact, I had a blind student in
4 Huntsville, Alabama.

5 MR. TRUDEAU: Yeah.

6 MR. BERG: I swear to you it's true.

7 MR. TRUDEAU: Wait a minute. You can't read if you
8 can't see.

9 MR. BERG: She was reading in Braille.

10 MR. TRUDEAU: Oh, okay.

11 MR. BERG: And she took the program to learn the memcry
12 skills. Because a lot of people when they hear speed reading,
13 they think fast reading. With Mega Reading it's not just fast
14 reading, it's fast learning. Remember what Tommy said, it's a
15 complete accelerated learning program. And what I teach them is
16 storing, retrieving, recalling, focusing.

17 Here's an important skill. Knowing what to look for.
18 How many times have you studied for a test -- people at home.
19 You study for a test, you take the test and none of the questions
20 you studied are asked. Everything else they ask. You go to an
21 important meeting and everything you thought was important was
22 not asked.

23 Well, if you don't know what to look for, you're going
24 to miss it. And I teach how to figure out what to look for.

25 MR. TRUDEAU: Now, you're not -- I was just --

EXHIBIT A

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1 interesting to note because obviously there are so many books out
2 there, like Wealth Without Risk by Charles Givens (phonetic)
3 which is a phenomenal book, How to Attract Anyone Anytime by
4 Susan Raven (phonetic), Les Brown (phonetic), Live Your Dreams.
5 There are so many phenomenals out -- Mary K. Ash (phonetic) and
6 we can't do all of these.

7 MR. BERG: No.

8 MR. TRUDEAU: (Inaudible).

9 MR. BERG: I could..

10 MR. TRUDEAU: Yeah.

11 Well that's -- this is the amazing thing. How about
12 learning David Letterman's top ten list.

13 MR. BERG: I did a show America's Talking about a year
14 ago. They had me read 18 700 page books in an hour and a half
15 and they quizzed me on them and I got every question right.

16 MR. TRUDEAU: Well, like -- I got Larry King's book. I
17 got Bill Gates' book. I got Colin Powell. I got -- now, the
18 Internet for Dummies, if people want to learn how to run the
19 Internet. I got -- here's magazines..

20 MR. BERG: By the way, Forbes Magazine just did an
21 article on this.

22 MR. TRUDEAU: No kidding.

23 MR. BERG: Forbes said this is a wonderful program for
24 business people.

25 MR. TRUDEAU: I got the New York Times. I got all this

EXHIBIT A

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1 -- now, how about biology. I mean look at -- folks, look at
2 these books. And I'm putting these all in front me just to show
3 you the point here. Calculus. Now, you're telling me -- this is
4 what kids have to go through in school.

5 MR. BERG: Right.

6 MR. TRUDEAU: Look at this book. They have read this.
7 You're telling me -- I know this is a mess here. But if a person
8 calls and gets your program, they'll be able to go through these
9 books. Now, let's be honest here. I got all these books here.
10 See if you can get a wide shot of this. I got Howard Stern's
11 book. I was invited to Howard Stern's birthday party.

12 MR. BERG: I read his book Private Parts in six minutes
13 on Comedy Central and then he tested me on the book and I got it
14 right.

15 MR. TRUDEAU: Howard did?

16 MR. BERG: Right.

17 MR. TRUDEAU: Howard did?

18 MR. BERG: I was on John Stewart's (phonetic) show and
19 Howard was the guest. He had just written Private Parts. It's
20 as thick as this book.

21 MR. TRUDEAU: Right.

22 MR. BERG: It took me I think six and a half minutes to
23 read and then he quizzed me and I got all the questions right.

24 MR. TRUDEAU: Okay. If somebody buys your program and
25 goes through like everything that's on the desk right here, the

EXHIBIT A

30

1 New York Times, all these books, how long would it take them to
2 do that? First it takes them a few hours to learn the technique.
3 Right?

4 MR. BERG: I would -- it just takes about three --
5 three, four hours to learn the technique.

6 MR. TRUDEAU: Normally it would take, what, a week?
7 Two, three weeks? A hundred hours to learn all this stuff -- to
8 go through all this stuff?

9 MR. BERG: I would say for the average person that
10 would be being kind.

11 MR. TRUDEAU: So, maybe 150 to 200 hours?

12 MR. BERG: I'd say several months for some of the
13 science books for certain people.

14 MR. TRUDEAU: That's right because that's all
15 scientific.

16 MR. BERG: It's not just light reading there.

17 MR. TRUDEAU: A person calls and gets your program, how
18 long?

19 MR. BERG: I'd say you could do that easily in at least
20 a month tops. Two weeks to a month depending upon your
21 background.

22 MR. TRUDEAU: Folks, you heard this. You can call
23 right now, get Howard's program. It takes just a few short
24 hours. It's easy. It's fun. Anybody can do it. You'll be the
25 greatest conversationalist. Kids get straight As with less study

EXHIBIT A

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1 time. You'll make more money in business because you'll be able
2 to remember all the information. Call the number on your screen.
3 You'll get a 50 percent discount to boot. This is Kevin Trudeau,
4 thanks for watching. This has been another edition of Vantage
5 Point.

6 ON SCREEN: For more information or to order Howard
7 Berg's Mega Reading call: 1-800-283-9666.
8 Tru-Vantage International, 7300 Lehigh Avenue, Niles, IL 60714
9 (847) 647-0300.

10 The proceeding has been a paid advertisement for Tru-
11 Vantage International.

12 (Whereupon, the taping was concluded.)
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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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Tru-Vantage International, L.L.C., is an Illinois limited liability company with its principal office or place of business at 7300 North Lehigh Avenue, Niles, Illinois.

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

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

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise

of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondents*" shall mean, Tru-Vantage International, L.L.C., its successors, assigns, managers, and each of its agents, representatives and employees.

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

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Howard Berg's Mega Reading or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product is successful in teaching anyone, including adults, children and disabled individuals, to increase their reading speed above 800 words per minute while substantially comprehending and retaining the material. For purposes of this Part, "substantially similar product" shall mean any product that is substantially similar in components, techniques, composition and properties.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program purported to significantly increase one's reading speed in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy 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 Tru-Vantage International, L.L.C., 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 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.

IV.

It is further ordered, That respondent Tru-Vantage International, L.L.C., and its successors and assigns, shall deliver a copy of this order to all current and future members 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.

V.

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

VI.

It is further ordered, That respondent Tru-Vantage International, L.L.C., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

Complaint

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IN THE MATTER OF

JEANIE ELLER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3799. Complaint, April 6, 1998--Decision, April 6, 1998*

This consent order prohibits, among other things, the Arizona-based respondent from making unsubstantiated claims, in radio and television infomercials, about the extent of success of Jeanie Eller Action Reading in teaching individuals to read.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew and C. Steven Baker.*

For the respondent: *Lewis Ross, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jeanie Eller, individually ("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 Jeanie Eller has manufactured, advertised, offered for sale, sold, and distributed products to the public, including Jeanie Eller's Action Reading. Individually or in concert with others, she participated in the acts or practices alleged in this complaint. Her residence is 42828 North 7th Avenue, Phoenix, Arizona.

2. Respondent entered into an agreement with Mega Systems, Inc., a corporation which creates and distributes program-length radio and television commercials which run for 30 minutes or less and fit within normal radio and television broadcasting time slots. The television commercials were and are broadcast on network, independent and cable television stations throughout the United States. The radio commercials were and are broadcast on network and independent radio stations throughout the United States. In at least one of Mega Systems, Inc.'s program-length television and radio commercials, respondent acts as the guest and promotes Jeanie Eller's Action Reading.

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 created and disseminated advertisements for Jeanie Eller's Action Reading, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. Trudeau: "According to my guest, Jennie Eller, every single person -- if they can see, hear and talk -- can learn to read, guaranteed. She also claims that her revolutionary approach to teaching reading is easy, quick and works 100 percent of the time."

Eller: "That is the program I took back. We started using it in the Anchorage School District. Every child that went through it learned to read."

"And when you go through this program, you start at the beginning and you take every logical step right through it. And when you come out, you are a fluent, independent reader. And I've put my 30 years of teaching credibility on the line. It absolutely is guaranteed to work."

"[B]ut any child that you show them how that code works, you can't stop them from reading. They crack that code. And that code is the key."

Trudeau: "But you're talking about this secret code. The government says -- you were mentioning to me -- that teaches (sic) certain kids just can't read, and you're saying that's hogwash."

Eller: "It is. It's absolute hogwash. I've been teaching for 30 years and I've never had anyone not learn to read."

Trudeau: "Because I just (sic) watching a show the other day on -- on -- on TV and they were saying, this guy's trying to read. He's tried -- he tried a phonics program himself. He -- he still can't read. He's frustrated. He thinks he's dumb. And they said -- they made the statement, the only way he can read is by hard, hard work, and he still may never learn how to read."

Eller: "No, that is absolutely not true, and I hope he's watching this show, because if he'll get this program, I guarantee you he'll learn to read."

"[I]f you tell them what the words are, they know those words. They speak those words. The people that I taught to read on the Oprah Show, as soon as they could decode, decipher the newspaper, they knew those words. They were articulate people. They spoke the language. They understood the language. They just could not decipher the language."

"Absolutely, because it not only teaches the decoding, the phonics part, it teaches comprehension."

B. For Adults

Easier and quicker for adults to learn, because most already know the vocabulary - they just need to learn how to "decode" written words and sentences.

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Most people can complete the entire program and learn to read within 4-6 weeks.

1. How can it improve comprehension?

Even though we've heard a lot of words before in conversation, a person who can't read wouldn't recognize them. Action Reading teaches you how to read words for their meaning. (It's like putting a persons (sic) face to their name, when you have only spoken to them on the telephone.)

6. Does Jeanie guarantee that she can teach anyone to read?

Action Reading can teach anyone who can see, hear, think and talk to read...

14. How does it work?

Jeanie's proven, phonics based method incorporates all of the learning senses through art, games, body movements, and music to create an active and entertaining experience that doesn't seem like work.

Learning to read has been compared to cracking a code. Once you know the secret it's easy to decode a sentence. Action Reading teaches the sounds and patterns of our language and how to use them for decoding. (Exhibit B; Telephone Sales Script.)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that Jeanie Eller's Action Reading is successful in teaching reading 100% of the time.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that she possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

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

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

Commissioner Thompson and Commissioner Swindle not participating.

JEANIE ELLER

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Complaint

EXHIBIT A

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: JEANIE ELLER'S ACTION READING
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 34

MIS/SALBERG COMPLAINT EXHIBIT J
TRUDEAG COMPLAINT EXHIBIT D
ELLER COMPLAINT EXHIBIT A

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EXHIBIT A

P R O C E E D I N G S

1
2 ANNOUNCER: The following is a paid commercial program
3 brought to you by Mega Systems.

4 MR. TRUDEAU: Thanks again for watching. I'm Kevin
5 Trudeau and this another edition of "A Closer Look". Over one
6 million children graduate from high school each year functionally
7 illiterate. That's what the U.S. Government says. They simply
8 can't read. Millions of adults, many of whom are watching
9 this show right now, can't read.

10 According to my guest, Jeanie Eller, every single
11 person -- if they can see, hear and talk -- can learn to read,
12 guaranteed. She also claims that her revolutionary approach to
13 teaching reading is easy, quick, and works 100 percent of the
14 time.

15 Jeanie, thanks for being my guest today.

16 MS. ELLER: Thank you, Kevin. It's a real honor.

17 MR. TRUDEAU: Yes, we were having some fun before this
18 show and I said, they can't read in a matter of hours, right?

19 MS. ELLER: That's right. You sound like my father.
20 One time he said, if you're so smart, why don't you just teach
21 them to read in 24 hours.

22 MR. TRUDEAU: That's right.

23 MS. ELLER: I said, well, if I could do it straight
24 through, I could. But most people wouldn't be able to go through
25 for 24 hours. But they can do it in as little as a month to six

EXHIBIT A

2

1 weeks.

2 MR. TRUDEAU: But, now, I have to ask you a question.
3 Before we talk about your program, I know that you're the, ah,
4 the spokesperson or the founder of this home study course, called
5 "Action Reading", which teaches kids and adults how to read at
6 their home. But is there a real problem today with illiteracy,
7 with kids and adults?

8 MS. ELLER: Oh, absolutely. In fact, a year ago, in
9 1993, they came out with research that showed that 90 million
10 adults are functionally illiterate.

11 MR. TRUDEAU: Ninety million.

12 MS. ELLER: That is half our population.

13 MR. TRUDEAU: I was going to say, how many people are
14 there in America?

15 MS. ELLER: Yeah, that's half of our adult population.
16 And what they define as functionally illiterate --

17 MR. TRUDEAU: Right.

18 MS. ELLER: -- is, they cannot read a newspaper.

19 MR. TRUDEAU: Uh-huh (yes).

20 MS. ELLER: They cannot go to the grocery store and
21 shop by the names of products. They have to look at the picture
22 to see what's in the container. They can't read a bus schedule
23 or figure out a job application or, you know, fill out a form.

24 They certainly cannot read the Constitution, the Bill
25 of Rights, or the issues in an election. They really cannot

EXHIBIT A

3

1 function in this society.

2 MR. TRUDEAU: Wait a minute. Who says half of our
3 people -- ah, half of the people in America can't read?

4 MS. ELLER: This was a study that was -- that came out.
5 It was on all the major television news. It was in "USA Today"

6 MR. TRUDEAU: Uh-huh (yes).

7 MS. ELLER: It was actually September of '93.

8 MR. TRUDEAU: Uh-huh (yes).

9 MS. ELLER: And it was published by the United States
10 Department of Education.

11 And, for example, you know, we don't realize that
12 people are out there who can't read and what -- what a handicap
13 that is.

14 I was doing a radio show and a man called in. And he
15 said, I want to tell you what it's like. I went to the grocery
16 store and I bought this container that had a picture of fried
17 chicken. Took it home, you know, the mouth was watering, all
18 ready to pop it in the microwave and eat the fried chicken. And
19 I opened it up and it was this white stuff that you cook the
20 chicken in, called shortening.

21 MR. TRUDEAU: Ahhh.

22 MS. ELLER: You see, that's how they have to live.
23 They have to rely on picture cues. They may be in a restaurant.
24 You know, you're sitting right there with someone --

25 MR. TRUDEAU: Right.

EXHIBIT A

1 MS. ELLER: -- and they say, well, what are you going
2 to have? What looks good to you? That's the way people have to
3 function, they hide it. They --

4 MR. TRUDEAU: It's like a secret.

5 MS. ELLER: -- they are embarrassed. Absolutely. And
6 they think it's their fault. They're embarrassed. They think
7 they've done something wrong or they think they have a learning
8 disability. It's really a tragic situation. Half of our adult
9 population.

10 MR. TRUDEAU: Well -- well, how do they go through
11 school and graduate and get a diplo- -- now, half of these people
12 have diplomas, right? I mean, a lot of these people --

13 MS. ELLER: Oh, yes --

14 MR. TRUDEAU: -- have diplomas.

15 MS. ELLER: -- many of them. And they've all --

16 MR. TRUDEAU: How do they --

17 MS. ELLER: -- attended school.

18 MR. TRUDEAU: -- how -- how -- how do they graduate
19 high school without learning how to read? I don't understand.

20 MS. ELLER: Well, see --

21 MR. TRUDEAU: How do they do homework? How do they --?

22 MS. ELLER: -- okay, here's what happened, Kevin.
23 We've changed the way we teach reading in the schools.

24 MR. TRUDEAU: Okay.

25 MS. ELLER: So, now, the methodology that we use it --

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EXHIBIT A

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1 that we use in the schools does not teach the children to read in
2 first grade, as it did when I was a child.

3 MR. TRUDEAU: Oh, 'cause I went to -- to school, I
4 remember in the first grade, we had the phonics, ah --

5 MS. ELLER: Okay.

6 MR. TRUDEAU: -- book.

7 MS. ELLER: Exactly. That's what you have to have to
8 learn an alphabetic language. And English is an alphabetic
9 language.

10 MR. TRUDEAU: Right.

11 MS. ELLER: You cannot memorize it, by sight, as if it
12 were Chinese.

13 MR. TRUDEAU: Well, aren't we learning -- aren't --
14 aren't they being taught phonics now?

15 MS. ELLER: Nooo. No, no, no.

16 MR. TRUDEAU: They're not being taught --

17 MS. ELLER: No.

18 MR. TRUDEAU: -- phonics in school?

19 MS. ELLER: No. Fifteen percent of the schools in
20 America are using intensive, systematic direct instruction of
21 phonics in first grade, as the research from the United States
22 Department of Education tells them they should. Eight-five
23 percent of the schools in America are not doing that. They are
24 having the children memorize words by sight, what we would know
25 recognize as the "Dick and Jane" type readers.

EXHIBIT A

6

1 MR. TRUDEAU: Right, the look -- isn't that the "look-
2 see" method?

3 MS. ELLER: "Look-say," yes.

4 MR. TRUDEAU: Okay, "look-say."

5 MS. ELLER: I call it "look and guess."

6 MR. TRUDEAU: Right. (Laughs.)

7 MS. ELLER: They call it "look and say." Well, the
8 reason I call -- do that is because --

9 MR. TRUDEAU: Yeah.

10 MS. ELLER: -- after teaching school for 30 years and
11 watching these children look at the picture and then just guess
12 at the words, I call it "look and guess."

13 MR. TRUDEAU: Sure.

14 MS. ELLER: Okay. Then, there's also something in the
15 schools now called "whole language."

16 MR. TRUDEAU: Uh-huh (yes).

17 MS. ELLER: And in that method, the teachers are told
18 to surround the children with written information and read
19 stories to the children that are repetitious and predictable.
20 The children will memorize them. That's -- that's up your alley.

21 MR. TRUDEAU: Right, right.

22 MS. ELLER: And they will figure the system out on
23 their own. And if they don't figure it out in first grade, don't
24 worry about it. Pass them on to second grade. If they don't
25 figure it out by fourth grade, pass them on to high school.

EXHIBIT A

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1 You see, what happens is, the children don't figure it
2 out. I train teachers all over the country. I get calls to come
3 into high schools where 90 percent of the kids in the high school
4 cannot read their textbooks. They have not figured the system
5 out on their own. And it's very simple to show them how the
6 system works.

7 So, what will happen is, I will train the teachers. I
8 will show the teachers how to teach reading. They will stop
9 teaching subjects for six weeks, teach all the kids to read, then
10 go back to their subjects, to their textbooks. It's that easy to
11 correct.

12 But the problem is, the teachers are not being given
13 the right information in their training. They don't have the
14 right tools. It wouldn't matter how hard they worked; with the
15 wrong information, they are not going to be able to teach the
16 children to read.

17 So, to answer your question, how do they get all the
18 way through, graduate --

19 MR. TRUDEAU: Yeah, right.

20 MS. ELLER: -- they get socially promoted right out the
21 door.

22 MR. TRUDEAU: And they never learn how to read.

23 MS. ELLER: Last year, we graduated two-and-a-half
24 million kids from high school; nationwide. One million of them,
25 according to the United States Department of Education, cannot

EXHIBIT A

1 even read their own diplomas.

2 MR. TRUDEAU: I -- that -- that -- it's incredible to
3 me, because this must, obviously, dramatically, adversely impact
4 these kids' self-esteem, self-confidence and income-earning
5 ability, right?

6 MS. ELLER: It's also impacting all the rest of us.
7 Because, you see, here's what happens. They're predicting -- the
8 United States Department of Education -- they're predicting that,
9 if we don't correct this problem --

10 MR. TRUDEAU: Uh-huh (yes).

11 MS. ELLER: -- by the Year 2000, we will have
12 two-thirds of our nation that will be functionally illiterate.
13 Now, how can the one-third of us who work and support all these,
14 ah, subsidized programs --

15 MR. TRUDEAU: Right.

16 MS. ELLER: -- support the two-thirds who don't? We're
17 heading for a big collapse.

18 Also, what you've got to realize is that illiteracy is
19 the best form of censorship there is. You don't have to ban the
20 books, you don't have to burn the books, if nobody can read the
21 books.

22 You cannot be a participating member of this society
23 unless you are literate.

24 MR. TRUDEAU: Now, that -- that -- that's a very
25 interesting, ah, way to look at it, from a political standpoint.

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EXHIBIT A

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1 MS. ELLER: Absolutely.

2 MR. TRUDEAU: Now, let me ask you a question. You --
3 you actually put together or -- or you have the teacher, on these
4 audio tapes, called "Action Reading".

5 MS. ELLER: That's me.

6 MR. TRUDEAU: Okay, that's you. And tell me a little
7 bit about that. How did you get involved? How did you start
8 this?

9 MS. ELLER: Well, I actually have --

10 MR. TRUDEAU: I mean, you -- you seem very passionate
11 about this whole program of reading.

12 MS. ELLER: Well, I absolutely am, because I have two
13 little baby granddaughters that I do not want to grow up in the
14 kind of society that I'm seeing today.

15 And what we're discovering is that a lot of the
16 problems in society are caused by illiteracy. Eighty-five
17 percent of the kids who go through juvenile court are illiterate.
18 So, if you can't read, what are you going to do?

19 MR. TRUDEAU: Right.

20 MS. ELLER: What kind of a job are you going to get?

21 MR. TRUDEAU: Right.

22 MS. ELLER: You see -- and especially in this
23 technological world. So, we have a real serious problem. And
24 that's why I'm very passionate about it.

25 But I actually have two stories.

EXHIBIT A

10

1 MR. TRUDEAU: Right.

2 MS. ELLER: My first story is a personal story.

3 MR. TRUDEAU: Uh-huh (yes).

4 MS. ELLER: Um, my first son, when he was five years
5 old, started first grade. He was one of those December babies.

6 MR. TRUDEAU: Right.

7 MS. ELLER: Okay, he did not learn to read in school.

8 This was my firstborn. My most precious thing in the world. I
9 trusted him to the public school.

10 MR. TRUDEAU: The public school system, okay.

11 MS. ELLER: And I was actually doing my student
12 teaching that year. So, my little Patrick didn't learn to read.
13 But they passed him to second grade. Couldn't read a word. So,
14 I said --

15 MR. TRUDEAU: What -- what were they teaching?

16 MS. ELLER: They were teaching "Dick and Jane."

17 MR. TRUDEAU: "Dick and Jane."

18 MS. ELLER: Sight reading.

19 MR. TRUDEAU: Sight reading, okay.

20 MS. ELLER: Trying to get him to memorize --

21 MR. TRUDEAU: "Look-guess-say," right, okay.

22 MS. ELLER: -- memorize half a million words in English
23 by sight.

24 MR. TRUDEAU: Right.

25 MS. ELLER: Absolutely impossible task.

EXHIBIT A

11

1 MR. TRUDEAU: Right.

2 MS. ELLER: Okay, he cried, he was very upset, he
3 didn't like school. Of course; he couldn't do anything.

4 MR. TRUDEAU: Right.

5 MS. ELLER: So, I said to him, as mothers do, you know,
6 well, Patrick, we can work really hard all summer and Mommy will
7 teach you to read. Or, next year, you can go back and start
8 again in first grade.

9 So, he chose, of course, as Mommy intended, to start
10 again. And that year, I put him in a classroom with a teacher
11 that I knew was using intensive, systematic phonics. At the end
12 of that year in first grade, he tested twelfth grade in reading
13 level. There was nothing --

14 MR. TRUDEAU: Twelfth grade?

15 MS. ELLER: -- wrong my child. It was the method that
16 the first teacher had used. She didn't have the right
17 information.

18 But that's not the end of the story.

19 MR. TRUDEAU: Okay.

20 MS. ELLER: Okay. I have another son who's 15 months
21 younger.

22 MR. TRUDEAU: Uh-huh (yes).

23 MS. ELLER: Okay. The next year, that son started
24 first grade. And Patrick was now in second grade. So, first
25 week of school, I get a call to come in to the school for a

EXHIBIT A

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1 conference. And I'm thinking, what in the devil could he have
2 done the first week of school? I mean, you know --

3 MR. TRUDEAU: He's already in trouble, right?

4 MS. ELLER: -- you know, what can this kid have done?

5 So, I go in and the teacher says to me, "Has Mitch been
6 retained?" And I said, "No, why?" And she said --

7 MR. TRUDEAU: You mean, held back?

8 MS. ELLER: Yeah.

9 MR. TRUDEAU: Okay.

10 MS. ELLER: Why? And she said, "Well, he's so big and
11 he reads so well." I said, "Oh, really?" She said, "Didn't you
12 know he could read?" I said, "No." And I thought, yeah, right.
13 You probably handed him "Peter Pan" or "Peter Rabbit" --

14 MR. TRUDEAU: Sure.

15 MS. ELLER: -- or one of the stories that he has
16 memorized, which is what little children do. They'll memorize
17 those stories. And if you miss a word, boy, they catch you.

18 So I went home thinking, you know, this is what had
19 happened. And I said to him, "Mitch, can you read?" And he
20 goes, "Yup." And I said, "Well, read to Mommy."

21 MR. TRUDEAU: Yeah.

22 MS. ELLER: And I expected him to go in his bedroom,
23 get one of the stories I read to them at night. No. He --

24 MR. TRUDEAU: "Winnie the Pooh" or something, right?

25 MS. ELLER: Yeah. He reaches in the bookcase, he pulls

EXHIBIT A

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1 out this book -- book by Pearl S. Buck, he opens it up and he
2 starts to read to me. And I said, "I didn't know you could read.
3 How did you learn to read?" And he goes, "Pat taught me." And I
4 said, "Whoa, whoa, wait a minute. Pat" -- and Pat was six --

5 MR. TRUDEAU: Right.

6 MS. ELLER: -- taught Mitch, who was five, to read.

7 MR. TRUDEAU: A six-year-old is teaching the
8 five-year-old.

9 MS. ELLER: And I said, "When did Pat teach you to
10 read?" And he said, "You know, Mom, every day he brings his
11 papers home. He erases them. We play school. And he "be's" the
12 teacher."

13 So, the six-year-old was erasing his materials and
14 teaching it over again to the five-year-old.

15 So, at that point, I said, Wait a minute. All the
16 stuff they've been telling me in the college of education --
17 about how half the kids can't learn to read, or a fourth of the
18 kids can't learn to read, or you have to do this, that, and the
19 other -- is baloney. If a six-year-old, with the right
20 information, can teach a five-year-old to read, then there's
21 something that they're not telling us in the college of
22 education.

23 MR. TRUDEAU: Well, is it because your children are
24 gifted? I mean, aren't there some kids just smarter --

25 MS. ELLER: They'd like to think they are. (Both

EXHIBIT A

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1 laugh.)

2 MR. TRUDEAU: Okay.

3 MS. ELLER: In fact, I have four, and they'd all like
4 to think that they're smarter than Mother. Actually -- actually,
5 they are. My children are smarter than I am. So, that's --
6 brings up a really good point, Kevin.

7 The children today are not dumb. That's not why half
8 of them can't read. That's not why half the American public is
9 illiterate. It is because we have changed the method we use in
10 the schools.

11 Now, to get to the other part of yours -- of your, ah,
12 question, why am I so passionate about this? Well, in 1974, I
13 was teaching school in Alaska. And every one of my first graders
14 could read the newspaper. They were writing letters to Congress.
15 They were writing letters to the soldiers in Vietnam, getting
16 back answers, writing again.

17 MR. TRUDEAU: Yeah.

18 MS. ELLER: Um, the superintendent came in and he said,
19 "Okay, there's no other teacher in all the 54 schools that are --
20 that's doing this. You're going to train all the teachers." And
21 I went, "Ah! Do you see those 47 boxes? I mean, every night I
22 dig in there to decide what I'm going to do. Come on, surely
23 there's a program that's already published that does what I do,
24 because it's not that unique. It's what good teachers have
25 always done. It's just teaching them the phonics, teaching them

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15

1 the comprehension and making it fun."

2 So, he finally said, "Okay. I'm going to send you
3 outside" -- that's what they call the rest of the United States -
4 -

5 MR. TRUDEAU: Right.

6 MS. ELLER: -- "outside of Alaska. And I want you to
7 look at every published program in America."

8 So, I looked. For three months, I visited schools all
9 over and I looked at every reading program that was being used in
10 the schools. And I found a program that was better than what I
11 did. It was called "Action Reading." It was developed by a high
12 school teacher in Newark, New Jersey, who was frustrated that
13 high school kids couldn't read.

14 MR. TRUDEAU: Right.

15 MS. ELLER: Moved down, grade by grade, developed this
16 program in first grade, and it was all reusable and it all fit in
17 one box. My husband loved it. Didn't have to move 47 boxes
18 anymore.

19 That is the program I took back. We started using it
20 in the Anchorage School District. Every child that went through
21 it learned to read. It was phenomenal.

22 And then what happened in my -- in my particular case
23 is, the principal came in at the end of the year and he said,
24 "Guess what, Jeanie, we have all these fifth and sixth graders
25 who didn't get "Action Reading" and they can't read.

EXHIBIT A

1 Next year, you have to teach those fifth and sixth graders."

2 Well, I found that I could do that in a semester,
3 instead of a whole year.

4 MR. TRUDEAU: Uh-huh (yes).

5 MS. ELLER: Then, the high school principal said,
6 "Guess what?"

7 MR. TRUDEAU: Guess what?

8 MS. ELLER: "We need to borrow her, because we have
9 kids in the high school who can't read."

10 MR. TRUDEAU: Yeah.

11 MS. ELLER: I found out you could do that in six weeks,
12 because the older the person --

13 MR. TRUDEAU: The quicker they can learn it.

14 MS. ELLER: Right.

15 MR. TRUDEAU: That's right.

16 MS. ELLER: The more they can absorb, plus they have
17 all the small motor skills. They've already got the -- the, ah,
18 auditory/visual connection. There's a lot of things that -- that
19 you develop --

20 MR. TRUDEAU: Right.

21 MS. ELLER: -- as you go along. And then I started
22 doing summer school and then summer camps, where I taught kids to
23 read in two weeks. And, eventually, I worked with Dr. Curatan,
24 the author of the "Action Reading," and we decided, because we
25 got so many calls from people saying, "I can't come to you. I

EXHIBIT A

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1 can't afford your camp. I can't send my child."

2 MR. TRUDEAU: Right.

3 MS. ELLER: "What can you send me?"

4 MR. TRUDEAU: Right.

5 MS. ELLER: And they couldn't afford the school
6 program, even though it's very inexpensive and reusable, they
7 wanted something they could afford, something they knew would
8 work.

9 So, I racked my brain, I prayed. Finally, we decided
10 we'd do the home program, so we did it. With audio tapes, I do
11 the teaching on the tape.

12 MR. TRUDEAU: Right, right.

13 MS. ELLER: We have a video that helps people, gives
14 them an overview, shows them where we got our system of reading
15 and writing, our alphabet, the whole thing. Explains how the
16 whole thing works. And also shows them preschoolers and -- and
17 elementary children and high school kids and college kids and
18 senior citizens --

19 MR. TRUDEAU: Right.

20 MS. ELLER: -- who've learned to read with this
21 program.

22 And when you go through this program, you start at the
23 beginning and you take every logical step right through it. And
24 when you come out, you are a fluent, independent reader. And
25 I've put my 30 years of teaching credibility on the line. It

EXHIBIT A

1 absolutely is guaranteed to work.

2 MR. TRUDEAU: Well, if you're watching right now and
3 you do want information on the program, "Action Reading" -- it's
4 a home study course. It's fun and easy to go through. It just
5 takes a few short hours.

6 And what age level can go through it?

7 MS. ELLER: Well, parents can use it with preschoolers.

8 MR. TRUDEAU: Right.

9 MS. ELLER: Anyone eight and above can do it all on
10 their own.

11 MR. TRUDEAU: Eight and above can go through it, and
12 preschoolers with their parents.

13 Call the number on the screen if you want more
14 information on Jeanie's program. And we did work out a special
15 arrangement. You will receive a substantial discount if, you do
16 call today, on the program.

17 Now, let's talk about, you said, age levels. You
18 mentioned, as, ah, eight and above can go through it on their
19 own. There are other phonics programs on the market -- some of
20 them are really expensive -- and I thought some of them were
21 pretty good.

22 What's the difference between your phonics program and
23 some of the other ones that people may be familiar with?

24 MS. ELLER: Okay, there are -- there are some good
25 phonics programs out there that work, and some of them are being

EXHIBIT A

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1 used in schools. And those programs are comprehensive.

2 Unfortunately, there have been a -- a number of
3 programs that have been made available to the public that are not
4 very comprehensive. They start out by teaching the -- the person
5 the names of the letters and the sounds, and then they go right
6 to -- well, open the workbook and read the sentences.

7 And that's, like, wait, wait, wait. How do I get from
8 just saying letter names and sounds to reading sentences?

9 So, they -- they have a big gap --

10 MR. TRUDEAU: Right.

11 MS. ELLER: -- missing.

12 MR. TRUDEAU: Okay.

13 MS. ELLER: So, they're not teaching the comprehension.
14 They're not act- -- actually teaching how the system of English
15 works. They're not teaching the whole systematic thing.

16 The program that I use, first of all, it's very
17 inexpensive. It's reusable. You -- you might need to get
18 another workbook, but everything else -- the tapes you can use
19 over with -- if you have other children in your family. You
20 know, if you want to share it with your church or --

21 MR. TRUDEAU: Right, uh-huh (yes).

22 MS. ELLER: -- something. Ah, the video, of course,
23 you can share with your friends and neighbors.

24 And the games are phenomenal, because they're actually
25 just drill. But the people playing them get so engrossed in just

EXHIBIT A

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1 the game idea that they don't realize they're doing drill.

2 So, what -- what the difference is, is that we take
3 every step. First of all, we explain where we got our system of
4 reading and writing. And most teachers don't know this.

5 MR. TRUDEAU: Right.

6 MS. ELLER: They don't realize that those letters,
7 those symbols, come from pictographs. They actually represented
8 something. Like the "A" represented a bull, the head of a bull.
9 And then it became just the lines of that. And then, eventually,
10 the Phoenicians developed the alphabet. So, it changed from
11 being a meaning-bearing symbol to a sound-bearing symbol.

12 MR. TRUDEAU: Uh-huh (yes).

13 MS. ELLER: And that was the invention of the alphabet.

14 MR. TRUDEAU: Right.

15 MS. ELLER: And that's the concept that teachers are
16 not given. They don't realize that you can't memorize half a
17 million words by sight. You've got to learn that code.

18 And so, we explain all that and then we show them how
19 to put those sounds together. And we do not start by teaching
20 them the names of the letters. Everybody I've ever worked with,
21 whether they were little children or adults, already knows the
22 ABCs.

23 MR. TRUDEAU: Sure.

24 MS. ELLER: But A-B-C doesn't make a word. C-A-T does
25 not make a word. If I go C-A-T, C-A-T, C-A-T, you don't hear a

Complaint

125 F.T.C.

EXHIBIT A

21

1 word.

2 MR. TRUDEAU: Right.

3 MS. ELLER: But if I show you the sounds and go "Kuh-
4 aah-tuh" and you go left to right, because in English you can
5 only read left to right; you can't go right to left, like you do
6 in Hebrew.

7 MR. TRUDEAU: Right.

8 MS. ELLER: Then you go, "Kuh-aah-tuh" and the word
9 "cat" comes right out of your mouth. As it does with my little
10 granddaughter, who's only two-and-a-half.

11 MR. TRUDEAU: Two-and-a-half.

12 MS. ELLER: Two-and-a-half. She's already sounding out
13 words. But, see, what happened is, her mother and father did not
14 teach her the ABCs. When she looks at an "M", they don't call it
15 an "M". They call it the "Mommy" letter, "mah-mah-mah". And
16 there's the "Daddy", the "dah-dah-dah". And her letter is the
17 same as yours, the "kah-kah-kah" letter.

18 MR. TRUDEAU: Right, right.

19 MS. ELLER: So, she'll look at something and she'll go,
20 "dah-o-g". Grandma, that's dog. She doesn't go D-O-G, D-O-G, D-
21 O-G, because that doesn't make a word.

22 MR. TRUDEAU: Interesting.

23 MS. ELLER: So -- and -- and it isn't that she's the,
24 you know, the most brilliant child in the world. She's the most
25 beautiful, but she's not the most brilliant.

EXHIBIT A

22

1 But -- but, really, any child that you show them how
2 that code works, you can't stop them from reading. They crack
3 that code. And that code is the key.

4 When I taught the four illiterate adults to read in two
5 weeks for the Oprah Winfrey Show --

6 MR. TRUDEAU: Uh-huh (yes).

7 MS. ELLER: -- one of the ladies, the third day -- this
8 was a lady who was 30 years old. She had never learned to read.
9 She dropped out of school in eighth grade, when she was pregnant
10 with the first of six children. Just a tragic, tragic story.
11 Been on drugs. Been on welfare. Had her children removed.
12 Everything. Wanted desperately to learn to read, get her
13 children back, and had -- you know, had taken care of her drug
14 problem.

15 MR. TRUDEAU: Right.

16 MS. ELLER: The third day, she said, "Jeanie, I always
17 knew there was a secret code that nobody showed me."

18 You see, if you don't know that there's an alphabetic
19 system, if nobody shows you that, it is a secret.

20 MR. TRUDEAU: So --

21 MS. ELLER: If you don't know there's a simple way to
22 do it.

23 MR. TRUDEAU: So, now, you were on Oprah.

24 MS. ELLER: Yes.

25 MR. TRUDEAU: You were on a lot of other -- I know you

EXHIBIT A

23

1 do, what, 400 radio appearances a year, or something?

2 MS. ELLER: Oh, I've done about 1,500.

3 MR. TRUDEAU: Okay, radio shows and you've been on
4 television and written up in newspapers, the program.

5 But you're talking about this secret code. The
6 government says -- you were mentioning to me -- that teaches
7 certain kids just can't read, and you're saying that's hogwash.

8 MS. ELLER: It is. It's absolute hogwash. I've been
9 teaching for 30 years and I've never had anyone not learn to
10 read.

11 MR. TRUDEAU: Because I just watching a show the other
12 day on -- on -- on TV and they were saying, this guy's trying to
13 read. He's tried -- he tried a phonics program himself. He --
14 he still can't read. He's frustrated. He thinks he's dumb.

15 And they said -- they made the statement, the only way
16 he can read is by hard, hard work, and he still may never learn
17 how to read.

18 MS. ELLER: No, that is absolutely not true, and I hope
19 he's watching this show, because if he'll get this program, I
20 guarantee you he'll learn to read. I -- I know what you're
21 talking about.

22 What they do is, they start by teaching the person the
23 ABCs.

24 MR. TRUDEAU: Uh-huh (yes).

25 MS. ELLER: And then, they have them start memorizing

EXHIBIT A

1 sight words. Now, that's exactly what the "Dick and Jane"
2 methodology was based on, that you memorize four hundred of the
3 most frequently used words in first grade. That's called first
4 grade level of reading.

5 MR. TRUDEAU: Right.

6 MS. ELLER: By the time you get to sixth grade, you're
7 supposed to have memorized six -- ah, three thousand of the most
8 common words in English. That's called sixth grade level of
9 reading.

10 Newspapers are now written at sixth grade level. They
11 use the same three thousand --

12 MR. TRUDEAU: Three thousand.

13 MS. ELLER: -- words over and over --

14 MR. TRUDEAU: Over and over, okay.

15 MS. ELLER: -- ad nauseam. Um, and half the American
16 people cannot read it. The problem is, adults start out and they
17 memorize maybe 15 words, maybe 100 words, maybe 200 words. But
18 they cannot pick up a newspaper and read anything --

19 MR. TRUDEAU: Right.

20 MS. ELLER: -- because there's always three or four
21 words in the sentence that they don't know what it means. And
22 what adults say to me is, it looks like the blank in his blank
23 are going to the blank --

24 MR. TRUDEAU: Well, isn't it --

25 MS. ELLER: -- because they don't know what those other

EXHIBIT A

25

1 words are.

2 MR. TRUDEAU: -- but isn't that vocabulary? Or is it -

3 -

4 MS. ELLER: No, no --

5 MR. TRUDEAU: -- different than from --

6 MS. ELLER: -- because if you -- if you tell them what

7 the words are, they know those words. They speak those words.

8 The people that I taught to read on the Oprah Show, as soon as

9 they could decode, decipher the newspaper, they knew those words.

10 They were articulate people. They spoke the language. They

11 understood the language. They just could not decipher the

12 language.

13 MR. TRUDEAU: So, they -- if you told them what the

14 word was, they knew the meaning.

15 MS. ELLER: Oh, yes. Many of them --

16 MR. TRUDEAU: But they just couldn't -- they didn't

17 know what the words said.

18 MS. ELLER: They couldn't decode it for themselves.

19 MR. TRUDEAU: Now --

20 MS. ELLER: So, that's the problem.

21 MR. TRUDEAU: -- now, is your program self-tutorial?

22 Because this is a big issue. A lot of people out there --

23 because I bought this program for my brother's son --

24 MS. ELLER: Uh-huh (yes).

25 MR. TRUDEAU: -- okay, because, you know, he's seven

EXHIBIT A

26

1 years old. I thought, he -- I want him to go, because he's going
2 to be eight. Well, if he can't go through it himself, at least I
3 know my brother will walk him through the program.

4 For an eight-year-old and above, can they go through
5 this program themselves?

6 MS. ELLER: Absolutely.

7 MR. TRUDEAU: Will they have fun doing it?

8 MS. ELLER: Absolutely. Because (both laugh) --

9 MR. TRUDEAU: Okay.

10 MS. ELLER: -- this program is multi-sensory. That's
11 why it's called "Action Reading". Because when Dr. Curatan first
12 started developing this, at first grade, first, he found out that
13 the children were all TV babies. That means, if you didn't show
14 them a picture, they didn't hear you.

15 MR. TRUDEAU: Right.

16 MS. ELLER: So, he had to work on their auditory
17 skills. So, the -- what we do with this program is, we get
18 people to understand that words are just sounds that you can put
19 together and take apart.

20 So, in English, we have 26 letters. We have 44 sounds
21 we use when we talk. And we have 70 ways to write down those 44
22 sounds. That's called the code. That's the alphabetic code. We
23 call them phonograms. Written forms of the sounds.

24 MR. TRUDEAU: Okay.

25 MS. ELLER: Okay. With those 70 phonograms, you can

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EXHIBIT A

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1 read anything in English. Now, when I first started this battle,
2 I call it now --

3 MR. TRUDEAU: Well, hold -- hold on one second before
4 you go on, because I want people to know, if you do want to call
5 and get information on Jeanie's program, which I highly
6 recommend, pick up your phone and call the 800 number that's on
7 the screen.

8 If -- if you want to read yourself. If you know
9 somebody -- ah, as I mentioned, I gave this to my -- my
10 brother's, ah, son, to learn how to read. And it's really the
11 most comprehensive, easiest, fastest way that anyone can learn
12 how to read.

13 MS. ELLER: Absolutely.

14 MR. TRUDEAU: Is this correct?

15 MS. ELLER: Absolutely, because it not only teaches the
16 decoding, the phonics part, it teaches comprehension. It teaches
17 the spelling patterns of English. And it teaches you penmanship
18 -- good, old handwriting.

19 MR. TRUDEAU: You know, I was just -- I was -- I get
20 notes in from, ah, people. They write things to me. And I look
21 and say, where do these kids learn how to write? They can't even
22 write.

23 MS. ELLER: We're not teaching handwriting in schools
24 anymore.

25 MR. TRUDEAU: Well, that -- there -- there's your

EXHIBIT A

1 answer.

2 MS. ELLER: And we also aren't teaching spelling in the
3 schools anymore, because they have a new philosophy that, if you
4 correct their spelling, you'll stifle their creativity; they
5 won't want to write.

6 MR. TRUDEAU: Um --

7 MS. ELLER: Sounds crazy to normal people, but that's
8 what teachers are being told.

9 MR. TRUDEAU: Is it -- does it -- now, if you learn how
10 to read. Let's take a child. Basically, if he becomes an
11 affluent -- how did you pronounce that? Af--?

12 MS. ELLER: Fluent, not affluent.

13 MR. TRUDEAU: Fluent, fluent.

14 MS. ELLER: Affluent is rich. (Both laugh.)

15 MR. TRUDEAU: Well, if they become fluent, will they
16 become affluent?

17 MS. ELLER: Well they have the ability then.

18 MR. TRUDEAU: But will -- but now -- now you know this,
19 because you've been in the teaching setting. If a child can read
20 -- and if a parent is watching right now, I guess you -- you told
21 me earlier, hey, ask yourself the question -- hand your child
22 something and see if they can read it.

23 MS. ELLER: Oh, absolutely. That is the most crucial
24 thing we -- we need to address. Because parents assume that,
25 because their children are in school -- they're trusting them to

EXHIBIT A

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1 the schools like I trusted my little boys -- that they're
2 learning to read. That is not an assumption you can make.

3 What you must do is, today, as soon as this show is
4 over, sit down with your child, hand them something they have not
5 memorized, like today's newspaper, pick out a story in today's
6 newspaper that's suitable for the age of your child, if you can
7 find one --

8 MR. TRUDEAU: Right, right.

9 MS. ELLER: -- that isn't all blood and gore. And if
10 your child is in second grade or above, your child should be able
11 to fluently and independently read a story in the newspaper.
12 When they come to a word they've never seen --

13 MR. TRUDEAU: They should read it out loud to you.

14 MS. ELLER: Yes, absolutely, read it out loud.

15 MR. TRUDEAU: Out loud.

16 MS. ELLER: How else are you going to know they're
17 reading?

18 MR. TRUDEAU: Right, okay.

19 MS. ELLER: Okay.

20 MR. TRUDEAU: Honesty?

21 MS. ELLER: Okay. And accurately. See, when they come
22 to a word they've never seen, they should be able to sound it
23 out, then pick up their speed and go right on.

24 And then, the second most important thing is, if they
25 can do that --

EXHIBIT A

1 MR. TRUDEAU: Uh-huh (yes).

2 MS. ELLER: -- then ask them comprehension questions
3 about what they just read. Who did it? Where did it happen?
4 When did it happen? Tell me in your own words what this story
5 was about.

6 According to the United States Department of Education,
7 in a document called, "What Works," the teaching of reading
8 should be taught in first grade with intensive, systematic direct
9 instruction of the phonetic system. It should be completed by
10 the end of first grade, second grade at the very latest.

11 And so, therefore, if your child is in second grade or
12 above, they should be able to fluently and independently read a
13 story in the newspaper.

14 Now, there's going to be a lot of people, Kevin, who
15 are going to find out their children can't do that. So, they've
16 got several choices. They can go to the school and say, what
17 method are you using?

18 MR. TRUDEAU: Right.

19 MS. ELLER: Are you having reading class after second
20 grade? Why are you doing that? Show me the research. Ah,
21 that's going to be a long, slow battle, because, I know, I've
22 been fighting it now for 20 years.

23 MR. TRUDEAU: Sure.

24 MS. ELLER: The best thing to do, the best way to solve
25 illiteracy in America, get yourself literate. Get yourself

EXHIBIT A

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1 literate. Get your children literate. And then, start trying to
2 make changes in the bureaucracy.

3 MR. TRUDEAU: Now, if your child becomes this fluent
4 reader, be able to -- if it's first grade, second grade -- picks
5 up the newspaper, "Mommy, let me show you this," and reads this
6 thing fluently, out loud. If they can't do that -- and if they
7 could, they'll do better in school.

8 MS. ELLER: Oh, let me tell you what'll happen to them.

9 MR. TRUDEAU: They -- they -- go ahead.

10 MS. ELLER: They'll be in the top five percent in the
11 nation. Accord- --

12 MR. TRUDEAU: That easy?

13 MS. ELLER: -- according to --

14 MR. TRUDEAU: You're saying that -- that easy?

15 MS. ELLER: It's -- well, you figure it out, okay?

16 You're a bright man. According to the United States Department
17 of Education, just five percent of our 17-year-olds can read at
18 an advanced level. This is also from "What Works." Okay, that's
19 one out of 20, right?

20 MR. TRUDEAU: Right.

21 MS. ELLER: All right. So, what we're saying is, 20 --
22 for every 20 kids who start first grade --

23 MR. TRUDEAU: So, the grades are going to go up?

24 MS. ELLER: -- one out of those 20 is going to learn to
25 read in school; 19 are not.

EXHIBIT A

1 MR. TRUDEAU: So, the grades will go up.

2 MS. ELLER: You'll be in the top five percent in the
3 nation.

4 MR. TRUDEAU: I bet you their self-esteem --

5 MS. ELLER: Oh --

6 MR. TRUDEAU: -- their self-confidence --

7 MS. ELLER: -- incredible what'll happen.

8 MR. TRUDEAU: They'll feel better about themselves.

9 Ah, SAT scores?

10 MS. ELLER: Oh, Alaska had -- I don't know what the
11 scores are for this year, but the last time I looked, Alaska had
12 the highest SAT scores in the nation.

13 MR. TRUDEAU: So, the SAT scores go up, they get --
14 they get into the college of their choice? If they get a good
15 education, if they come out, ah, the top five percent, they're
16 making more money. They get into the job of their choice.

17 MS. ELLER: Then they can be affluent.

18 MR. TRUDEAU: If some -- exactly. If they're fluent at
19 first, then affluent later.

20 MS. ELLER: You got it.

21 MR. TRUDEAU: If an adult is watching us right now and
22 they're at a certain income level, if -- you're telling me, if
23 they can learn to read and read fluently, they have a better
24 chance of in- -- making more money, of, ah, improving their own
25 rate of success in their own career.

EXHIBIT A

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1 MS. ELLER: Absolutely. I had a man call me -- you
2 just made me think of this -- he had been a Vietnam Vet, stayed
3 in, went into the National Guard, couldn't read. Only his wife
4 knew he couldn't read. And anything he had to read, he would go,
5 "Oh, I forgot my reading glasses. What does it say?"

6 MR. TRUDEAU: Ah.

7 MS. ELLER: Or, he would take it home, have his wife
8 read to him -- because his wife knew he couldn't read -- he'd
9 come back.

10 He called me up. He was absolutely desperate. He was
11 getting a promotion and he had to read. It was a desk job. And
12 he said he'd gone to several places. They told him it was going
13 to take him two years, three years, six years to learn to read.
14 He said, "I don't have that kind of time."

15 MR. TRUDEAU: Right.

16 MS. ELLER: "What can you do?" I said, "Take this
17 program. I guarantee you, if you'll go through it, if you'll
18 start back at square one and go through this program, when you
19 finish, you'll be able to read anything".

20 He called me back in a month. He got his promotion.
21 He could now read anything. And that man was a new person. I
22 mean, you could hear it. You could hear it --

23 MR. TRUDEAU: You can hear it.

24 MS. ELLER: -- in his voice.

25 MR. TRUDEAU: Folks, if you're watching right now and

EXHIBIT A

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1 you want more information on Jeanie's program, please call the
2 800 number. We highly recommend and endorse this program. I
3 bought it myself for my -- my brother's son. I think you'll see
4 some fantastic results for you and the children and the people
5 that you love.

6 This is Kevin Trudeau. Thanks again for watching me.
7 And watch me on another edition of "A Closer Look."

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EXHIBIT B

**ACTION READING
SUMMARY**

About Jeanie Eller

- Her program is endorsed by The National Right to Read Foundation and The National Reading Reform Foundation!
- Nationally renowned teaching and reading expert.
- 30 years of teaching experience
- Trains or Retrains teachers in "In Service Meetings"
- Has appeared on Oprah Winfrey's show

Side notes from Program

- 85% of all schools teach kids to read by sight
- 15% use phonics
- By the year 2000, two-thirds of our country will be illiterate (functionally disabled)!
- More than 1 million children each year graduate without the ability to read.

For Children

- Excellent home study program for preschoolers
- Children 8 and older can do the program on their own
- The audio cassettes are filled with songs and rhymes that hold their attention
- The video tape is fun for kids because Jeanie has FUN pictures on the flash cards that they like and they get to make lots of funny sounds that later translates into reading!
- Helps boost self esteem and confidence
- Gives kids an edge in school that makes it easier for them to excel
- Helps improve comprehension of materials read
- Helps enhance penmanship abilities
- Incorporates all of the learning senses through art, games, body movements, and music to create an active and entertaining experience that kids won't think is "work".
- Excellent for kids raised in homes where English is NOT spoken

MSI/SALBERG COMPLAINT EXHIBIT K
TRUDEAU COMPLAINT EXHIBIT E
ELLER COMPLAINT EXHIBIT B

EXHIBIT B

**ACTION READING
SUMMARY**
continued

For Adults

- Relieves embarrassment of not being able to read (newspaper, food labels, bus schedules, menus, job applications, etc.)
- Boost confidence and self esteem
- Can make a person more employable
- Easier and quicker for adults to learn, because most already know the vocabulary - they just need to learn how to "decode" written words and sentences.
- Other:
- Uses intensive systematic phonics (based on word sounds, not spellings)
- Most people can complete the entire program and learn to read within 4-6 weeks.

Complaint

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EXHIBIT B

ACTION READING SCRIPT

Thank you for calling Action Reading my name is _____, and who and I speaking with?

Hi _____, are you calling about Fast Track Action Reading program?

[Caller] Yes I am.

Great! I can help you with that.

Is this for a child or an adult? (If a child) how old is he/she?

OK good! Jeanie's program can definitely help!

As a matter of fact it's endorsed by The National Right to Read Foundation and The National Reading Reform Foundation. Plus, it's backed by a 100% money back guarantee!

The key to Jeanie's proven approach is the use of all learning senses, through art, games, body movements and music to create an active, entertaining experience. And Jeanie not only teaches you how to read, but also comprehension and writing skills. The program includes over 9 hours of audio cassette tapes, a 100 page guide book, flash cards, 7 game boards and playing pieces, along with a bonus video tape. And the best part is the value. Normally, Jeanie charges schools \$1500 per day to learn about her proven methods. But you can take advantage the same information and receive the complete Action Reading program for just \$139.97, plus S&H. And Jeanie is so sure her program works, she offers you a full, three month, money back guarantee in writing. If for any reason you're not satisfied, simply return it for a full refund of the product purchase price - no questions asked! And all I need to get the program out to you is your address and credit card number - would you prefer to use Visa, Mastercard or Discover?

[Capture all information]

_____ your total including shipping and handling is \$152.47 and you'll receive your program in 2 - 4 weeks. If you have any questions you may call our customer service number at 1-800-634-2990. Thank you for calling and have a great day!

EXHIBIT B

**ACTION READING
TOP QUESTIONS AND ANSWERS**

1. **How can it improve comprehension?**
Even though we've heard a lot of words before in conversation, a person who can't read wouldn't recognize them. Action Reading teaches you how to read words for their meaning. (It's like putting a person's face to their name, when you have only spoken to them on the telephone.)
2. **What age group can use this program?**
From pre-school to adults. Pre Schoolers may take 2 years to complete, while adults as little as 4 weeks.
3. **Does it work for adults as well as children?**
Absolutely! Age has little to do with learning to read.
4. **How does it compare to other programs? (i.e., Hooked on Phonics)**
Action Reading is less expensive and much more comprehensive. It actually teaches the skill of reading while incorporating all of the learning senses.
5. **Can children use the course on their own?**
Children 8 years and up can complete the course on their own. We recommend that parents still monitor and assist.
6. **Does Jeanie guarantee that she can teach anyone to read?**
Action Reading can teach anyone who can see, hear, think and talk to read...guaranteed or your money back!
7. **Can a child with ADD learn to read with Action Reading?**
Action Reading is a multi-sensory, active program that can help keep a person's attention. It's unique, proven method incorporates all of the learning senses through art, games, body movements and music to create an active, entertaining experience that does not seem like work.
8. **Is the course too child-like for an adult?**
Absolutely not! Even adults need to start from the beginning.

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EXHIBIT B

9. Is Jeanie still teaching seminars? How much are they?

Jeanie's in-school training seminars are \$1500 per day. However, you can benefit from the same information, in the comfort of your own home, for only a fraction of the cost.

10. Can someone with Dyslexia learn to read with Action Reading?
Action Reading teaches left to right tracking and it explains how the skill of reading works.**11. Is there a lot of memorization?**
No. Unlike the way most schools teach kids by memorizing thousands of words by sight. A person only needs to learn the 70 unique sounds of the English language. This unique, proven method is based on word sounds, not spellings.**12. Will an adult complete the course the same way as a child?**
An adult will complete the course exactly as a child would, however, they will likely complete it much easier and quicker.**13. How can this course help the mentally disabled?**
It all depends on the degree of the disability. However, Action Reading is logically and systematically designed so that the student masters one step before moving on to the next. The parent or teacher can set the pace to match the student's learning abilities, and it can be completed over and over until the student masters the course. The program is structured yet fun, while praise and pride of accomplishment are built in.**14. How does it work?**
Jeanie's proven, phonics based method incorporates all of the learning senses through art, games, body movements, and music to create an active and entertaining experience that doesn't seem like work.

Learning to read has been compared to cracking a code. Once you know the secret it's easy to decode a sentence. Action Reading teaches the sounds and patterns of our language and how to use them for decoding.

15. How long does it take to complete?
You can complete the course at your own pace and most students can complete the entire program with-in just 4-6 weeks.

Complaint

EXHIBIT B

16. Delivery time?
- 2 - 4 weeks for credit card orders
 - 2 - 4 weeks for phone/mail checks
 - 4 - 5 business days for Federal Express (CC orders only)
17. Shipping charges?
- Regular forth class mail - \$12.50
 - Federal Express - \$9.50 extra
18. Caller wants to speak with Jeanie Eller or other Mega personalities.
- They may write to Mega Systems at:
- Mega Systems Inc.
 - Action Reading
 - PO Box 11031
 - Merrillville, IN 46410
19. What does the program contain?
- 6 audio cassettes
 - Visual aid flash cards
 - 7 game boards with playing pieces
 - 100 page workbook
 - Bonus video tape

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EXHIBIT B

**QUESTIONS, OBJECTIONS AND
REBUTTALS**

Remember...

People are not calling to figure out why they should buy, they are calling to figure out why not to buy!

1. I want to think about it.

- Don't make your decision now, decide in a month or two after you/ your child have seen the results from the program. Jeanie is so confident that her program works she gives you a full three months to decide!
- What could be a better gift than the gift of reading? Once a child knows how to read, the sky's the limit!
- Why? What's your hesitation?
- Exactly, I wouldn't want you to base your decision on a 5 minute phone call. It wouldn't be fair to you or your _____ problem. Let's get this out to you so that you can base your decision on results - that way you can make an educated decision.
- Exactly! that's why Jeanie Eller gives you an entire three months. So that you can not only think about it, but you can experience the results that he guarantees you will receive.
- What question do you still have _____ that's causing you to hesitate?

2. How much is the book?

- Let me tell you Mr./Mrs./Ms. _____ exactly what you will be receiving, your discount, and how it will benefit you. O.K.?

EXHIBIT B

3. Can you send me written information?

- Let me tell you Mr./Mrs./Ms. _____ exactly what you will be receiving, your discount for ordering today and how the Jeanie's program will benefit you. O.K.?
- I can give you all the information you need. What specifically would you like to know?
- I wish the literature told the whole story. In fact, it will probably raise key questions that I would be able to answer for you now. (NO PAUSE ..ask probing question).

4. I need to speak with my wife or husband.

- That's exactly what Jeanie Eller wants you to do. She allows us to send the entire program to you, on a no risk basis - so that you and your wife can go through it together and really determine the value of the information and see how it can really benefit your family.
- Let's get this out to you so that you and your wife can review it together. Don't ask her to make a decision on the price, but on the information and the results. Remember you have a full three month money back guarantee.
- Why don't you talk with them right now. I can wait.

5 It's too expensive/ I'm on a fixed income/ I can't afford it.

- Three-pay- What if I could get the entire program out to you for just \$46.65 a month for three months; would that be better for you?
- If this can help you _____, wouldn't it be worth reviewing?
- Would you be using a credit card to place your order today? Great then what I'll be able to do is to put you on our 3 pay plan, and your last name is ?
- _____ I'm sure you would agree that a product is worth what it does for you. Let's explore what benefits Action reading offers you.

Complaint

125 F.T.C.

EXHIBIT B

- If I could demonstrate how Action Reading would be worth every penny we're asking, you would be willing to take advantage of what we're offering today, right?
 - _____ The value of Action reading is what it will do for you, not what you have to pay for it, right?
 - Price is an important consideration, isn't it? Would you consider value equally important? Let me tell you about the value of our products.
 - I can appreciate your situation and that's why Jeanie Eller offers you an easy 3 payment plan so you can still take advantage of the discount today. By using the 3 pay plan Jeanie Eller's program becomes more affordable and best of all, there are no financing fees or added costs. Let me give you a breakdown of the payments so we can get this right out to you?
6. I'm not interested.
- May I ask why?
 - _____ What result would make the price worth it in your opinion?

EXHIBIT B

HOW TO EXPLAIN THE 3 PAY PLAN

I can appreciate your situation, and that's why Jeanie offers an easy 3 pay plan, so you can still take advantage of her proven program. By using the 3 pay plan her program now becomes easier to own, and best of all, there are no financing fees or added costs. Let me give you a breakdown of the payments so we can get this out to you OK?

Your payments will be split up with the first payment consisting of 1/3 of the product price plus applicable shipping charges. The second and third payments consist of two equal payments of the remaining 2/3 of the product price. That breaks out to:

<u>1st Payment</u>	<u>2nd Payment</u>	<u>3rd Payment</u>
\$59.15	\$46.65	\$46.65

DOESN'T NOT HAVE A CREDIT CARD

Do you have a checking account?

YES

Great! A lot of people like yourself are not using credit cards, that's why Jeanie offers you check by phone, so that you can still take advantage of the discount today. Go ahead and get your checkbook and I'll walk you through the process.

- (Name) may I have your address?
- And your daytime telephone number with area code first?
- May I have the name of your bank?
- And the city and state that your bank is located in?
- May I have the check number located in the upper right hand corner of the next check in your checkbook?
- There is a long series of numbers on the bottom of that check. Will you please read all of them to me starting from left to right? Please read just the numbers and not the symbols. Make sure you do not leave any numbers out.

Great! (Name) your total including shipping and handling is \$152.47 and you will receive your program in 2-4 weeks. If you have any questions you may call our customer service number at 1-800-634-2990. Thank You for calling and have a great day!

Complaint

125 F.T.C.

EXHIBIT B

WANTS MORE INFORMATION ON CHECK BY PHONE

(Name) when you send a check to a company they use the information off the front of the check to process it, well that same information is what we are now able to process by phone. With the bank name, the check number and the numbers off the bottom of the check we'll be able to secure your order today, and expedite it right away.

Also, (Name) what you can do is contact your bank and let them know that you have given Mega Systems the authority to put check #____ through for a one time charge of \$____ not a penny more or less. This way you can be assured that you still have control of your account O.K.?

**WILL NOT USE CHECK BY PHONE
DOES NOT HAVE CHECKING ACCOUNT**

Let me send you an invoice with a postage paid return envelope for your convenience.

If you have any questions you may call our customer service number at 1-800-634-2990.

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Jeanie Eller resides at 42828 North 7th Avenue, Phoenix, Arizona.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

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

evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean Jeanie Eller, individually and her agents, representatives and employees.

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

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Jeanie Eller Action Reading or any other product or program that provides instruction in any aspect of reading in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. The extent to which individuals who use such product will learn to read, or
- B. The success rate of individuals who use 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.

II.

It is further ordered, That respondent Jeanie Eller shall, for three (3) 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 her 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.

III.

It is further ordered, That respondent Jeanie Eller, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her current business or employment, or of her 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 her 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.

IV.

It is further ordered, That respondent Jeanie Eller 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 she has complied with this order.

V.

This order will terminate on April 6, 2018, 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.

Commissioner Thompson and Commissioner Swindle not participating.

LONDON INTERNATIONAL GROUP, INC.

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

Docket C-3800. Complaint, April 7, 1998--Decision, April 7, 1998

This consent order prohibits, among other things, the Georgia-based condom manufacturer from making any comparative claims about the strength, efficacy or risk of breakage of any condom in the future, unless the respondent possesses and relies upon competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Linda Badger, Kerry O'Brien and Jeffrey Klurfeld.*

For the respondent: *Wayne H. Matelski, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that London International Group, Inc., a corporation, 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 London International Group, Inc. is a New Jersey corporation with its principal office or place of business at 3585 Engineering Drive, Norcross, Georgia.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including "Ramses" brand condoms. Ramses brand condoms are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for Ramses brand condoms, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements and depictions:

A. "it won't give you X-ray vision or bionic strength. but it will make you a hero tonight.

Ramses* gives you the sensitivity and natural feeling you want. and because it's 30% stronger than the leading brand, it performs like a champ. so you can too.

Ramses®. a trusted companion.

*Ramses® regular strength condoms.”

[The advertisement depicts an individual condom wrapper labeled: “RAMSES CONDOM”] (Exhibit A).

B. “WOMEN PREFER THE STRONG SENSITIVE TYPE.

Ramses provides both strength and sensitivity with that exquisite natural feel. And 30% more strength* than the leading brand. Now all you need to do is learn to cry.

Ramses. A Trusted Companion.

*Ramses regular strength condoms.”

[The advertisement depicts an individual condom wrapper labeled: “durex RAMSES 1 *PREMIUM* CONDOM LATEX”] (Exhibit B).

C. “IT’S TRUE. WOMEN WANT WHAT’S IN YOUR WALLET.

It's not the money they're after. It's the sensitivity. The natural feel. All that added strength* (30% more than the leading brand). An empty wallet can be a beautiful thing. **Ramses. A Trusted Companion.**

*Ramses regular strength condoms.”

[The advertisement depicts an individual condom wrapper labeled: “durex RAMSES 1 *PREMIUM* CONDOM LATEX”] (Exhibit C).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Ramses brand condoms are thirty percent stronger than the leading brand.

B. Ramses brand condoms break thirty percent less often than the leading brand.

6. 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.

7. 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. Respondent submitted inadequate data to substantiate its claim that Ramses brand condoms are thirty percent stronger than other condoms. Respondent also submitted inadequate substantiation for the claim that Ramses brand condoms break thirty percent less often than other condoms. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

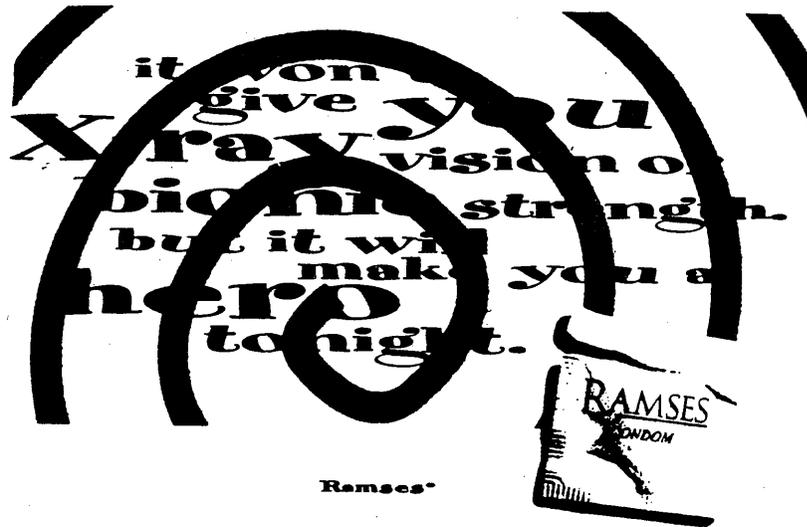
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

125 F.T.C.

EXHIBIT A

EXHIBIT A



it won't
 give you
 X-ray vision or
 bionic strength.
 but it will
 make you a
 hero
 tonight.

Ramses®

gives you the

sensitivity and natural

feeling you want. and because it's 30%

stronger than the leading brand, it performs like a

champ. so you can too. Ramses! a trusted companion.

EXHIBIT B

EXHIBIT B

**WOMEN
PREFER
STRONG
SENSITIVE
TYPE**

000065LI
9623004

Provides both strength and sensitivity with
a unique natural feel. And 30% more strength*
the leading brand. Now all you need to do is
smile to cry. Ramses. A Trusted Companion.

**Durex
RAMSES**

*Ramses regular
Distributed by L
Tampa, FL 3421

Complaint

125 F.T.C.

EXHIBIT C

EXHIBIT C

**WOMEN
WANT
WHAT'S IN
YOUR WALLET.**

It's not the money they're after. It's the sensitivity. The natural feel. All that added strength* (30% more than the leading brand). An empty wallet can be a beautiful thing. Ramses. A Trusted Companion.

000064LI
9623004

Ramses regular strength

Durex International, Inc., Sarasota, FL 34230-7413

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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 London International Group, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 3585 Engineering Drive, in the City of Norcross, State of Georgia.

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

ORDER

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, "*respondent*" shall mean London International Group, Inc., a corporation, its successors and assigns and its officers, 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 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 "Ramses" brand condoms or any other condom in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

- A. The comparative or quantifiable strength of any condom;
- B. The comparative or quantifiable risk of breakage of any condom; or
- C. The comparative or quantifiable efficacy of any condom,

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

Provided, that respondent shall not be deemed in violation of Part I of this order for any representation if the Food and Drug Administration has approved such representation pursuant to 21 U.S.C. 352 or 360. Provided, however, that clearance of a report submitted under 21 U.S.C. 360(k) ("pre-market notification") shall not be deemed an approval of a representation under this paragraph unless the Food and Drug Administration clears such representation based on its review and evaluation of substantiation submitted with such report.

II.

It is further ordered, That respondent London International Group, 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 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.

III.

It is further ordered, That respondent London International Group, 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. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent London International Group, 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.

V.

It is further ordered, That respondent London International Group, 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.

VI.

This order will terminate on April 7, 2018, 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
GUINNESS PLC, 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-3801. Complaint, April 17, 1998--Decision, April 17, 1998

This consent order requires, among other things, Guinness and Grand Met, producers and sellers of Dewar's Scotch, Bombay Original gin, and Bombay Sapphire gin brands, to divest, within six months of this order, certain assets to Commission approved buyers.

Appearances

For the Commission: *Joseph Brownman, Phillip Broyles and William Baer.*

For the respondents: *Ron Rolfe, Cravath, Swaine & Moore, New York, N.Y. and Bill Norfolk, Sullivan & Cromwell, 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, having reason to believe that Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18, and Guinness and Grand Met, having also merged into a successor corporation known as Diageo plc ("Diageo"), 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 GUINNESS PLC

1. Respondent Guinness was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Among other things, respondent Guinness, through United Distillers, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

3. Respondent Guinness had total sales, for all products, of about \$8 billion in 1996. Respondent Guinness' United States sales of all products totaled about \$645 million in 1996.

4. Respondent Guinness was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Guinness' premium Scotch brands in the United States were Johnnie Walker Red and Dewar's White Label. Respondent Guinness' premium gin brands in the United States were Tanqueray gin and Tanqueray Malacca gin.

5. Respondent Guinness was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT GRAND MET

6. Respondent Grand Met was, until on or about December 17, 1997, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

7. Among other things, respondent Grand Met, through International Distillers and Vintners, a wholly-owned subsidiary corporation, produced and sold Scotch from distilleries located in Scotland and gin from distilleries located in England.

8. Respondent Grand Met had total sales, for all products, of about \$14 billion in 1996. Respondent Grand Met's United States sales of all products totaled about \$8 billion in 1996.

9. Respondent Grand Met was, and at all times relevant herein has been, engaged in the sale and distribution of distilled spirits, including "premium Scotch" and "premium gin," in the United States. Respondent Grand Met's premium Scotch brands in the United States included J&B Rare, J&B Select, and The Famous Grouse. Respondent Grand Met's premium gin brands in the United States were Bombay Original and Bombay Sapphire.

10. Respondent Grand Met was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT DIAGEO

11. Respondent Diageo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

12. Respondent Diageo is the successor corporation to respondents Guinness and Grand Met.

13. Respondent Diageo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE MERGER

14. On or about May 11, 1997, respondents Guinness and Grand Met executed an agreement to merge their two companies. The value of the merger, measured by the aggregate market capitalization, was approximately \$36 billion.

15. On or about December 17, 1997, respondents Guinness and Grand Met merged their two corporations, creating respondent Diageo.

IV. TRADE AND COMMERCE

A. *Relevant Product Markets*

16. Relevant product markets in which it is appropriate to assess the effects of the proposed merger include (a) premium Scotch and (b) premium gin. Product markets broader than premium Scotch and premium gin may also exist. Total United States sales for premium Scotch are about 3.2 million 9-liter case equivalents, which represents over \$600 million in retail sales. Total United States sales of all premium gin is about 2.2 million 9-liter case equivalents, which represents over \$400 million in retail sales.

17. Premium Scotch is blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands.

18. Premium gin is gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands.

B. Relevant Geographic Markets

19. The relevant geographic market in which it is appropriate to assess the effects of the proposed merger is the United States.

C. Conditions of Entry

20. Entry into the relevant markets would not be timely, likely, or sufficient to prevent anticompetitive effects.

V. MARKET STRUCTURE

21. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm and four-firm concentration ratios. The proposed merger, if consummated, will substantially increase that concentration.

22. In the premium Scotch product market, respondent Guinness was the largest competitor in the United States with about a 68% share and respondent Grand Met was the second largest, with about a 24% share. Together, they would control approximately 92% of all United States premium Scotch sales. The proposed merger would increase the HHI by over 3000 points and produce an industry concentration of over 8000 points.

23. In the premium gin market, respondent Guinness was the largest competitor in the United States with about a 58% share and respondent Grand Met was the third largest, with about a 15% share. Together, they would control approximately 73% of all United States premium gin sales. The proposed merger would increase the HHI by over 1700 points and produce an industry concentration of over 6000 points.

VI. EFFECTS OF THE MERGER

24. The merger may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between Guinness and Grand Met;

(b) By increasing the likelihood that respondents will unilaterally exercise market power; and

(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction; each of which increases the likelihood that the prices of premium Scotch and premium gin will increase.

VII. VIOLATIONS CHARGED

25. The agreement entered into between respondents Guinness and Grand Met for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Further, the already consummated merger of Guinness and Grand Met is a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed merger between Guinness plc ("Guinness") and Grand Metropolitan plc ("Grand Met"), and Guinness and Grand Met, having merged into a successor corporation known as Diageo plc ("Diageo"), all sometimes referred to herein as "respondents," and 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 the Clayton Act and Federal Trade Commission Act;

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents, for purposes of this proceeding, 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment 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 Guinness plc was a corporation organized, existing, and doing business under and by virtue of the laws of the

United Kingdom with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE.

2. Respondent Grand Metropolitan plc was a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

3. Respondent Diageo plc is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over 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. "*Guinness*" means Guinness plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Guinness plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*Grand Met*" means Grand Metropolitan plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Grand Metropolitan plc, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Respondents*" means Guinness and Grand Met, individually and collectively, and their successor, Diageo.

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

E. "*Dewar's*" means "Dewar's," "Dewar's White Label," and any other brand of Scotch whisky that uses the name "Dewar's" in connection with Scotch whisky.

F. "*Bombay*" means "Bombay," "Sapphire," "Bombay Original," "Bombay Sapphire" and any other brand that uses the name "Bombay" in connection with gin.

G. "*Assets To Be Divested*" means:

1. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Guinness, anywhere in the world,

used in the manufacture, distribution, marketing, and sale of Scotch whisky under any trade name or trademark that incorporates the term Dewar's, including, without limitation (except that distilleries, distilling capacity, storage capacity, inventory, and cooperage services, are limited as specified in subparagraphs (i) - (k) below), the following:

- a. The trade name or trademark "Dewar's" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Dewar's" Scotch whisky;
- b. The Dewar's profit and loss statements, Dewar's contribution statements and Dewar's advertising, promotional, and marketing spend records;
- c. All Dewar's customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, blend specifications, formulas;
- d. All names of manufacturers and suppliers under contract with respondents who produce for, or supply to, respondents in connection with the manufacture or sale of Dewar's;
- e. Copies of all product testing required by any regulatory authority relating to Dewar's;
- f. All price lists for Dewar's;
- g. Molds currently in use for bottling Dewar's in its various sizes sufficient to produce 3 million 9-liter cases of Dewar's per year;
- h. All inventories of finished case goods and packaging relating to Dewar's;
- i. Sufficient distilling capacity to produce 3 million 9-liter cases of Dewar's per year, including the distillery located in Aberfeldy, Scotland;
- j. Sufficient inventory of aged, distilled malt and grain whisky and storage capacity to produce 3 million 9-liter cases of Dewar's White Label per year for seven (7) years, provided, however, that the acquirer may utilize such stocks solely for the purpose of producing Dewar's or for trading for other stocks to be used in producing Dewar's.
- k. Sufficient cooperage services to produce 3 million 9-liter cases of Dewar's per year;
- l. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Dewar's entered into in the ordinary course of business with customers (together with associated bid and performance bonds), other Scotch distillers, suppliers, sales

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

m. All rights under warranties and guarantees, express or implied, relating to Dewar's;

n. All books, records, and files, relating to Dewar's; and

2. All assets, properties, business and goodwill, tangible and intangible, owned or controlled by Grand Met, anywhere in the world, used in the manufacture, distribution, marketing, and sale of gin under any trade name or trademark that incorporates the term "Bombay," including, without limitation, the following:

a. The trade name or trademark "Bombay" and all trademarks, trade dress, trade names, and logos associated with the sale of any "Bombay" gin;

b. The Bombay profit and loss statements, Bombay contribution statements and Bombay advertising, promotional and marketing spend records;

c. All Bombay customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, blend specifications, formulas;

d. All names of manufacturers and suppliers under contract with respondents who produce for, or supply to, respondents in connection with the manufacture or sale of Bombay;

e. Copies of all product testing required by any regulatory authority relating to Bombay;

f. All price lists for Bombay;

g. Molds currently in use for bottling Bombay in its various sizes sufficient to produce 800,000 9-liter cases of Bombay per year;

h. All inventories of finished case goods and packaging relating to Bombay;

i. To the extent transferable or assignable, all rights, titles, and interests in and to the contracts relating to Bombay entered into in the ordinary course of business, including but not limited to the contract between Grand Met and Greenalls Group plc as relating to Bombay, with customers (together with associated bid and performance bonds), other distillers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

- j. All rights under warranties and guarantees, express or implied, relating to Bombay; and
- k. All books, records, and files, relating to Bombay.

H. "*Merger*" means the proposed merger of Grand Met and Guinness pursuant to the merger agreement dated May 11, 1997, leading to the creation of Diageo.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within six (6) months from the date the agreement containing consent order is signed by respondents, all of the Assets To Be Divested; with the assets described in paragraphs I.G.1 going to a single acquirer and the assets described in paragraphs I.G.2 also going to a single acquirer (who may be the same acquirer as the acquirer of the assets described in paragraph I.G.1),

1. Provided, however, that if the Commission, in its sole discretion, determines that the acquirer of any of the Assets To Be Divested does not require any or all of the distillery capacity, cooperage services, or inventory of or storage capacity for aged, distilled malt and grain whiskies referred to in paragraphs I.G.1(i) - (k) in order to fulfill the purposes of this order (including as a result of other arrangements made by the acquirer such as supply agreements with respondents or others as approved by the Commission), then respondents shall not be required to divest such assets,

2. Provided further, that to the extent that the Assets To Be Divested include ownership interests in distilled spirits distributors, respondents shall not be required by virtue of anything contained in this order to divest such ownership interests,

3. Provided further, that to the extent that any document or other material included within the Assets To Be Divested contains information concerning a brand other than Dewar's or Bombay, such other information need not be provided, and

4. Provided further, that if any document or other material included within the Assets To Be Divested is required to be retained by respondents by requirements of law, or for tax purposes or for defending products liability lawsuits, respondents may retain a copy of such material for use only for such purposes.

B. Respondents shall make best efforts to ensure the continued and uninterrupted supply of Bombay to the acquirer by its existing supplier, Greenalls Group plc ("Greenalls"), under the terms of the existing contract between Greenalls and Grand Met. In the event Greenalls does not agree to supply the acquirer under terms acceptable to the acquirer, to ensure the acquirer an uninterrupted supply of Bombay at supply levels consistent with the terms of the contract with Greenalls, at the request of the acquirer, respondents shall produce and bottle Bombay in England for the acquirer using the same production methods, type of equipment, and recipe as those used by Greenalls for the production of Bombay, through September 30, 2001, or such shorter or longer time period as respondents and the acquirer may mutually agree. Respondents shall charge the acquirer, for a period of twelve (12) months from the date of the divestiture, no more than the prices for Bombay charged by Greenalls as of the date the agreement containing consent order is signed. Thereafter, through September 30, 2001, respondents may charge the acquirer prices in accordance with the terms in the existing contract between Grand Met and Greenalls.

C. The purposes of the order are to remedy the lessening of competition resulting from the merger as alleged in the Commission's complaint, and to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are engaged at the time of the merger.

D. Respondents shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

E. Pending divestiture of the Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested, except for ordinary wear and tear.

F. Respondents shall comply with all 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 divested all the Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets to be Divested within six (6) months of the date respondents sign the agreement containing consent order, the Commission may appoint a trustee to divest the Assets To Be Divested. 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, 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 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 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 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 have the exclusive power and authority to divest the Assets To Be Divested.

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-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may 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 expeditiously the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Section II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities 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, 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 Assets To Be Divested.

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, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. 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 respondents shall, for a period of one year from the date of the divestiture pursuant to this order, or for such shorter period as the acquirer shall determine, make available, at no cost to the acquirer, such technical assistance and know-how as the acquirer shall require to enable the acquirer to produce Dewar's Scotch or Bombay gin according to current production processes and formulas.

V.

It is further ordered, That, 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 Sections II, III, and IV of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Sections II, III, and IV of this order. 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 Sections II, III, and IV of the order, including a description of all substantive contacts or negotiations for the 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, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request to counsel, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to counsel for respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents, who may have counsel present.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement is by and among Guinness plc ("Guinness"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 39 Portman Square, London, England W1H 0EE, Grand Metropolitan plc ("Grand Met"), a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1M 9AG, the successor of Guinness and Grand Met,

Diageo, and the Federal Trade 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 FOR AGREEMENT

Whereas, Guinness and Grand Met, pursuant to an agreement dated May 11, 1997, agreed to merge; and

Whereas, the Commission is now investigating the proposed merger to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that the merger contemplated by the agreement, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission; and

Whereas, if the parties accept the attached 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 purpose of this agreement and of the consent order is to preserve the Assets To Be Divested pending the divestiture to the acquirer approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the merger; and

Whereas, Guinness's and Grand Met's entering into this agreement shall in no way be construed as an admission by Guinness or Grand Met that the proposed merger is illegal; and

Whereas, 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, unless the Commission determines to reject the consent order, it will terminate Guinness' obligation to give twenty (20) days' notice to the Commission's staff prior to consummating the merger with Grand Met, the parties agree as follows:

TERMS OF AGREEMENT

1. Guinness and Grand Met agree to execute, and upon acceptance by the Commission of the Agreement Containing Consent

Order for public comment agree to be bound by, the attached Consent Order.

2. Unless the Commission brings an action to seek to enjoin the proposed merger 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 merger, Guinness and Grand Met will be free to close the merger after 11:59 p.m. on the date the Commission accepts the Consent Order for public comment.

3. Guinness and Grand Met agree that from the date this Agreement is accepted until the earliest 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. From the time Guinness and Grand Met sign this Agreement until the divestitures set out in the Consent Order have been completed, Guinness, Grand Met, and Diageo shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and the ability to compete at the same levels of sales, profitability, and market share as prior to the merger, subject to prevailing market conditions, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

5. Should the Federal Trade Commission seek in any proceeding to compel Guinness, Grand Met, or Diageo to divest themselves of the Assets To Be Divested or to seek any other injunctive or equitable relief, Guinness, Grand Met, and Diageo 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 merger. Guinness, Grand Met, and Diageo also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel for Guinness, Grand Met, and Diageo, the aforesaid Guinness, Grand Met, and Diageo

shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Guinness or Grand Met or Diageo, in the presence of counsel, to inspect any facility and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Guinness or Grand Met or Diageo relating to compliance with this Agreement; and

b. Upon five (5) days' notice to counsel for Guinness or Grand Met or Diageo and without restraint or interference from them, to interview officers or employees of Guinness, Grand Met, and Diageo, who may have counsel present, regarding any such matters.

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

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission accepts a consent order settling allegations that the merger of Guinness PLC and Grand Metropolitan PLC would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges as antitrust product markets: (1) "premium Scotch," which is defined as "blended Scotch whisky that is made and bottled in Scotland, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of the Johnnie Walker Red, Dewar's White Label, and J&B Rare brands," and (2) "premium gin," which is defined as "gin that is made and bottled in England, generally advertised, promoted, and available throughout the United States, and sold at retail at prices comparable to the prices of Tanqueray, Bombay Original, and Bombay Sapphire brands." I cannot support the complaint as written.

Although at first glance the markets may seem overly creative, if not gerrymandered, the complaint merits our careful attention. For reasons that are not apparent, the proposed product markets exclude brands not marketed throughout the United States, if there are any, that compete head to head with the national brands. By definition, the "premium gin" product market also excludes domestically bottled gin brands, if any, that are sold at prices comparable to Tanqueray and Bombay. I see no reason for these seemingly arbitrary exclusions.

More importantly, the price limitations in the product markets do not seem justifiable. As recognized in Commission precedent, competition occurs along a continuum of prices. In *Heublein, Inc.*, 96 FTC 385 (1980), for example, the Commission dismissed the complaint based on findings in an "all wine" market and the table, dessert and sparkling wine submarkets. As then Commissioner Pitofsky stated in the Heublein opinion, although the competitive offerings of the wine industry were not altogether homogeneous, "those diverse products nevertheless may 'appropriately be designated as a market' for antitrust analysis." 96 FTC at 576 quoting *Coca Cola Bottling Co. of New York, Inc.*, 93 FTC 110 (1979).

Despite my disagreement with the allegations in the complaint, I find reason to believe that the merger of Guinness PLC and Grand Metropolitan PLC would violate the law on the basis of a broader market and that an order to remedy the lessening of competition in the broader market would be appropriate. The divestiture of the Dewar's Scotch and Bombay gin brands will have some remedial effect in the broader market, and for that reason, I have voted to accept the order.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

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-3802. Complaint, April 20, 1998--Decision, April 20, 1998

This consent order requires, among other things, S.C. Johnson & Son, Inc., a Wisconsin-based manufacturer and seller of household cleaning products, to divest certain assets relating to stain and soil remover products and glass cleaner products it would gain in the acquisition of DowBrands.

Appearances

For the Commission: *Steven Bernstein, Yolanda Gruendel, Ann Malester and William Baer.*

For the respondent: *Mark Kovner, Kirkland & Ellis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, S.C. Johnson & Son, Inc. ("S.C. Johnson"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of the home care and home food management businesses of DowBrands Inc., DowBrands L.P. and DowBrands Canada Inc. (hereinafter collectively "DowBrands"), entities 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, 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. "*Soil and stain remover products*" means products that are designed to pretreat soiled and stained clothing prior to washing in order to aid in the cleaning of the soiled or stained area of the clothing.

2. "*Glass cleaner products*" means products that are designed primarily to clean glass and mirrors, but which may also be used to clean other surfaces.

II. RESPONDENT

3. Respondent S.C. Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 1525 Howe Street, Racine, Wisconsin.

4. Respondent is engaged in, among other things, the manufacture and sale of soil and stain remover products and glass cleaner products.

5. 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.

III. THE ACQUIRED COMPANY

6. DowBrands Inc. 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 9550 Zionsville Road, Indianapolis, Indiana. DowBrands L.P. is a limited partnership 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 2030 Dow Center, Midland, Michigan. DowBrands Canada Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 250 6th Avenue S.W., Suite 2200, Calgary, Alberta T2P 3H7.

7. DowBrands is engaged in, among other things, the manufacture and sale of soil and stain remover products and glass cleaner products.

8. DowBrands 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

9. On October 27, 1997, S.C. Johnson entered into Asset Purchase Agreements with DowBrands to acquire certain assets of DowBrands' home care and home food management businesses for approximately \$1.125 billion ("Acquisition").

V. THE RELEVANT MARKETS

10. 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 soil and stain remover products; and
- (b) The research, development, manufacture and sale of glass cleaner products.

11. 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 lines of commerce.

VI. STRUCTURE OF THE MARKETS

12. The market for the research, development, manufacture and sale of soil and stain remover products is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post-merger HHI is 5,646 points, which is an increase of 2,730 points over the premerger HHI level. S.C. Johnson and DowBrands are the two leading suppliers of soil and stain remover products in the United States.

13. S.C. Johnson and DowBrands are actual competitors in the relevant market for the research, development, manufacture and sale of soil and stain remover products in the United States.

14. The market for the research, development, manufacture and sale of glass cleaner products is highly concentrated as measured by the HHI. The post-merger HHI is 4,920 points, which is an increase of 1,180 points over the premerger HHI level. S.C. Johnson and DowBrands are the two leading suppliers of glass cleaner products in the United States.

15. S.C. Johnson and DowBrands are actual competitors in the relevant market for the research, development, manufacture and sale of glass cleaner products in the United States.

VII. BARRIERS TO ENTRY

16. Entry into either the market for the research, development, manufacture and sale of soil and stain remover products or the market for the research, development, manufacture and sale of glass cleaner products is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph seventeen because of, among other things, the difficulty of developing a new product, gaining brand name recognition and customer acceptance, and establishing a network of retail distributors.

VIII. EFFECTS OF THE ACQUISITION

17. The effects of the Acquisition, if consummated, 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 FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) By eliminating actual, direct, and substantial competition between S.C. Johnson and DowBrands in the relevant markets;
- (b) By increasing the likelihood that S.C. Johnson will unilaterally exercise market power in the relevant markets;
- (c) By increasing the likelihood that customers of soil and stain remover products and glass cleaner products would be forced to pay higher prices;
- (d) By reducing innovation in the relevant markets; and
- (e) By reducing the level of advertising and promotion of soil and stain remover products and glass cleaner products.

IX. VIOLATIONS CHARGED

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

19. The Acquisition described in paragraph nine, 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.

Commissioner Azcuenaga not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets of the home care and home food management businesses of DowBrands Inc., DowBrands L.P. and DowBrands Canada Inc. (hereinafter collectively "DowBrands"), 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 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 agreement containing consent order 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 S.C. Johnson & Son, Inc. ("S.C. Johnson") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 1525 Howe Street, Racine, Wisconsin.

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 "*S.C. Johnson*" means S.C. Johnson & Son, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by S.C. Johnson & Son, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*DowBrands*" means DowBrands Inc., 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 9550 Zionsville Road, Indianapolis, Indiana; DowBrands L.P., a limited partnership 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 2030 Dow Center, Midland, Michigan; and DowBrands Canada Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 250 6th Avenue, S.W., Suite 2200, Calgary, Alberta T2P 3H7.

C. "*Reckitt & Colman*" means Reckitt & Colman, Inc., 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 1655 Valley Road, Wayne, New Jersey.

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

E. "*Acquisition*" means the acquisition of DowBrands' Home Care and Home Food Management Businesses by S.C. Johnson pursuant to Asset Purchase Agreements dated as of October 27, 1997.

F. "*Acquirer*" means Reckitt & Colman or the entity to whom S.C. Johnson shall divest the Divested Assets.

G. "*Soil and stain remover products*" means products designed to pretreat soiled and stained clothing prior to washing, which are applied by aerosol spray, trigger spray, or in liquid, solid, gel, or any other form.

H. "*Glass cleaner products*" means products designed primarily to clean glass and mirrors (but which may also be used to clean other surfaces), which are applied by trigger spray or in liquid or any other form. "Glass cleaner products" shall not include products characterized as all-purpose or multi-purpose cleaners, including, but not limited to, "Fantastik."

I. "*Starch products*" means products designed to starch clothing, which are applied by trigger spray or in any other form.

J. "*Laundry detergent products*" means products designed to be added to water in a washing machine to clean laundry, which are applied in liquid, powder or any other form.

K. "*Oven cleaner products*" means products designed to clean ovens, which are applied in aerosol spray or any other form.

L. "*Urbana facility*" means the facility located in Urbana, Ohio, where DowBrands manufactured, among other things, soil and stain remover products and glass cleaner products.

M. "*Divested Assets*" means the assets required to be divested pursuant to paragraphs II or III of this order.

N. "*Divestiture Agreement*" means the agreement for the sale of the Divested Assets to Reckitt & Colman, dated December 22, 1997; Amendment No. 1 to the agreement for the sale of the Divested

Assets to Reckitt & Colman, dated January 12, 1998; and the contract manufacturing agreement dated January 12, 1998 by and between S.C. Johnson and Reckitt & Colman.

O. "*New Divestiture Agreement*" means any agreement other than the Divestiture Agreement for the sale of the Divested Assets between S.C. Johnson and any Acquirer.

P. "*Supply agreement*" means an agreement between S.C. Johnson and the Acquirer to supply the soil and stain remover products, glass cleaner products, and starch products acquired by S.C. Johnson from DowBrands, under the terms and conditions herein specified.

Q. "*Cost*" means direct cash cost of raw materials, packaging and labor.

R. "*Non-public acquirer information*" means any information not in the public domain obtained by respondent directly or indirectly from the Acquirer prior to the effective date, or during the term, of the supply agreement required by paragraph II of this order. Non-public acquirer information shall not include information that subsequently falls within the public domain through no violation of this order by respondent.

II.

It is further ordered, That:

A. Respondent shall divest absolutely and in good faith, either:

1. Pursuant to the Divestiture Agreement the assets described in Part I of Exhibit A of this order to Reckitt & Colman within ten (10) business days after the date the Commission accepts this agreement containing consent order for public comment, provided, however, that respondent shall not be required to divest any assets pursuant to this paragraph II.A.1 that are not conveyed under the Divestiture Agreement, and provided further, however, that if, at the time it determines to make the order final, the Commission notifies respondent that Reckitt & Colman is not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then respondent and Reckitt & Colman shall rescind the Divestiture Agreement, and respondent shall divest the Divested Assets pursuant to paragraph II.A.2 of this order within one hundred twenty (120) days of the date the order becomes final; or

2. The assets described in Part I of Exhibit A of this order and, at the option of the Acquirer, any or all of the assets described in Part II of Exhibit A of this order, to an Acquirer within six (6) months after the date on which respondent signed the agreement containing

consent order in this matter. Respondent shall divest these assets pursuant to paragraph II.A.2 of this order only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Except for a divestiture pursuant to paragraph II.A.1 of this order, respondent shall divest the Divested Assets pursuant to a New Divestiture Agreement that, at the Acquirer's option, shall include the following and respondent shall commit to satisfy the following:

1. Respondent shall supply and deliver to the Acquirer in a timely manner and under reasonable terms and conditions, up to a twelve (12) month supply of DowBrands' soil and stain remover products, glass cleaner products, and starch products specified in the New Divestiture Agreement, at cost, in quantities not to exceed 110 percent of DowBrands' 1998 production forecast.

2. After respondent commences delivery of the soil and stain remover products, glass cleaner products, and starch products to the Acquirer, all U.S. and world wide inventory of the soil and stain remover products, glass cleaner products, and starch products acquired by respondent from DowBrands pursuant to the Acquisition may be sold by respondent only to the Acquirer.

3. Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses arising from the manufacture of the soil and stain remover products, glass cleaner products, and starch products supplied to the Acquirer by respondent pursuant to the supply agreement. This obligation shall be contingent upon the Acquirer's giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent 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 respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by respondent to the Acquirer.

4. For a period not to exceed eighteen (18) months from the date respondent begins delivery of DowBrands products pursuant to paragraph II.C.1 of this order, upon reasonable notice and request by the Acquirer, respondent shall make available to the Acquirer all records kept in the normal course of business that relate to the cost of manufacturing or supplying the soil and stain remover products, glass cleaner products, and starch products acquired by respondent from DowBrands.

5. Upon reasonable notice and request by the Acquirer, for a period not to exceed six (6) months from the date the New Divestiture Agreement is signed, upon reasonable notice and request by the Acquirer, respondent shall provide at cost: (a) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to manufacture the soil and stain remover products, glass cleaner products, and starch products in substantially the same manner and quality employed or achieved by DowBrands at the time the agreement containing consent order is signed; and (b) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary Environmental Protection Agency approvals to manufacture and sell soil and stain remover products, glass cleaner products, and starch products in the United States.

D. Respondent shall not provide, disclose or otherwise make available to any of its employees any non-public acquirer information nor shall respondent use any non-public acquirer information obtained or derived by respondent in its capacity as supplier pursuant to the supply agreement, except for the sole purpose of supplying products pursuant to the supply agreement.

E. Pending divestiture of the Divested Assets, respondent shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith the Divested Assets pursuant to paragraph II.A of this order or fails to enter into a supply agreement (if such supply agreement is requested by the Acquirer), the Commission may appoint a trustee to divest the assets described in Part I of Exhibit A of this order and, at the option of the Acquirer, any or all of the assets described in Part II of Exhibit

A of this order, and enter into a supply agreement. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestiture described in paragraph III.A of the order.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph 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 for the divestiture required by this order or believes that the divestiture required by this order can be achieved within a reasonable time, then that 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 period for the divestiture only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner consistent with the terms of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, 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 respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's accomplishing the divestiture required by paragraph III.A of this order.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any

claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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 may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

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

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondent has completed the divestiture of the Divested Assets and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestiture.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate

respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VI.

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

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

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

Commissioner Azcuenaga not participating.

EXHIBIT A

Part I

(a) All of DowBrands' rights, title, and interest acquired by respondent from DowBrands pursuant to the Acquisition, in and to:

(1) Soil and stain remover products, including, but not limited to, the brands and trademarks "Spray 'n Wash," "Spray 'n Wash Gel," "Spray 'n Wash for White Laundry," "Spray 'n Wash Stain Stick," and "Thicker More Powerful Spray 'n Wash";

(2) Glass cleaner products, including, but not limited to, the brands and trademarks "Glass Plus" and "New Fresh Scent Glass Plus"; and

(3) Starch products, including, but not limited to, the brand and trademark "Spray 'n Starch."

(b) All of DowBrands' rights, title, and interest, acquired by respondent from DowBrands pursuant to the Acquisition, in the following assets and businesses, relating to the research, development, manufacture, sale, and distribution of soil and stain remover products, glass cleaner products, and starch products

("Exhibit A Part I Products"), including, without limitation, the following:

(1) All customer lists, vendor lists, catalogs, sales and promotion literature, advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, artwork, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and formulas, copyrights, trademarks, and trade names, but excluding all Universal Product Codes or similar bar codes relating to the Exhibit A Part I Products, provided, however, that respondent may retain for a period not to exceed six (6) months from the date of the Acquisition a non-exclusive royalty free right to the molds used in the production of both Divested Assets and non-divested assets, as well as the patents listed on Exhibit B, and provided further, however, that respondent may retain for perpetuity co-exclusive royalty free rights to use the trademark "We Work Hard So You Don't Have To" in connection with any products owned by respondent;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers, suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, licensors, licensees, consignors, and consignees, but excluding all accounts and notes receivable of respondent;

(4) All rights under warranties and guarantees, express or implied;

(5) All books, records, files, and supporting documents; and

(6) All Environmental Protection Agency ("EPA"), and all other federal and state regulatory agency, registrations and applications, and all documents related thereto, provided, however, that with respect to EPA pesticide registration number 3696-138, respondent need only provide the Acquirer with the information and data on the specific alternative formulation relating to the Divested Assets that is transferred.

Part II

(a) All of DowBrands' rights, title, and interest acquired by respondent from DowBrands pursuant to the Acquisition, in and to the Urbana Facility, including, but not limited to, all machinery,

fixtures, equipment, vehicles, furniture, tools and all other tangible personal property.

(b) All of DowBrands' rights, title, and interest acquired by respondent from DowBrands pursuant to the Acquisition, in and to:

(1) Laundry detergent products, including, but not limited to, the brands and trademarks, "Yes," "Ultra Yes," and "Ultra Vivid Color Care"; and

(2) Oven cleaner products, including, but not limited to, the brand and trademark, "Heavy Duty Oven Cleaner."

(c) All of DowBrands' rights, title, and interest, acquired by respondent from DowBrands pursuant to the Acquisition, in the following assets and businesses, relating to the research, development, manufacture, sale, and distribution of laundry detergent products and oven cleaner products ("Exhibit A Part II Products"), including, without limitation, the following:

(1) All customer lists, vendor lists, catalogs, sales and promotion literature, advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, artwork, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and formulas, copyrights, trademarks, and trade names, but excluding all Universal Product Codes or similar bar codes relating to the Exhibit A Part II Products, provided, however, that respondent may retain for a period not to exceed six (6) months from the date of the Acquisition a non-exclusive royalty free right to the molds used in the production of both Divested Assets and non-divested assets, as well as the patents listed on Exhibit B, and provided further, however, that respondent may retain for perpetuity co-exclusive royalty free rights to use the trademark "We Work Hard So You Don't Have To" in connection with any products owned by respondent;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers, suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, licensors, licensees, consignors, and consignees, but excluding all accounts and notes receivable of respondent;

(4) All rights under warranties and guarantees, express or implied;

(5) All books, records, files, and supporting documents; and

(6) All EPA, and all other federal and state regulatory agency, registrations and applications, and all documents related thereto, provided, however, that with respect to EPA pesticide registration number 3696-138, respondent need only provide the Acquirer with the information and data on the specific alternative formulation relating to the Divested Assets that is transferred.

EXHIBIT B

Country/ Case No.	Patent No.	Issue Date	Inventors	Title
United States 41251	352,546	11/15/94	S.A. Silvenis, J.A. Zurcher, J.L. Ghighi	SPRAYER SHROUD
MX 41251	7944	8/30/95	S.A. Silvenis, J.A. Zurcher, J.L. Ghighi	SPRAYER SHROUD
CA 41251	77464	11/2/95	S.A. Silvenis, J.A. Zurcher, J.L. Ghighi	SPRAYER SHROUD
United States 41386	358,990 (design)	6/6/95	D.C. Wilson, K.M. Stockwell, W.J. Britt	UPPER PORTION OF A BOTTLE
CA 41386	79419	11/15/96	D.C. Wilson, K.M. Stockwell, W.J. Britt	UPPER PORTION OF A BOTTLE
MX 41386	7877	7/25/95	D.C. Wilson, K.M. Stockwell, W.J. Britt	UPPER PORTION OF A BOTTLE

IN THE MATTER OF

SHELL OIL COMPANY, 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-3803. Complaint, April 21, 1998--Decision, April 21, 1998

This consent order requires, among other things, the two petroleum corporations to divest, to Commission-approved buyers, a package of assets, including a refinery, a terminal and certain retail gasoline stations.

Appearances

For the Commission: *Richard Liebeskind, Frank Lipson, Arthur Nolan, Phillip Broyles and William Baer.*

For the respondents: *Steven Newborn, Rogers & Wells, Washington, D.C. and Marc Schildkraut and Tim Boyle, Howrey & Simon, Washington, D.C.*

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 respondent Shell Oil Co. ("Shell"), a corporation, and respondent Texaco Inc. ("Texaco"), a corporation, both subject to the jurisdiction of the Commission, have entered into an agreement or agreements (or may enter into an agreement or agreements), with themselves and with others, 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, to form a limited liability corporation ("LLC") or LLCs and to transfer to said LLCs the corporations, businesses, and assets that constitute the principal part of the petroleum refining and marketing businesses of Shell, Texaco, and their affiliates in the United States, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

SHELL OIL COMPANY

1. Respondent Shell Oil Co. 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 One Shell Plaza, Houston, Texas.

2. Respondent Shell is, and at all times relevant herein has been, engaged in the business of refining, transporting, and marketing petroleum products, including gasoline, diesel fuel, jet fuel, and asphalt, in the United States. Among other places, Shell has refined or marketed petroleum products in the States of Alabama, Arizona, California, Georgia, Hawaii, Louisiana, Mississippi, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington and in the District of Columbia.

3. Respondent Shell 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.

TEXACO INC.

4. Respondent Texaco 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 2000 Westchester Avenue, White Plains, New York.

5. Respondent Texaco is, and at all times relevant herein has been, engaged in the business of transporting crude oil and refining, transporting, and marketing petroleum products, including gasoline, diesel fuel, jet fuel, and asphalt, in the United States. Texaco and Saudi Refining Co. ("Saudi Refining") jointly control Star Enterprises, Inc. ("Star"). Star is, and at all times relevant herein has been, engaged in the business of refining and marketing petroleum products, including gasoline, diesel fuel, jet fuel, and asphalt, in the United States. Among other places, Texaco or Star has refined or marketed petroleum products in the States of Alabama, Arizona, California, Georgia, Hawaii, Louisiana, Mississippi, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington and in the District of Columbia.

6. Respondent Texaco 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.

THE JOINT VENTURES

7. In October 1996, Shell and Texaco announced that they were considering forming a joint venture or ventures to combine their "downstream," or refining, transportation, and marketing, businesses in the United States. On or about March 18, 1997, Shell and Texaco entered into a Memorandum of Understanding regarding the formation of a joint venture to be known as "Westco." Westco was to be organized as an LLC into which Shell and Texaco would contribute their refining and marketing assets located in the midwestern and western United States (roughly corresponding with Petroleum Administration for Defense Districts ("PADDs") II, IV, and V). Shell and Texaco would also contribute to Westco their pipeline interests and businesses nationwide.

8. On or about July 16, 1997, Shell, Texaco, and Saudi Refining entered into a Memorandum of Understanding regarding the formation of a joint venture to be known as "Eastco." Eastco was to be organized as an LLC into which Shell and Star would contribute their refining and marketing assets located in the Gulf Coast and eastern United States (roughly corresponding with PADDs I and III). The total value of the businesses to be contributed to both Westco and Eastco is more than \$10 billion.

9. The Westco and Eastco joint ventures, and any other combination of the petroleum refining, transportation, or marketing businesses, operations, or assets of Shell, Texaco, and Star, are referred to herein as the "Joint Venture."

TRADE AND COMMERCE

10. The relevant lines of commerce (*i.e.*, the product markets) in which to analyze the effects of the Joint Venture are the refining, transportation, terminaling, wholesale sales, and retail sales of conventional unleaded gasoline, CARB-II gasoline ("CARB gasoline") (*i.e.*, gasoline that meets the specifications of "CARB," the California Air Resources Board), diesel fuel, kerosene jet fuel (also known as "kerojet"), and asphalt; and the transportation of undiluted heavy crude oil to the San Francisco, California, area.

11. Conventional unleaded gasoline is a motor fuel used in automobiles. Conventional unleaded gasoline is manufactured from crude oil at refineries in the United States and throughout the world. There are no substitutes for gasoline as fuel for automobiles and other vehicles that use gasoline.

12. CARB gasoline is a motor fuel used in automobiles. CARB gasoline is cleaner burning and therefore causes less air pollution than other gasolines. Beginning in June 1996, the State of California

has prohibited the sale or use of any gasoline other than CARB gasoline in that State. CARB gasoline is generally manufactured from crude oil only at refineries in California and at Shell's refinery at Anacortes, Washington. There are no substitutes for gasoline sold in California as fuel for automobiles and other vehicles that use gasoline.

13. Kerosene jet fuel is a motor fuel used in jet airplanes, and is manufactured from crude oil at refineries in the United States and throughout the world. There are no substitutes for kerosene jet fuel as fuel for jet airplanes.

14. Asphalt is a paving material made from crude oil. There are no economic substitutes for asphalt.

15. The Texaco heated pipeline is the only pipeline that supplies undiluted heavy crude oil to the San Francisco Bay area. Shell and a competitor refine asphalt in the San Francisco Bay area. For the competitor, there are no economic substitutes for undiluted heavy crude oil in refining asphalt.

16. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the Joint Venture described herein are the following:

a. The Puget Sound area of Washington State ("Puget Sound"), *i.e.*, the cities of Seattle, Tacoma, Olympia, and Bremerton and surrounding areas, where the Joint Venture will reduce competition in the markets for conventional gasoline and kerosene jet fuel, as alleged below;

b. The Pacific Northwest, *i.e.*, the States of Washington and Oregon west of the Cascades Mountains, where the Joint Venture will reduce competition in the markets for conventional gasoline and kerosene jet fuel, as alleged below;

c. The State of California, where the Joint Venture will reduce competition in the market for CARB gasoline, as alleged below;

d. The northern portion of the State of California, *i.e.*, the State of California approximately north of Fresno, where the Joint Venture will reduce competition in the market for asphalt, as alleged below;

e. The San Francisco Bay area, where the Joint Venture will have the incentive and ability to raise the cost of undiluted heavy crude oil, as alleged below;

f. The inland portions of the States of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, and Tennessee (*i.e.*, the portions more than 50 miles from the ports of Savannah, Charleston, Wilmington, and Norfolk) (the "inland Southeast"),

where the Joint Venture will reduce competition in the market for transportation of refined light petroleum products, as alleged below;

g. San Diego County, California, where the Joint Venture will reduce competition in the market for CARB gasoline, as alleged below; and

h. The island of Oahu, Hawaii, where the Joint Venture will reduce competition in the market for conventional gasoline and diesel fuel, as alleged below.

MARKET STRUCTURE

17. The refining of conventional gasoline and kerosene jet fuel for Puget Sound and the Pacific Northwest is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios. The Joint Venture would significantly increase the HHIs in each of these already highly concentrated markets.

18. The refining of CARB gasoline for California is moderately concentrated, whether measured by the HHI or by four-firm concentration ratios. The Joint Venture would significantly increase the HHIs in this already moderately concentrated market.

19. Texaco is the only entity that supplies undiluted heavy crude oil by pipeline to refiners in the San Francisco Bay area. Texaco's pipeline from the San Joaquin Valley to the San Francisco Bay area is a heated pipeline. A heated crude oil pipeline can transport heavy crude oils without diluting them with lighter petroleum materials.

20. The transportation of refined light petroleum products, including gasoline, diesel fuel, and jet fuel, to the inland Southeast is highly concentrated, whether measured by the HHI or by four-firm concentration ratios. The Joint Venture would significantly increase the risk of coordinated behavior between Colonial Pipeline Co. ("Colonial") and Plantation Pipe Line Co. ("Plantation"), as alleged below.

21. The wholesale and retail markets for CARB gasoline in San Diego County, California, are currently moderately concentrated, whether measured by the HHI or by four-firm concentration ratios. The Joint Venture would significantly increase the HHIs and result in highly concentrated markets.

22. The terminaling, wholesale, and retail markets for gasoline and diesel fuel on Oahu, Hawaii, are highly concentrated, whether measured by the HHI or by four-firm concentration ratios. The Joint Venture would significantly increase the HHIs in each of these already highly concentrated markets.

ENTRY CONDITIONS

23. Entry into the relevant markets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

FIRST VIOLATION CHARGED

24. Shell and Texaco are actual competitors in the refining of conventional gasoline and kerosene jet fuel in Puget Sound.

25. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the refining of conventional gasoline and kerosene jet fuel in Puget Sound, 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. By eliminating direct competition in conventional gasoline and kerosene jet fuel between refineries owned or controlled by Shell and Texaco;
- b. By increasing the likelihood that the combination of Shell and Texaco will unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Shell and Texaco and their competitors in Puget Sound;

each of which increases the likelihood that the prices of gasoline and kerosene jet fuel will increase in Puget Sound.

SECOND VIOLATION CHARGED

26. Shell and Texaco are actual competitors in the refining of conventional gasoline and kerosene jet fuel in the Pacific Northwest.

27. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the refining of conventional gasoline and kerosene jet fuel in the Pacific Northwest, 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. By eliminating direct competition in conventional gasoline and kerosene jet fuel between refineries owned or controlled by Shell and Texaco;
- b. By increasing the likelihood that the combination of Shell and Texaco will unilaterally exercise market power; and

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Shell and Texaco and their competitors in the Pacific Northwest;

each of which increases the likelihood that the prices of gasoline and kerosene jet fuel will increase in the Pacific Northwest.

THIRD VIOLATION CHARGED

28. Shell and Texaco are actual competitors in the refining of CARB gasoline in California.

29. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the refining of CARB gasoline in California, 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. By eliminating direct competition in CARB gasoline between refineries owned or controlled by Shell and Texaco;

b. By increasing the likelihood that the combination of Shell and Texaco will unilaterally exercise market power; and

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Shell and Texaco and their competitors in California;

each of which increases the likelihood that the price of CARB gasoline will increase in California.

FOURTH VIOLATION CHARGED

30. Shell is the leading refiner of asphalt in northern California. Texaco is the only entity that supplies undiluted heavy crude oil by pipeline to the San Francisco Bay area, the location of all refineries in northern California.

31. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the refining of asphalt in northern California, 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. By providing the combination of Shell and Texaco with the incentive and ability to raise the cost of undiluted heavy crude oil by pipeline to the competing refiner of asphalt in the San Francisco Bay area; and

b. By reducing competition between Shell and its competitors in the sales of asphalt in northern California;

each of which increases the likelihood that the price of asphalt in northern California will increase.

FIFTH VIOLATION CHARGED

32. Texaco owns approximately 14% of Colonial, and Shell owns approximately 24% of Plantation. Colonial and Plantation are actual competitors in the transportation of refined light petroleum products to the inland Southeast.

33. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the transportation of refined light petroleum products to the inland Southeast, 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. By eliminating direct competition between Colonial and Plantation in the transportation of refined light petroleum products to the inland Southeast;

b. By providing Shell and Texaco with access to sensitive competitive information of both Colonial and Plantation; and

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between Colonial and Plantation, or between the owners of each;

each of which increases the likelihood that the prices of refined light petroleum products (including gasoline, diesel fuel, and kerosene jet fuel) will increase in the inland Southeast.

SIXTH VIOLATION CHARGED

34. Shell and Texaco are actual competitors in the wholesale and retail sales of CARB gasoline in San Diego County, California.

35. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the wholesale and retail sales of CARB gasoline in San Diego County, California, 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. By eliminating direct competition in the wholesale and retail sales of CARB gasoline; and

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Shell and Texaco and their competitors in San Diego County, California;

each of which increases the likelihood that the price of CARB gasoline will increase in San Diego County, California.

SEVENTH VIOLATION CHARGED

36. Shell and Texaco are actual competitors in the terminaling and wholesale and retail sales of gasoline and diesel fuel on Oahu, Hawaii.

37. The effect of the Joint Venture, if consummated, may be substantially to lessen competition in the terminaling and wholesale and retail sales of gasoline and diesel fuel on Oahu, Hawaii, 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. By eliminating direct competition in the terminaling and wholesale and retail sales of gasoline and diesel fuel; and

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Shell and Texaco and their competitors on Oahu, Hawaii;

each of which increases the likelihood that the prices of gasoline and diesel fuel will increase on Oahu, Hawaii.

STATUTES VIOLATED

38. The proposed Joint Venture between Shell and Texaco 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.

Commissioner Thompson not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed joint ventures of Shell Oil Co. ("Shell") and Texaco Inc. ("Texaco"), and it now appearing that Shell and Texaco, hereinafter sometimes referred to as "respondents," have been furnished 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 respondents with violations of the Clayton Act and the Federal Trade Commission Act;

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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments 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 Shell Oil Company 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 One Shell Plaza, Houston, Texas.

2. Respondent Texaco 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 2000 Westchester Ave., White Plains, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over 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. "*Shell*" means Shell Oil Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures (including the Joint Venture), subsidiaries, divisions, groups and affiliates controlled by Shell, and the respective

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

B. "*Texaco*" means Texaco Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures (including the Joint Venture), subsidiaries, divisions, groups and affiliates controlled by Texaco, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Additional Shell Oahu Retail Assets*" means one or more Retail Sites (including all Retail Assets relating to such Retail Sites) on Oahu owned by Shell having an aggregate 1996 gasoline sales volume and 1996 average gasoline sales volumes per month per station at least equal to the gasoline volume of:

(a) Texaco Historical Oahu Retail Assets that since October 1, 1996, became Shell Oahu Retail Assets; and

(b) Each of Texaco's Oahu Retail Sites that cannot be assigned without landlord approval and for which the necessary approvals could not be obtained after good faith, diligent effort.

D. "*Additional Texaco Oahu Retail Assets*" means one or more Retail Sites (including all Retail Assets relating to such Retail Sites) on Oahu owned by Texaco having an aggregate 1996 gasoline sales volume and 1996 average gasoline sales volumes per month per station at least equal to the gasoline sales volume of:

(a) Shell Historical Oahu Retail Assets that since October 1, 1996, became Texaco Oahu Retail Assets; and

(b) Each of Shell's Oahu Retail Sites that cannot be assigned without landlord approval and for which the necessary approvals could not be obtained after good faith, diligent effort.

E. "*Anacortes Refinery Assets*" means Shell's refinery located in Anacortes, Washington, and all tangible and intangible assets used in operating said refinery. "Anacortes Refinery Assets" shall also include all Assigned Northwest Seller Agreements and, at the acquirer's option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output, provided, however, that respondents are not required to divest agreements with Northwest Branded Sellers other than Assigned Northwest Seller Agreements, and provided, further, that "Anacortes Refinery Assets" does not include Shell's proprietary trade names and trademarks. At the acquirer's option, "Anacortes Refinery Assets" shall include all agreements under

which Shell receives crude oil or other inputs at or for the Anacortes refinery, and all exchange agreements under which Shell delivers petroleum products refined at the Anacortes refinery. In the event that respondents are unable to satisfy all conditions necessary to divest any intangible asset, subject to Commission approval, respondents shall substitute equivalent assets. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or less cost.

F. "*Applicable Consent Decree*" means (i) a consent decree in an action commenced by the States of Washington or Oregon, under which decree respondents will divest the Anacortes Refinery Assets; (ii) a consent decree in an action commenced by the State of California, under which decree respondents will divest the San Diego Divestiture Assets; or (iii) a consent decree in an action commenced by the State of Hawaii under which respondents will divest the Oahu Distribution Assets.

G. "*Assigned Northwest Seller Agreements*" means all Replacement Supply Contracts between respondents and any Northwest Branded Seller, which a Northwest Branded Seller has consented to be assigned and respondents have assigned to the acquirer of the Anacortes Refinery Assets.

H. "*Colonial*" means Colonial Pipeline Company.

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

J. "*Existing Supply Agreements*" means:

1. Each supply contract and related agreements between Shell and each Northwest Branded Seller that gives such Northwest Branded Seller the right to sell or resell gasoline using Shell's brand name at any Retail Site in Oregon or Washington, including all loan agreements, debts, obligations, promissory notes, and similar agreements with such Northwest Branded Seller; and

2. Each supply contract and related agreements between Texaco and each Former Shell Northwest Branded Seller that gives such Former Shell Northwest Branded Seller the right to sell or resell gasoline using Texaco's brand name at any Retail Site in Oregon or Washington that was a Shell branded Retail Site on or after October 1, 1996, including all loan agreements, debts, obligations, promissory notes, and similar agreements with such Former Shell Northwest Branded Seller.

K. "*Former Shell Northwest Branded Seller*" means any person that was a Shell Northwest Branded Seller as of October 1, 1996, and that, on the date of divestiture of the Anacortes Refinery Assets, has,

by virtue of a contract or agreement with Texaco, the right to sell or resell gasoline using Texaco's brand name at Retail Sites in Oregon or Washington, or to resell gasoline to such a person.

L. "*Huntway*" means Huntway Refining Company, with offices located at 1651 Alameda Street, Wilmington, California, and any of its successors or assigns that continue the operation of Huntway's asphalt refinery at Benicia, California.

M. "*Huntway Supply Agreement*" means the agreement or agreements between Huntway and Texaco pursuant to which Texaco will supply heavy crude oil to Huntway from the San Joaquin Valley, dated November 25, 1997, and attached hereto as Confidential Exhibit A. Subject to the provisions of paragraph VII.C of this order, Huntway and Texaco may from time to time amend the Huntway Supply Agreement.

N. "*Joint Venture*" means the joint venture between Shell and Texaco known as "Westco" (publicly announced on March 18, 1997, and described in a Memorandum of Understanding of the same date); the joint venture among Shell, Texaco and Saudi Refining, Inc. known as "Eastco" (publicly announced July 16, 1997, and described in a Memorandum of Understanding of the same date); and any other combination of the United States petroleum refining, product transportation, or marketing assets or operations of respondents, and all of their directors, officers, employees, agents and representatives, successors, and assigns; subsidiaries, divisions, groups and affiliates, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

O. "*Long-term lease*" means a lease the terms of which allow respondents to divest to the acquirer of Retail Assets a right to occupy the Retail Assets for ten (10) years or longer from the date on which the order becomes final, and where such divestiture is not subject to a landlord approval or, if subject to such approval, respondents have obtained the necessary approval prior to the divestiture. "Long-term lease" does not include a leasehold interest in which any respondent is a lessor.

P. "*Northwest Branded Seller*" means Shell Northwest Branded Sellers and Former Shell Northwest Branded Sellers.

Q. "*Oahu Distribution Assets*" means either the Shell Oahu Distribution Assets or the Texaco Oahu Distribution Assets.

R. "*Person*" means any individual, partnership, association, company or corporation.

S. "*Plantation*" means Plantation Pipe Line Company.

T. "*Replacement Supply Contract*" means a supply contract and related agreements identical to Existing Supply Agreements between

respondents and any Northwest Branded Seller, except for terms relating to respondents' trademarks, trade names, logos, trade dress, identification signs, additized product inventory, credit card agreements, satellite-based or centralized credit card processing equipment not incorporated in gasoline dispensers, or system-wide software and databases, which Replacement Supply Contract with the Northwest Branded Seller's consent shall be assigned to the acquirer of the Anacortes Refinery Assets.

U. "*Respondents*" means Shell and Texaco, individually and collectively, and the Joint Venture.

V. "*Retail Assets*" means, for each Retail Site, all assets, tangible or intangible, that are used at that Retail Site, including but not limited to all related permits and contracts, and all assets relating to all ancillary businesses (such as automobile mechanical service, convenience store, restaurant or car wash) located at each Retail Site. Respondents shall make good faith, diligent efforts to obtain all third-party approvals necessary to convey all licenses, permits, consents and ancillary businesses with each Retail Site. "Retail Assets" do not include respondents' proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory, petroleum franchise agreements, petroleum product supply agreements, credit card agreements, satellite-based or centralized credit card processing equipment not incorporated in gasoline dispensers, or system-wide software and databases. Upon divestiture, respondents shall cancel all dealer leases, dealer loans, building incentive agreements, and related dealer agreements between respondents and their lessee dealers applicable to divested Retail Sites.

W. "*Retail Site*" means a business establishment from which gasoline is sold to the general public.

X. "*San Diego Divestiture Assets*" means a package of San Diego Retail Assets, to be identified by respondents but approved by the Commission, that (i) includes individual Retail Sites each of which sold an average of at least 85,000 gallons of gasoline per month during 1996; (ii) each of which complies with all 1998 environmental requirements for underground storage tanks; (iii) for each of which respondents can convey fee ownership or a long-term lease; and (iv) in the aggregate had retail gasoline sales from Retail Sites of at least 43,200,000 gallons during calendar year 1996.

Y. "*San Diego Retail Assets*" means all Retail Assets in San Diego County, California, that are owned by respondents or leased by respondents from another person.

Z. "*Shell Historical Oahu Retail Assets*" means all Retail Assets on the island of Oahu, Hawaii, that were owned by Shell on or after October 1, 1996, or leased by Shell from another person on or after October 1, 1996.

AA. "*Shell Northwest Branded Seller*" means any person (other than Shell) who has, by virtue of a contract or agreement with Shell, the right to sell gasoline using Shell's brand name at Retail Sites in Oregon or Washington, or the right to resell gasoline to any such person.

BB. "*Shell Oahu Distribution Assets*" means Shell's Oahu Terminal, Shell Oahu Retail Assets, and Additional Texaco Oahu Retail Assets.

CC. "*Shell Oahu Retail Assets*" means all Retail Assets on the island of Oahu, Hawaii, owned by Shell or leased by Shell from another person.

DD. "*Shell's Oahu Terminal*" means all of Shell's interest in its petroleum storage and distribution terminal on the island of Oahu, Hawaii, including all tangible or intangible assets that are used to operate the terminal for the storage and distribution of petroleum products, including but not limited to all real estate, storage tanks, loading and unloading facilities, permits and contracts pertaining to the terminal facilities. "Shell's Oahu Terminal" does not include respondents' proprietary additive packages, trademarks, trade names and identification signs; respondents' proprietary equipment, computer hardware and software used to monitor and verify product specifications; and system-wide software, databases and respondents' proprietary equipment used to control, operate and manage the terminal.

EE. "*Texaco's Oahu Terminal*" means all of Texaco's interest in its petroleum storage and distribution terminal on the island of Oahu, Hawaii, including all tangible or intangible assets that are used to operate the terminal for the storage and distribution of petroleum products, including but not limited to all real estate, storage tanks, loading and unloading facilities, permits and contracts pertaining to the terminal facilities. "Texaco's Oahu Terminal" does not include respondents' proprietary additive packages, trademarks, trade names and identification signs; respondents' proprietary equipment, computer hardware and software used to monitor and verify product specifications; and system-wide software, databases and respondents' proprietary equipment used to control, operate and manage the terminal.

FF. "*Texaco Historical Oahu Retail Assets*" means all Retail Assets on the island of Oahu, Hawaii, that were owned by Texaco on

or after October 1, 1996, or leased by Texaco from another person on or after October 1, 1996.

GG. "*Texaco Oahu Distribution Assets*" means Texaco's Oahu Terminal, Texaco Oahu Retail Assets, and Additional Shell Oahu Retail Assets.

HH. "*Texaco Oahu Retail Assets*" means all Retail Assets on the island of Oahu, Hawaii, owned by Texaco or leased by Texaco from another person.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith and at no minimum price, within six (6) months from the date the order becomes final, the Anacortes Refinery Assets.

B. Respondents shall divest the Anacortes Refinery Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Anacortes Refinery Assets is to ensure the continued use of the Anacortes Refinery Assets in the same businesses in which the Anacortes Refinery Assets were engaged at the time of the announcement of the proposed Joint Venture, and to remedy the lessening of competition in the refining of conventional gasoline, CARB gasoline and jet fuel resulting from the proposed Joint Venture as alleged in the Commission's complaint.

D. Respondents shall offer each Northwest Branded Seller a Replacement Supply Contract. Within five (5) days of final approval of this order by the Commission, respondents shall send a notice, in the form of Exhibit B to this order, to each Northwest Branded Seller, offering each Northwest Branded Seller a Replacement Supply Contract that would give the Northwest Branded Seller the option of affiliating with the acquirer of the Anacortes Refinery Assets upon divestiture of the Anacortes Refinery Assets. Within two (2) days after respondents sign a letter of intent with a prospective acquirer of the Anacortes Refinery Assets, respondents shall send a notice, in the form of Exhibit B to this order, to each Northwest Branded Seller, again offering each Northwest Branded Seller a Replacement Supply Contract, identifying the prospective acquirer, and stating the deadline for accepting the Replacement Supply Contract and consenting to the assignment of that Contract to the acquirer. Respondents shall not attempt in any way to discourage any Northwest Branded Seller from accepting a Replacement Supply Contract. Respondents shall identify each Northwest Branded Seller to each prospective acquirer of the Anacortes Refinery Assets that

has received other confidential information of respondents in connection with its inquiry. Respondents shall allow any Northwest Branded Seller to consent to the assignment of the Replacement Supply Contract for at least thirty (30) days after the second notice is mailed.

E. Until the divestiture required by paragraph II.A has been completed, respondents shall not permit or approve any branding application by any of their jobbers to supply any Shell Northwest Branded Seller, under which such Shell Northwest Branded Seller would sell or resell Texaco branded gasoline, except to the extent respondents have the right to assign or release that Shell Northwest Branded Seller without the jobber's consent or approval.

F. Respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Exhibit C. The Agreement to Hold Separate shall continue in effect until such time as respondents have divested all the Anacortes Refinery Assets as required by this paragraph II, or until such other time as provided in the Agreement to Hold Separate.

III.

It is further ordered, That:

A. Respondents shall divest to a single acquirer, absolutely and in good faith and at no minimum price, within six (6) months from the date the order becomes final, the San Diego Divestiture Assets.

B. Respondents shall divest the San Diego Divestiture Assets to a single acquirer that receives the prior approval of the Commission, only in a manner that receives the prior approval of the Commission, and in a package of specific Retail Sites that receives the prior approval of the Commission.

C. The purpose of the divestiture of the San Diego Divestiture Assets is to ensure the continued use of the San Diego Divestiture Assets in the same business in which the San Diego Divestiture Assets were engaged at the time of the announcement of the proposed Joint Venture, and to remedy the lessening of competition in the wholesale and retail sale of gasoline in San Diego County, California, resulting from the proposed Joint Venture, as alleged in the Commission's complaint.

D. Pending divestiture of the San Diego Divestiture Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the San Diego Retail Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the San Diego Retail Assets except for ordinary wear and tear. Respondents shall continue at least at their scheduled

pace all capital projects involving the San Diego Retail Assets that were ongoing, planned, or approved as of or after October 1, 1997, and otherwise maintain the San Diego Retail Assets to at least the same standards and on the same schedule as respondents have been maintaining the San Diego Retail Assets until the date of divestiture. Respondents shall not remove or degrade the brand identification at the San Diego Retail Assets, until the San Diego Divestiture Assets are divested.

IV.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith and at no minimum price, within six (6) months from the date the order becomes final, either the Texaco Oahu Distribution Assets or the Shell Oahu Distribution Assets.

B. Respondents shall divest the Texaco Oahu Distribution Assets or the Shell Oahu Distribution Assets only to a single acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Oahu Distribution Assets is to ensure the continued use of the Oahu Distribution Assets in the same business in which the Oahu Distribution Assets were engaged at the time of the announcement of the proposed Joint Venture, and to remedy the lessening of competition resulting from the proposed Joint Venture in the terminaling of gasoline and diesel fuel on Oahu and the wholesale and retail sale of gasoline and diesel fuel on Oahu, as alleged in the Commission's complaint.

D. Pending divestiture of the Oahu Distribution Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the Oahu Distribution Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Oahu Distribution Assets except for ordinary wear and tear. Respondents shall continue at least at their scheduled pace all capital projects involving the Oahu Distribution Assets that were ongoing, planned, or approved as of or after October 1, 1997, and otherwise maintain the Oahu Distribution Assets to at least the same standards and on the same schedule as respondents have been maintaining the Oahu Distribution Assets, until the date of divestiture. Respondents shall not remove or degrade the brand identification at the Oahu Distribution Assets, until the Oahu Distribution Assets are divested.

V.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith and at no minimum price, within six (6) months from the date the order becomes final, either all of Texaco's interest in Colonial or all of Shell's interest in Plantation.

B. Respondents shall divest the Colonial or Plantation interest identified in subparagraph V.A only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of either Texaco's interest in Colonial or Shell's interest in Plantation is to prevent an interlock or common owner in both of these pipeline systems and to remedy the lessening of competition resulting from the proposed Joint Venture as alleged in the Commission's complaint.

D. Pending divestiture of either Texaco's interest in Colonial or Shell's interest in Plantation, respondents shall not serve on Colonial's board of directors or any committee thereof, attend meetings of Colonial's board of directors or any committee thereof, vote any of Texaco's stock in Colonial, or receive any information from Colonial not made available to all shippers or to the public at large, except that a Texaco representative may observe meetings of the Colonial board of directors and may receive and use nonpublic information of Colonial solely for the purpose of effectuating the divestiture of Texaco's interest in Colonial pursuant to this order. Said Texaco representative shall be identified to the Commission, shall not divulge any nonpublic Colonial information to respondents (other than employees of respondents whose sole responsibility relating to the Joint Venture is to effectuate the divestiture, and agents of respondents specifically retained for the purpose of effectuating the divestiture), and shall acknowledge these obligations in writing to the Commission.

VI.

It is further ordered, That:

A. If respondents have not divested the assets required to be divested pursuant to paragraphs II, III, IV, or V, absolutely and in good faith and with the Commission's prior approval within the time periods required, the Commission may appoint either David Prend or another person or persons to act as trustee (or trustees) to divest those assets that respondents have failed to divest as required by this order. If respondents have failed to divest the San Diego Divestiture Assets

as required by paragraph III above, the trustee may select Retail Assets from those San Diego Retail Assets that respondents own in fee or can divest a long-term lease, in accordance with the requirements of paragraph III. 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, 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 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 a trustee is appointed by the Commission or a court pursuant to paragraph VI.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 either (i) select David Prend to be the trustee; or (ii) select another person or persons as 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, other than David Prend, within ten (10) days after 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 have the exclusive power and authority to divest the assets to be divested.

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 divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VI. 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-month period, the trustee has submitted a plan of divestiture or

believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may 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 respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraphs II, III, IV, or V of this order, as applicable; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities 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, 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 assets to be divested.

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, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.

12. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures.

VII.

It is further ordered, That:

A. Respondents shall provide heavy crude oil to Huntway pursuant to the Huntway Supply Agreement for a period of ten (10) years from the effective starting date of the Huntway Supply Agreement. The Huntway Supply Agreement shall be fully assignable to any successor of Huntway that continues to operate the asphalt refinery now operated by Huntway, and may be canceled by respondents only if Huntway's asphalt refinery ceases operations "permanently," as such "permanent" cessation is defined in the Huntway Supply Agreement.

B. The purpose of the requirements of this paragraph VII is to ensure that Texaco's volumes and prices of undiluted heavy crude oil supplied to Huntway are unaffected by changes in Texaco's incentives as a result of combining with Shell, so as to prevent (1) the raising of costs for undiluted heavy crude oil to Shell's asphalt competitor, and (2) the raising of prices for asphalt in northern California, as alleged in the Commission's complaint.

C. For a period of ten (10) years from the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, reduce the volumes offered to Huntway, increase the price for crude oil supplied to Huntway, or terminate the Huntway Supply Agreement, except according to the

terms of the Huntway Supply Agreement. Any amendment to the Huntway Supply Agreement relating to an increase in price, a decrease in volume, or termination shall not be effective until approved by the Commission, provided, however, that any such amendment shall be deemed approved unless the Commission notifies respondents, within ninety (90) days of the Commission's receiving actual notice of the amendment, of the Commission's intention to consider the amendment further.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

A. Acquire any stock, share capital, equity, partnership, membership or other interest valued at \$100 million or more in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in the refining of petroleum products in the States of Alaska, Washington, Oregon or California; or

B. Acquire any assets, valued at \$100 million or more and used, or used within the preceding year (and still suitable for use), in the refining of petroleum products in the States of Alaska, Washington, Oregon or California.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where

appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IX.

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 II, III, IV, V, VI, and VII of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, III, IV, V, VI, and VII of this order. 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, III, IV, V, VI, and VII of the order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year 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 a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with each provision of this order.

X.

It is further ordered, That:

A. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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.

B. Upon formation of the Joint Venture, respondents shall cause the Joint Venture to be bound by the terms of this order.

XI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents 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 each respondent relating to any matters contained in this order; and

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

XII.

If (i) respondents have fully complied with all terms of this order; (ii) respondents within four (4) months after final approval of this order by the Commission have submitted a complete application in support of the divestiture of the assets and businesses to be divested pursuant to paragraphs II, III, IV or V of this order, as the case may be (including the buyer, manner of divestiture and all other matters subject to Commission approval); and (iii) the Commission has approved the divestiture and has not withdrawn its acceptance; but (iv) respondents have certified to the Commission within ten (10) days after the Commission's approval of the divestiture that a State, notwithstanding timely and complete application by respondents to the State, has failed to approve the divestiture under an Applicable Consent Decree of the particular assets or businesses whose divestiture is also required under this order, then, with respect to the particular divestiture that remains unconsummated, the time in which the divestiture is required under this order to be complete shall be extended for sixty (60) days. During such sixty (60) day period, respondents shall exercise utmost good faith and best efforts to resolve the concerns of the particular State.

Commissioner Thompson not participating.

EXHIBIT A

[Confidential Exhibit A to Decision & Order
Redacted From Public Record Version]

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EXHIBIT B

Exhibit B
to
AGREEMENT CONTAINING CONSENT ORDER

Notification Letter

To be given within five (5) days of Order becoming final

The Federal Trade Commission has entered into a consent order with Shell and Texaco, in connection with their announced joint venture, that requires Shell to sell its refinery and related assets in Anacortes, Washington ("Shell Anacortes Refinery") to an acquirer approved by the Commission by _____, 1998. The States of Washington and Oregon have also entered into a consent decree with Shell and Texaco. Pursuant to the consent order of the Federal Trade Commission, Shell is required to give certain retail sellers of Shell branded gasoline in the States of Washington and Oregon the option to replace their existing supply agreements, together with all ancillary agreements (*i.e.*, all leases, contracts, debts, loans and understandings), with a supply agreement that, at your option, can be assigned to the acquirer of the Shell Anacortes Refinery. If you elect to replace your existing agreements with such a Replacement Supply Contract, your Shell station will *not* be assigned to the acquirer *unless you choose to become affiliated with the acquirer*. This option will also be made available to Shell jobbers in Washington and Oregon, and to Texaco jobbers and retail dealers that have a direct contractual relationship with Texaco, and that operated or supplied Shell branded gasoline stations on or after October 1, 1996. This option for Texaco jobbers and dealers concerns only those stations that were selling Shell branded gasoline on or after October 1, 1996.

Please review the enclosed agreements. Signing these agreements gives you the option of electing to affiliate with the acquirer of the Shell Anacortes Refinery once the acquirer has been identified. The agreements are for the same term that remains on your current agreements, for the same volume, and require you to meet the same obligations, including performance on debt obligations. *You do not need to do anything now.* You will receive a second notice identifying the prospective acquirer of the Shell Anacortes Refinery and giving you the opportunity to affiliate with that acquirer. If you have any questions regarding this option, please write to the Federal Trade Commission, Bureau of Competition, Compliance Division, Washington, D.C. 20580.

Second Notice – to be mailed withing two (2) days of the signing of a letter of intent to divest the Anacortes Refinery Assets

The Federal Trade Commission has entered into a consent order with Shell and Texaco, in connection with their announced joint venture, that requires Shell to sell its refinery and related assets in Anacortes, Washington ("Shell Anacortes Refinery") to an acquirer approved by the Commission by _____, 1998. The States of Washington and Oregon have also entered into a consent decree with Shell and Texaco. Pursuant to the consent order of the Federal Trade Commission, Shell is required to give certain retail sellers of Shell branded gasoline in the States of Washington and Oregon the option to replace their existing supply agreements, together with all ancillary agreements (*i.e.*, all leases, contracts, debts, loans and understandings), with a supply

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agreement that, at your option, can be assigned to the acquirer of the Shell Anacortes Refinery. This option is also being made available to Shell jobbers in Washington and Oregon, and to Texaco jobbers and retail dealers that have a direct contractual relationship with Texaco, and that operated or supplied Shell branded gasoline stations on or after October 1, 1996. This option for Texaco jobbers and dealers concerns only those stations that were selling Shell branded gasoline on or after October 1, 1996.

You were sent a notice on _____, 1998, that enclosed agreements for you to review. A second copy of these agreements is enclosed. These agreements give you the option to replace your existing supply agreements, together with all ancillary agreements (*i.e.*, all leases, contracts, debts, loans and understandings), with a supply agreement that, at your option, can be assigned to the acquirer of the Shell Anacortes Refinery. Please review the enclosed agreements. The agreements are for the same term that remains on your current agreements, for the same volume, and require you to meet the same obligations, including performance on debt obligations.

Shell and Texaco intend to apply to the Federal Trade Commission, and to the Attorneys General of the States of Washington and Oregon, for approval to divest the Shell Anacortes Refinery to _____. If the governmental entities approve the proposed divestiture, you will have an opportunity to affiliate with _____. You have thirty (30) days from the date of this notice, or until _____, 1998, to affiliate with _____. If you elect to affiliate with _____, please sign the enclosed agreements and return them to the address set forth on the enclosed instruction sheet. Your affiliation with _____ will begin on the day _____ consummates the acquisition of the Shell Anacortes Refinery.

The Federal Trade Commission has retained the right to disapprove the sale of the Shell Anacortes Refinery to an acquirer identified by Shell and Texaco. If the Commission determines not to approve this divestiture, the divestiture will not occur and you will not become affiliated with _____ pursuant to the enclosed agreements. In that event, Shell and Texaco will send you new agreements when a new acquirer is identified. If you have any questions regarding this option, please write to the Federal Trade Commission, Bureau of Competition, Compliance Division, Washington, D.C. 20580.

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PREMISES

WHEREAS, Shell and Texaco intend to enter into the Joint Venture, as defined in Paragraph I of the Agreement Containing Consent Order (attached hereto and subsequently referred to herein as "Consent Order;" each capitalized term used in this Hold Separate shall have the same definition as contained in the Consent Order) and Shell and Texaco intend to contribute to said Joint Venture certain of their petroleum refining and marketing assets and operations in the United States, including their petroleum refining and marketing assets and operations in the States of Washington, Oregon and California; and

WHEREAS, Shell and Texaco each owns and operates, among other things, a petroleum refinery at Anacortes, Washington; and

WHEREAS, the Commission is now investigating the formation of the proposed Joint Venture to determine if it would violate any of the statutes enforced by the Commission; and

WHEREAS, if the Commission accepts the attached Consent Order, which would require, among other things, the divestiture of the Anacortes Refinery Assets, the Commission must 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 Section 2.34 of the Commission's Rules; and

WHEREAS, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Anacortes Refinery Assets during the period prior to the divestiture of said assets, the divestiture required by the Consent Order or resulting from any proceeding challenging the legality of the proposed Joint Venture might not be possible, or might be less than an effective remedy; and

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WHEREAS, the Commission is concerned that if the proposed Joint Venture is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Anacortes Refinery Assets, and the Commission's right to have the Anacortes Refinery Assets continue as a viable petroleum refining business independent of the Respondents and the Joint Venture; and

WHEREAS, the purposes of this Hold Separate and the Consent Order are to:

- (i) preserve the Anacortes Refinery Assets as a viable, competitive, and ongoing petroleum refining business, independent of the Respondents and the Joint Venture, until divestiture is achieved;
- (ii) prevent interim harm to competition pending divestiture and other relief; and
- (iii) remedy any anticompetitive effects of the proposed Joint Venture;

WHEREAS, Respondents, entering into this Hold Separate shall in no way be construed as an admission by Respondents that the proposed Joint Venture is illegal; and

WHEREAS, Respondents understand that no act or transaction contemplated by this Hold Separate 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 Hold Separate.

NOW, THEREFORE, upon the understanding that the Commission has not yet determined whether it will challenge the proposed Joint Venture, and in consideration of the Commission's agreement that the Commission will accept the Consent Order for public comment and will excuse Respondents from their obligation to comply with all outstanding data requests and their obligation not to consummate the proposed Joint Venture until 21 days after their compliance with valid data requests, the parties agree as follows:

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1. Respondents agree to execute and be bound by the attached Consent Order.
2. Respondents agree that from the date the Consent Order is accepted by the Commission for public comment until the earlier of the dates listed in subparagraphs 2.a. or 2.b. ("Hold Separate Period"), they will comply with the provisions, with the exception of subparagraph 3.s., of this Hold Separate:
 - a. three (3) 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. the day after the divestiture of the Anacortes Refinery Assets, as required by the Consent Order, is completed.

Respondents agree to comply with subparagraph 3.s. until one (1) year after the Anacortes Refinery Assets are divested.

3. To assure the complete independence and viability of the Anacortes Refinery Assets, and to assure that no Material Confidential Information ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.) is exchanged between the Respondents, the Joint Venture and the Anacortes Refinery Assets, Respondents shall hold the Anacortes Refinery Assets separate and apart on the following terms and conditions:

- a. The Anacortes Refinery Assets shall be held separate and apart and shall be managed and operated independently of Respondents (meaning here and

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hereinafter, Shell, Texaco and the Joint Venture excluding the Anacortes Refinery Assets), except to the extent that Respondent must exercise direction and control over such assets to assure compliance with this Hold Separate or the Consent Order, and except as otherwise provided in this Hold Separate.

- b. Shell shall appoint Robert C. Harrell as Independent Auditor, at least three (3) days prior to the formation of NEWCO. Respondents shall give the Independent Auditor all powers and authority necessary to effectuate his/her responsibilities pursuant to this Hold Separate.
- c. Within five (5) business days of the Commission's acceptance of the Consent Order for public comment, Respondents shall (1) organize a distinct and separate legal entity, either a corporation, limited liability company, or general or limited partnership ("NEWCO") to be composed of the Anacortes Refinery Assets; provided, however, that Respondents may designate as NEWCO under this Hold Separate, Shell Anacortes Refinery Company ("SARC"), an existing Delaware corporation; (2) cause NEWCO to adopt constituent documents that are consistent with the provisions of the Hold Separate and the Consent Order; and (3) transfer all ownership and control of all Anacortes Refinery Assets to NEWCO.
- d. NEWCO shall be staffed with sufficient employees to maintain the viability and competitiveness of the Anacortes Refinery Assets. The NEWCO employees shall include (i) all personnel employed by SARC as of the date the Commission accepts the Consent Order for public comment; (ii) those

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persons employed by Shell, but transferred to NEWCO by Respondents pursuant to this Hold Separate for the duration of the Hold Separate Period, including employees working in refinery management, production, supply and trading, sales, marketing, and finance areas, who are listed on Confidential Attachment B ("Transferred Employees"); and (iii) those persons hired from other sources. The Management Team, with the approval of the Independent Auditor, shall have the authority to replace employees who were transferred to Shell Oil Products Company or have otherwise left their positions with SARC since March 18, 1997. To the extent that NEWCO employees leave NEWCO prior to the divestiture of the Anacortes Refinery Assets, the Management Team may replace the departing NEWCO employees, subject to the approval of the Independent Auditor, with persons who have similar experience and expertise.

- e. The Independent Auditor shall monitor the organization of NEWCO and shall have responsibility for managing NEWCO (including the Anacortes Refinery Assets) consistent with the terms of Hold Separate; for maintaining the independence of NEWCO (including the Anacortes Refinery Assets) consistent with the terms of this Hold Separate and Consent Order; and assuring Respondent's compliance with its obligations pursuant to the Hold Separate.
- f. Simultaneous with the organization of NEWCO, Shell shall appoint, subject to the approval of the Independent Auditor, four individuals from among the current employees of SARC or Shell Oil Products Company

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working in refinery management, production, supply and trading, sales, marketing, or financial operations to manage and maintain NEWCO. The Management Team, in its capacity as such, shall report directly and exclusively to the Independent Auditor and shall manage NEWCO independently of the management of the Respondents and the Joint Venture. The Management Team shall not be involved, in any way, in the operations of the businesses of the Respondents or the Joint Venture during the Hold Separate Period.

- g. Respondents shall not change the composition of the Management Team unless the Independent Auditor consents. Respondents shall not change the composition of the management of NEWCO, except that the Management Team shall be permitted to remove management employees for cause subject to approval of the Independent Auditor. The Independent Auditor shall have the power to remove members of the Management Team for cause and to require Respondents to appoint replacement members to the Management Team in the same manner as provided in subparagraph 3.f. of this Hold Separate.
- h. The Independent Auditor, each member of the Management Team, each NEWCO employee, and each Transferred Employee shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate. These individuals must retain and maintain all confidential information relating to the held separate business on a confidential basis and, except as is permitted by this Hold Separate, such

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persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents' or the Joint Venture's business. These persons shall not be involved in any way in the refinery management, production, supply and trading, sales, marketing, and financial operations of the competing products of Respondents or the Joint Venture.

- i. Respondents shall establish written procedures to be approved by the Independent Auditor, covering the management, maintenance, and independence of the Anacortes Refinery Assets consistent with the provisions of the Hold Separate.
- j. Respondents shall circulate, to NEWCO employees and to Respondents' employees who are responsible for the operation of petroleum refineries or the refining or marketing of petroleum products in the United States, a notice of this Hold Separate and Consent Order in the form attached as Attachment A.
- k. The Independent Auditor shall have full and complete access to all personnel, books, records, documents and facilities of NEWCO and Shell Oil Products Company or to any other relevant information, as the Independent Auditor may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to the Anacortes Refinery Assets. Respondent shall develop such financial or other information as such Independent Auditor may request and shall

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cooperate with the Independent Auditor. Respondent shall take no action to interfere with or impede the Independent Auditor's ability to perform his/her responsibilities consistent with the terms of the Hold Separate or to monitor Respondent's compliance with the Hold Separate and the Consent Order.

- i. Respondents may require the Independent Auditor to sign a confidentiality agreement prohibiting the disclosure of any material information gained as a result of his or her role as Independent Auditor to anyone other than the Commission.
- m. The Independent Auditor shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the Independent Auditor's duties and responsibilities.
- n. The Independent Auditor and the Management Team shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondents shall indemnify the Independent Auditor and the Management Team and hold the Independent Auditor and the Management Team harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Independent Auditor's or the Management Team'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

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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 Independent Auditor or the Management Team.

- o. Respondents shall provide NEWCO with sufficient working capital to operate the Anacortes Refinery Assets at least at current rates of operation, to meet all capital calls in respect of the Anacortes Refinery Assets, and to carry on, at least at their scheduled pace, all capital projects for the Anacortes Refinery Assets ongoing, planned, or approved as of or after October 1, 1997. During the period this Hold Separate is effective, Respondents shall make available for use by NEWCO funds sufficient to perform all necessary routine maintenance to, and replacements of, the Anacortes Refinery Assets. Respondents shall provide NEWCO with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Anacortes Refinery Assets until the date of divestiture is completed.
- p. All NEWCO transactions valued at \$1,000,000 or more that are out of the ordinary course of business shall be subject to a majority vote of the Management Team. In case of a tie, the Independent Auditor shall cast the deciding vote.
- q. Respondents shall continue to provide the same support services (except for those services being provided by the Transferred Employees) to the Anacortes Refinery Assets as are being provided to such assets by

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Respondents as of the date this Hold Separate is signed by Respondents. Respondents may charge NEWCO the same fees, if any, charged by Shell for such support services as of the date this Hold Separate is signed by Respondents. Respondents' personnel providing such support services must retain and maintain all Material Confidential Information of the Anacortes Refinery Assets on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Anacortes Refinery Assets.

- r. Except as provided in this Hold Separate, Respondents shall not employ or make offers of employment to NEWCO employees, during the Hold Separate Period. The acquirer of the Anacortes Refinery Assets shall have the option of offering employment to the NEWCO employees. After the Hold Separate Period, Respondents may offer employment to NEWCO employees who have not accepted employment with the acquirer of the Anacortes Refinery Assets. Respondents shall not interfere with the employment of such NEWCO employees by the acquirer of the Anacortes Refinery Assets: shall not offer any incentive to such NEWCO employees to decline employment with the acquirer of the Anacortes Refinery Assets or accept other employment with the Respondents or the Joint Venture.

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and shall remove any impediments that may deter such NEWCO employees from accepting employment with the acquirer of the Anacortes Refinery Assets, including but not limited to the payment, or the transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondents or the Joint Venture.

- s. For a period of one (1) year from the date the Anacortes Refinery Assets are divested, Respondents shall not employ or make offers of employment to NEWCO employees who have accepted offers of employment with the acquirer of the Anacortes Refinery Assets.
- t. Notwithstanding the preceding subparagraph 3.r., Respondents may offer a bonus or severance to those NEWCO employees that continue their employment with NEWCO until the date that the Anacortes Refinery Assets are divested.
- u. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Anacortes Refinery Assets, the Independent Auditor, the Management Team, or NEWCO or any of its operations; provided, however, that Respondents may exercise only such direction and control over NEWCO as is necessary to assure compliance with this Hold Separate or the Consent Order, or with all applicable laws.

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- v. Except for the Management Team and except to the extent provided in subparagraph 3.q., Respondents or the Joint Venture shall not permit any other of their employees, officers, or directors to be involved in the operations of NEWCO.
- w. Respondents shall maintain the viability, competitiveness, and marketability of the Anacortes Refinery Assets; shall not sell, transfer, or encumber said Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Anacortes Refinery Assets.
- x. If the Independent Auditor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, Respondents shall appoint a substitute Independent Auditor, subject to Commission approval.
- y. Respondents shall continue to pay to the Transferred Employees, until divestiture of the Anacortes Refinery Assets is accomplished, their salaries, all accrued bonuses, pensions and other accrued benefits to which the Transferred Employees would otherwise have been entitled had they remained in the employment of Shell during the Hold Separate period.
- z. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Joint Venture, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets pursuant to the

Decision and Order

EXHIBIT C

Consent Order, or complying with this Hold Separate or the Consent Order, Respondents shall not receive or have access to, or use or continue to use, any Material Confidential Information, not in the public domain, about NEWCO or the Anacortes Refinery Assets. Nor shall NEWCO or the Management Team receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondents and relating to Respondents' business. Respondents may receive, on a regular basis, aggregate financial information relating to NEWCO necessary to allow Respondents to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

- aa. Within thirty (30) days after the date this Hold Separate is accepted by the Commission and every thirty (30) days thereafter until this Hold Separate terminates, the Independent Auditor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Independent Auditor's assessment of the extent to which NEWCO is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

4 Should the Commission seek in any proceeding to compel Respondents to divest any of the Anacortes Refinery Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Hold

EXHIBIT C

Separate, or in any way relating to the Joint Venture, as defined in the draft complaint, Respondents shall not raise any objection based upon the fact that the Commission has permitted the formation of the Joint Venture. Respondents also waive all rights to contest the validity of this Hold Separate.

5. To the extent that this Hold Separate requires Respondents to take, or prohibits Respondents from taking, certain actions that otherwise may be required or prohibited by contract, Respondents shall abide by the terms of this Hold Separate or the Consent Order and shall not assert as a defense such contract requirements in a civil action brought by the Commission to enforce the terms of this Hold Separate or Consent Order.

6. For the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to its principal office, Respondents shall permit any duly authorized representatives of the Commission:

- a. Access, during office hours of Respondents and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Hold Separate; and
- b. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

7. This Hold Separate Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Shell Oil Company and Texaco Inc. have entered into a Consent Order and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of certain assets.

As used herein, the term "Anacortes Refinery Assets" means all assets as defined in paragraph I.E of the Consent Order. Under the terms of the Consent Order, Shell and Texaco must divest the Anacortes Refinery Assets within six (6) months from the date the FTC's Order becomes final.

The term "Joint Venture" means the joint venture between Shell and Texaco known as "Westco" (publicly announced on March 18, 1997, and described in a Memorandum of Understanding of the same date), and any other combination of the United States petroleum refining or marketing assets or operation of Shell and Texaco.

Until after the FTC's Order becomes final and Anacortes Refinery Assets are divested, the Anacortes Refinery Assets must be managed and maintained as separate, ongoing businesses, independent of all other Shell, Texaco, or Joint Venture businesses. All competitive information relating to the Anacortes Refinery Assets must be retained and maintained by the persons involved in the operation of the Anacortes Refinery Assets on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Shell Anacortes Refinery.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Shell, Texaco, and Joint Venture to civil penalties and other relief as provided by law.

APPENDIX B

[Confidential Appendix B to Agreement to Hold Separate
Redacted From Public Record Version]

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission issues its final decision and order resolving allegations that the proposed joint venture of Shell Oil Company with Texaco Inc. and Star Enterprises would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. I find reason to believe that the joint venture, if consummated, would affect competition adversely in the refining of asphalt in Northern California and, therefore, support paragraph VII of the order, which provides relief in that market. I do not find reason to believe the other violations of law alleged in the complaint and, therefore, dissent from paragraphs II, III, IV and V of the order, which require divestitures in other markets. Although the allegation relating to refineries in the northwestern United States is arguably valid, on balance, I cannot support it and, therefore, cannot support paragraph II of the order. The complaint allegations that support paragraphs III, IV and V of the order seem to me far removed from our usual analysis under the merger guidelines.

I understand that the parties have negotiated identical relief with various state attorneys general and that the divestitures in the proposed Commission order will be required in any event. My obligation, however, is to apply federal law as I see it.

IN THE MATTER OF

CABLEVISION SYSTEMS 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-3804. Complaint, April 27, 1998--Decision, April 27, 1998

This consent order requires, among other things, Cablevision Systems Corporation to divest, to a Commission-approved buyer, Tele-Communication, Inc.'s cable systems assets in Paramus and Hillsdale, New Jersey.

Appearances

For the Commission: *Jill Frumin, Phillip Broyles and William Baer.*

For the respondent: *Yvonne Quinn and James Masella, Sullivan & Cromwell, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Cablevision Systems Corporation ("CVS"), a corporation subject to the jurisdiction of the Commission, proposes to acquire certain cable television systems owned by Tele-Communications, Inc. ("TCI"), 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"), 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 pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. CVS

PARAGRAPH 1. Respondent CVS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 Media Crossways, Woodbury, New York.

PAR. 2. Respondent CVS 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 FTC Act, as amended, 15 U.S.C. 44.

II. TCI

PAR. 3. TCI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 5619 DTC Parkway, Englewood, Colorado.

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

III. THE PROPOSED ACQUISITION

PAR. 5. Respondent CVS entered into an agreement with TCI in which CVS will acquire certain cable television systems presently owned and operated directly or indirectly by TCI in New Jersey and New York serving approximately 820,000 subscribers, in exchange for CVS voting securities valued at approximately \$423,000,000 ("the acquisition").

IV. THE RELEVANT MARKETS

PAR. 6. The relevant line of commerce in which to analyze the effects of the acquisition is the distribution of multichannel video programming by cable television.

PAR. 7. The relevant geographic areas in which to analyze the effects of the acquisition are the Boroughs of Paramus and Hillsdale, in Bergen County, New Jersey.

PAR. 8. The relevant line of commerce is highly concentrated with only two cable television providers -- CVS and TCI -- in the relevant geographic areas.

PAR. 9. Respondent CVS is an actual and potential competitor of TCI in the relevant line of commerce in the relevant geographic areas.

PAR. 10. Timely and effective entry in the relevant line of commerce in the relevant geographic areas is unlikely.

V. EFFECTS OF THE ACQUISITION

PAR. 11. The effects of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

- a. Actual competition between CVS and TCI to serve existing residential neighborhoods, hotels, and apartment complexes will be eliminated;
- b. Actual competition between CVS and TCI to serve new residential neighborhoods, hotels, and apartment developments will be eliminated; and
- c. Actual and potential competition between CVS and TCI to extend their cable systems throughout the relevant geographic areas will be eliminated.

VI. VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, 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 ("Commission"), having initiated an investigation of the proposed acquisition by Cablevision Systems Corporation ("Cablevision") of certain cable television systems owned and operated by Tele-Communications, Inc. ("TCI"), and it now appearing that Cablevision, hereinafter sometimes referred to as "respondent," has 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 respondent with violations of the Clayton Act and Federal Trade Commission Act; 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, 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 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 Cablevision Systems Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 Media Crossways, Woodbury, New York.

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

ORDER

I.

It is ordered, That:

As used in this order, the following definitions shall apply:

A. "*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.

B. "*Acquisition*" means the acquisition by Cablevision of certain cable television systems owned and operated directly or indirectly by TCI and serving various communities in New Jersey and New York, as set forth in paragraph five of the draft of complaint.

C. "*Respondent*" or "*Cablevision*" means Cablevision Systems Corporation and all of its directors, officers, employees, agents, and representatives, and also includes (1) all of Cablevision Systems Corporation's predecessors, successors, assigns, subsidiaries, and divisions and all of their respective directors, officers, employees, agents, representatives, successors, and assigns; and (2) any partnerships, joint ventures, and affiliates that Cablevision Systems Corporation Controls and the respective directors, officers, employees, successors and assigns of each.

D. "*TCI*" means Tele-Communications, Inc. and all of its directors, officers, employees, agents, and representatives, and also includes (1) all of Tele-Communications, Inc.'s, predecessors, successors, assigns, subsidiaries, and divisions and all of their respective directors, officers, employees, agents, representatives, successors, and assigns; and (2) any partnerships, joint ventures, and

affiliates that Tele-Communications, Inc., controls and the respective directors, officers, employees, successors and assigns of each.

E. "*Control*" has the meaning set forth in 16 C.F.R. 801.1 as that regulation read on November 1, 1997.

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

G. "*TCI Paramus and Hillsdale Systems Assets*" means the Cable Television System Assets that were owned directly or indirectly by TCI prior to this Acquisition and that are physically located in the relevant geographic area, and all other properties, privileges, rights, interests and claims, real and personal, tangible and intangible, of every type and description that are owned, leased, held or used in the provision of Cable Television Service by TCI solely in and for the relevant geographic area, including governmental permits, franchises, intangibles, equipment and real property; provided, however, that "TCI Paramus and Hillsdale Systems Assets" shall not include:

1. The TCI Optical Transfer Network (the "OTN") that distributes Cable Television Service to certain municipalities, townships and boroughs north and south of Paramus and which is located at the intersection of Bluebell Court and Pascack Road near the border of Paramus and Washington Township;

2. The TCI fiber optic cable that distributes Cable Television Service to certain municipalities, townships and boroughs north of Paramus, and which is located on the border of Paramus and Washington Township along Blue Bell Court, Pascack Road and Linwood Avenue;

3. The TCI fiber optic cable that distributes Cable Television Service to certain municipalities, townships and boroughs north of Paramus, and which is located on the border of Paramus and Ridgewood Township along Gateway Road and along that portion of Linwood Avenue between Gateway Road and Paramus Road;

4. The TCI fiber optic cable that distributes Cable Television Service to certain municipalities, townships and boroughs south of Paramus and which is located along Pascack Road, Fairview Road, Century Road, Spring Valley Road and Howland Avenue; and

5. All other TCI fiber optic cables located within the relevant geographic area that are not used to provide Cable Television Service in the relevant geographic area.

H. "*Cable Television Service*" means the delivery of video entertainment and informational programming via a Cable Television System.

I. "*Cable Television System*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide video entertainment and informational programming to multiple subscribers within a community.

J. "*Cable Television System Assets*" means those physical assets including but not limited to coaxial cable and amplifiers, that make up the facility that is a Cable Television System.

K. "*Relevant geographic area*" means that area within the official municipal boundaries of each of the Boroughs of Paramus and Hillsdale in the County of Bergen in the State of New Jersey.

L. "*Competitiveness, viability and marketability*" of the TCI Paramus and Hillsdale Systems Assets means that, subject to paragraph II.D, Cablevision shall continue the operation of the TCI Paramus and Hillsdale Systems Assets in the ordinary course of business without material change or alteration that may adversely affect the value or goodwill of the TCI Paramus and Hillsdale Systems Assets, which do not include a headend and which are currently operated (including the selection of video programming for distribution over those assets and the marketing and pricing of Cable Television Service delivered over those assets) as a part of and from the single headend of the TCI Northern New Jersey Cable Television System.

M. "*Headend*" means the control center of a Cable Television System, where incoming signals are amplified, converted, and combined, together with signals originated in the Cable Television System, in a common transmission medium for distribution to subscribers.

N. "*Person*" means a corporation, partnership, joint venture or other business entity, whether incorporated or unincorporated.

O. "*News 12 N.J.*" means the regional video programming service known as News 12 New Jersey.

P. "*TCI Northern New Jersey Cable Television System*" means the Cable Television System owned directly or indirectly by TCI that serves fifty-three communities in northern New Jersey from a single headend located in Oakland, New Jersey, and that, at the time of the Acquisition, includes the TCI Paramus and Hillsdale Systems Assets.

Q. "*Signing date*" means the date the respondent executes the agreement containing consent order.

R. "*Divestiture period*" means the six (6) month period from the signing date.

S. "*Signal services*" means the transmission by Cablevision from one or more of its headends of the signals of one or more

programming services (including broadcast television signals) to the acquirer of the TCI Paramus and Hillsdale Systems Assets, subject to Cablevision's and such acquirer's having the necessary licenses or other authorizations to re-transmit such programming service(s).

T. "*Bergen Cable Television System*" means the Cable Television System owned by Cablevision prior to the Acquisition that serves the relevant geographic area and a number of other communities in and around Bergen County in New Jersey from a single headend.

II.

It is further ordered, That:

A. Cablevision shall divest, absolutely and in good faith, the TCI Paramus and Hillsdale Systems Assets within the divestiture period; provided, however, that, if respondent has entered into a binding contract with and has obtained the Commission's approval for an acquirer and filed all applications for other required governmental approvals within six (6) months from the signing date, the divestiture period shall be extended by (i) an additional period of time equivalent to the number of days that any governmental body (other than the Commission) takes to approve or disapprove an application necessary to be approved or disapproved prior to completion of the divestiture, and (ii) an additional five business days to enable the closing of the divestiture. Cablevision shall undertake its best efforts to facilitate any governmental approvals required to effect divestiture of the TCI Paramus and Hillsdale Systems Assets and their continued use in Cable Television Service in the relevant geographic area. Cablevision shall grant to the acquirer or acquirers of the TCI Paramus and Hillsdale Systems Assets an indefeasible right to use the two fibers (the "Fibers") that link the TCI Cable Television System Assets in Paramus and the TCI Cable Television System Assets in Hillsdale for so long as the acquirer or acquirers (and/or their successors in interest) use the Fibers to provide Cable Television Service, and/or voice, data or internet transmissions, in or to the TCI Paramus and Hillsdale Systems Assets. To ensure the availability of cable programming services to the TCI Paramus and Hillsdale Systems Assets after divestiture, for the period of this order, Cablevision shall waive and not obtain, solely with respect to delivery by the acquirer of the TCI Paramus and Hillsdale Systems Assets by means of a Cable Television System in the relevant geographic area, any exclusive rights to cable programming services, except for News 12 N.J.

B. For the purpose of facilitating the divestiture of the TCI Paramus and Hillsdale Systems Assets, Cablevision shall, within the earlier of the termination of the divestiture period or divestiture:

1. Extend the coaxial trunk cable currently located on Hillsdale Avenue in the Borough of Hillsdale in order to provide Cable Television Service to those homes that are located in the Borough of Hillsdale and to the west of the Garden State Parkway.

2. Create within one hundred (100) yards of the OTN a point of connection to the TCI Paramus System Assets such that the acquirer or acquirers of such assets can directly or indirectly connect a headend to such assets through that point of connection.

C. Cablevision shall divest the TCI Paramus and Hillsdale Systems Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the TCI Paramus and Hillsdale Systems Assets is to ensure the continued use of the TCI Paramus and Hillsdale Systems Assets as an ongoing, viable deliverer of Cable Television Service in the relevant geographic area, and to remedy the lessening of competition resulting from the proposed acquisition of the TCI Paramus and Hillsdale Systems Assets by Cablevision as alleged in the Commission's complaint.

D. Until divestiture of the TCI Paramus and Hillsdale Systems Assets, Cablevision shall take such actions as are necessary to maintain the competitiveness, viability and marketability, as such existed at the time of the Acquisition, of the TCI Paramus and Hillsdale Systems Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the TCI Paramus and Hillsdale Systems Assets except for ordinary wear and tear; provided, however, that nothing in this order or the annexed Agreement to Hold Separate shall be construed:

1. To prohibit Cablevision from altering the programming offered on, branding, or channel line-up of the Cable Television Service delivered over the TCI Paramus and Hillsdale Systems Assets to subscribers located in the relevant geographic area, if Cablevision alters in the same way the programming offered on, branding, or channel line-up of Cable Television Service delivered from the headend serving the TCI Northern New Jersey Cable Television System to other communities served from that headend;

2. Either to require or to prohibit Cablevision from constructing an independent headend, trunk cable(s), node(s), and/or any other

facilities for the purpose of permitting the distribution of Cable Television Service to subscribers located in the relevant geographic area;

3. To require Cablevision to divest any assets, properties, privileges, rights, interests, claims, real or personal, tangible or intangible, of TCI Northern New Jersey other than those that are the TCI Paramus and Hillsdale Systems Assets; or

4. To prohibit Cablevision from providing headend services, including signal services, to the acquirer or acquirers of the TCI Paramus and Hillsdale Systems Assets for up to twelve (12) months following divestiture.

E. Until divestiture of the TCI Paramus and Hillsdale Systems Assets, any promotion for the Cable Television Service delivered over Cablevision's Bergen Cable Television System that is offered by Cablevision to existing or potential subscribers located in the relevant geographic area shall be offered on comparable terms to other existing or potential subscribers to the Bergen Cable Television System.

III.

It is further ordered, That:

A. If Cablevision has not obtained the Commission's approval of an acquirer for the TCI Paramus and Hillsdale Systems Assets within the divestiture period:

1. The Commission may appoint a trustee to divest the TCI Paramus and Hillsdale Systems Assets. 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, Cablevision 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; and

2. Cablevision shall construct a headend with the necessary capability to enable the TCI Paramus and Hillsdale Systems Assets to provide Cable Television Service comparable to that being provided over the TCI Paramus and Hillsdale Systems Assets in the

relevant geographic area on the signing date. Cablevision shall initiate the process of creating this headend at the time this paragraph III.A.2 becomes applicable, if ever, and shall complete the construction of this headend no later than twelve months from the date this order becomes final; provided, however, that paragraph III.A.2 shall not apply in the event that an acquirer that has entered into a binding agreement to acquire the TCI Paramus and Hillsdale Systems Assets notifies Cablevision and the Commission in writing that the acquirer would prefer to construct the headend itself after its acquisition of the TCI Paramus and Hillsdale Systems Assets.

B. If Cablevision has, prior to the end of the divestiture period, both obtained the Commission's approval of an acquirer for the TCI Paramus and Hillsdale Assets and filed all applications for other governmental approvals that must be obtained prior to divestiture, but one or more of such approvals are denied after the divestiture period, then the divestiture period shall be extended by a period of time equal to the time between the date of submission of the application for the approval(s) that were denied and the date that such approval(s) were denied. Notwithstanding this extension of the divestiture period, the requirements of paragraph III.A.2 shall apply.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A.1 of this order, Cablevision shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Within ten (10) days after appointment of the trustee, Cablevision 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.

3. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the TCI Paramus and Hillsdale Systems Assets.

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

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the TCI Paramus and Hillsdale Systems Assets or to any other relevant information as the trustee may request. Cablevision shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Cablevision shall not take any action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Cablevision 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 expeditiously the most favorable price and terms available in each contract that is submitted to the Commission, subject to Cablevision's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Cablevision from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Cablevision, 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 Cablevision, 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 Cablevision, 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 TCI Paramus and Hillsdale Systems Assets.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A.1 of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the TCI Paramus and Hillsdale Systems Assets.

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

IV.

It is further ordered, That:

Cablevision shall comply with all terms of the Hold Separate Agreement, attached to this order and made a part hereof as Appendix I. The Hold Separate Agreement shall continue in effect until such time as the TCI Paramus and Hillsdale Systems Assets shall have been divested as required by this order.

V.

It is further ordered, That:

A. For a period of ten (10) years from the date this order becomes final, Cablevision shall not, without providing advance written

notification to the Commission, directly or indirectly through subsidiaries, partnerships or otherwise:

1. Acquire any stock, share capital, equity, or other ownership interest (an "Interest") in any concern, corporate or non-corporate, that is engaged at the time of such acquisition, or that has been engaged within the two (2) years preceding such acquisition, in providing Cable Television Service within the relevant geographic area; or

2. Acquire any assets used for or previously used for (and still suitable for use for) providing Cable Television Service within the relevant geographic area; provided, however, that this paragraph V shall not apply to the acquisition of products or services in the ordinary course of business; and provided, further, that this paragraph V shall not apply to:

(i) The acquisition by Cablevision of any Interest in a person that is engaged in the business described in subparagraph V.A.1 or that owns any assets described in subparagraph V.A.2 that results in Cablevision's owning no more than 5% of the total Interests in that person and that does not give Cablevision Control of that person;

(ii) The acquisition by Cablevision of any Interest in a person that is engaged in the business described in subparagraph V.A.1 or that owns any assets described in subparagraph V.A.2 if (a) the value of such business or assets represents no more than 10% of the total value of such person, (b) in connection with such acquisition such person agrees with Cablevision to divest such business or assets prior to the consummation of such acquisition, and (c) such business or assets are, in fact, so disposed of within such period;

(iii) The acquisition by any person of the business described in subparagraph V.A.1 or of any assets described in subparagraph V.A.2 if (a) Cablevision owned an Interest in that person prior to such person's acquisition of such business or assets, (b) the value of such business or assets represents no more than 5% of the total value of such person following its acquisition, and (c) Cablevision owns no more than 33 $\frac{1}{3}$ % of the total Interests in such person; or

(iv) The formation and operation, with any person that is engaged in the business described in subparagraph V.A.1 or that owns any assets described in subparagraph V.A.2, of any joint venture, enterprise or partnership concerning any telecommunication service (including, but not limited to video, data or voice) and ancillary services related thereto that does not involve the TCI Paramus and Hillsdale Systems Assets.

B. Notification required under this provision 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 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where, appropriate, granted by letter from the Commission's Bureau of Competition; provided, however, that prior notification shall not be required by this paragraph V 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.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Cablevision has fully complied with the provisions of paragraphs II, III, and IV of this order, Cablevision shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II, III, and IV of this order. Cablevision shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, and IV of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Cablevision shall include in its compliance reports copies of all written communications to and from such parties, and all reports and recommendations concerning divestiture.

B. One (1) year 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,

Cablevision shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VII.

It is further ordered, That:

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

VIII.

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 and on reasonable notice to Cablevision, Cablevision shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to Cablevision and without restraint or interference from it, to interview officers, directors, or employees of Cablevision, who may have counsel present, relating to any matters contained in this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement To Hold Separate ("Agreement") is by and between Cablevision Systems Corporation ("Cablevision"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1 Media Crossways, Woodbury, New York; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

Whereas, Cablevision entered into an agreement with Telecommunications, Inc. ("TCI"), a Delaware corporation, whereby Cablevision will acquire certain Cable Television Systems owned and operated by TCI (hereinafter the "Acquisition"); and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Agreement"), which would require the divestiture of the TCI Paramus and Hillsdale Systems Assets (as defined in the Consent Agreement), the Commission must place the Consent Agreement on the public record for a period of at least sixty (60) days 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 understanding is not reached, preserving the independent pricing and marketing of the Cable Television Service provided over the TCI Paramus and Hillsdale Systems Assets in the relevant geographic area during the period prior to the final acceptance and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the assets described in paragraph II of the Consent Agreement; and

Whereas, the purpose of this Agreement and the Consent Agreement is to preserve the TCI Paramus and Hillsdale Systems Assets pending divestiture, and to remedy any anticompetitive effects of the Acquisition; and

Whereas, Cablevision's entering into this Agreement shall in no way be construed as an admission by Cablevision that the Acquisition is illegal or has any anticompetitive effects; and

Whereas, Cablevision understands 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, upon the understanding that the Commission has not yet determined whether it will challenge the Acquisition, and in consideration of the Commission's agreement to accept the Consent

Agreement for public comment and grant early termination of the HSR waiting period, the parties agree as follows:

1. Cablevision agrees to execute and be bound by the attached Consent Agreement.

2. Cablevision agrees that it will comply with the provisions of paragraph 3 of this Agreement from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a-2.b:

a. Three (3) 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 day after the divestiture required by the Consent Agreement has been completed.

3. Pending divestiture, Cablevision shall operate the TCI Paramus and Hillsdale Systems Assets on the following terms and conditions:

a. Cablevision will retain two (2) members of the management of TCI Northern New Jersey (the "management team"), who are fully familiar with the TCI Paramus and Hillsdale Systems Assets, to price and market the Cable Television Service delivered over the TCI Paramus and Hillsdale Systems Assets. The individuals on the management team shall price and market such Cable Television Service independently of the management of Cablevision's other businesses, including Cablevision's Paramus and Hillsdale Cable Television Systems. The individuals on the management team shall not be involved in any way in the operation or management of any other Cablevision Cable Television System. If any member of the management team is unable or unwilling to continue to serve on the management team (or becomes unable to do so during the term of this Agreement) that position will be filled by an individual not involved in any way in the operation or management of any other Cablevision Cable Television System.

b. The management team, in its capacity as such, shall report directly and exclusively to an individual to be designated by Cablevision (the "Cablevision Contact") who has no direct responsibilities for Cable Television System operations and who is competent to assure the continued operations of the TCI Paramus and Hillsdale Systems Assets in accordance with this Agreement.

c. Cablevision shall not exercise direction or control over, or influence directly or indirectly, the management team or any of its activities relating to the pricing and marketing of Cable Television Service delivered by the TCI Paramus and Hillsdale Systems Assets;

provided, however, that Cablevision may exercise such direction and control over the management team and the TCI Paramus and Hillsdale Systems Assets as is necessary to ensure compliance with this Agreement and with the Consent Agreement and with all applicable laws.

d. Pending divestiture and subject to paragraphs II.D and I.L of the Consent Agreement, Cablevision shall maintain the competitiveness, viability and marketability of the TCI Paramus and Hillsdale Systems Assets and shall not sell, transfer, encumber (other than in the ordinary course of business), or otherwise impair their competitiveness, viability or marketability (as defined in the Consent Agreement).

e. Except for the Cablevision Contact and the management team, Cablevision shall not permit any other Cablevision employee, officer, or director to be involved in the pricing or marketing of Cable Television Service delivered by TCI Paramus and Hillsdale Systems Assets; provided, however, that Cablevision employees involved in engineering, construction, customer service, data processing, training, human resources, finance, legal services, tax, accounting, insurance, internal audit, payroll, programming, purchasing, real estate, risk management, telephony, compliance with FCC regulations, contract administration, and similar services may provide such services to the TCI Paramus and Hillsdale Systems Assets.

f. The management team shall serve at the cost and expense of Cablevision. Cablevision shall indemnify the management team against any losses or claims of any kind that might arise out of management team members' involvement under this Agreement, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team.

g. If any member of the management team ceases to act or fails to act diligently, a substitute member shall be appointed.

4. Should the Federal Trade Commission seek in any proceeding to compel Cablevision to divest any of the TCI Paramus or Hillsdale Systems Assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Agreement or this Agreement, or in any way relating to the Acquisition, as defined in the Consent Agreement, Cablevision 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 permitted the Acquisition.

Cablevision also waives all rights to contest the validity of this Agreement.

5. To the extent that this Agreement requires Cablevision to take, or prohibits Cablevision from taking, certain actions that otherwise may be required or prohibited by contract, Cablevision shall abide by the terms of this Agreement or the Consent Agreement and shall not assert as a defense such contractual requirements in any action brought by the Commission to enforce the terms of this Agreement or the Consent Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Cablevision made to its principal office, Cablevision shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

CUC INTERNATIONAL 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-3805. Complaint, May 4, 1998--Decision, May 4, 1998

This consent order requires, among other things, the New Jersey-based corporation to divest all of its Interval timeshare exchange business assets to Interval Acquisition Corporation, a new entrant into the timeshare exchange services market controlled by a venture capital firm, Willis Stein & Partners, L.P.

Appearances

For the Commission: *Jacqueline Mendel, Eric Elmore, Ann Malester and William Baer.*

For the respondents: *Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, New York, N.Y. and Michael L. Weiner, Skadden, Arps, Slate & Meagher, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that CUC International Inc. has agreed to acquire HFS Incorporated, both corporations 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 ("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. RESPONDENTS

1. Respondent CUC International Inc. ("CUC") 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 707 Summer Street, Stamford, Connecticut.

2. Respondent HFS Incorporated ("HFS") 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 6 Sylvan Way, Parsippany, New Jersey.

3. 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.

II. THE ACQUISITION

4. Pursuant to an Agreement and Plan of Merger dated May 27, 1997, CUC will acquire all of the voting shares of HFS for approximately \$8.7 billion ("the Acquisition").

III. THE RELEVANT MARKET

5. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisition is the sale of timeshare exchange services to timeshare developers and owners. A significant benefit of timeshare ownership is the right to exchange the use of that unit for another comparable unit at a different resort property (or at the same resort for a different time period). The ability of timeshare owners to trade timeshare ownerships for vacation through worldwide exchange networks is a major reason why consumers decide to purchase timeshare interests. In lieu of returning to the same resort every year for a vacation, the timeshare exchange program allows an owner the opportunity to stay at many different vacation destinations. The owner of a particular resort unit relies on the timeshare exchange company to provide the exchange properties and to process the exchange. Exchange companies label time periods according to whether they are high, mid, or low season. They also grade and rate each property to provide for an equal or fair exchange.

6. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the Acquisition is the world.

7. The relevant market set forth in paragraphs five and six is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios. CUC and HFS are the only two competitors in the relevant market; thus the Acquisition would result in a monopoly in the relevant market.

8. Entry into the relevant market, which requires significant sunk costs, would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraphs nine and ten because of, among other things, the difficulty of establishing a worldwide network of timeshare resorts in order to provide the relevant services. The significant network externalities in this market result in high entry barriers: a new entrant cannot sign up members unless it already has a substantial membership and it cannot get a substantial membership if it cannot sign up new members. Thus, it is

extremely unlikely that a new entrant not already in the timeshare exchange business could enter successfully.

IV. EFFECTS OF THE ACQUISITION

9. The effect of the Acquisition 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, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between CUC and HFS;
- b. By increasing the likelihood that the firm created by the merger of CUC and HFS would unilaterally exercise market power;
- c. By increasing the likelihood that timeshare resort developers and timeshare owners would be forced to pay higher affiliation and exchange fees; and
- d. By increasing the likelihood that timeshare exchange service provided to developers and owners would be reduced.

10. All of the above increase the likelihood that the only firm in the relevant market would increase prices or reduce services in the near future and in the long term.

V. VIOLATIONS CHARGED

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.

12. 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.

Commissioner Thompson not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of HFS Incorporated by CUC International Inc., 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 consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of 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, and having duly considered the comments received, 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 CUC International 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 707 Summer Street, Stamford, Connecticut.

2. Respondent HFS Incorporated 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 6 Sylvan Way, Parsippany, New Jersey.

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. "*CUC*" means CUC International Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its present and future subsidiaries, divisions, groups, and affiliates controlled by CUC International Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each. CUC, after consummation of the Acquisition, includes HFS Incorporated.

B. "*HFS*" means HFS Incorporated, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its present and future subsidiaries, divisions, groups, and affiliates controlled by HFS Incorporated, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. "*Respondents*" means CUC and HFS, individually and collectively.

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

E. "*Acquisition*" means the merger of HFS with and into CUC pursuant to the Agreement and Plan of Merger dated as of May 27, 1997.

F. "*Interval*" means (a) Interval Holdings, Inc., a wholly-owned subsidiary of CUC International Inc., 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 6262 Sunset Drive, Miami, Florida; (b) CUC Vacation Exchange, Inc., a wholly-owned subsidiary of CUC International Inc., 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 707 Summer Street, Stamford, Connecticut; and (c) all assets of and equity interests in all direct and indirect subsidiaries of Interval Holdings, Inc. or CUC Vacation Exchange, Inc., except for those subsidiaries listed in Appendix A to the order.

G. "*RCI*" means Resort Condominiums International, Inc., a wholly-owned subsidiary of HFS, 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 3502 Woodview Trace, Indianapolis, Indiana, and all assets of and equity interests in all direct and indirect subsidiaries of Resort Condominiums International, Inc., including, but not limited to, Resort Computer Corporation.

H. "*Timeshare Exchange*" means the offering for exchange, trade, barter or other temporary use of the right to accommodations at a vacation development previously allocated to any individual, corporation, partnership or other business entity for a specified period of time each year, for a specified number of years (including for perpetuity)("such properties") in exchange for the temporary use of such properties at other times and/or locations.

I. "*Timeshare Exchange Business*" means the business of conducting Timeshare Exchanges including, without limitation, the provision of those goods and services associated with conducting such Timeshare Exchanges.

J. "*CUC Timeshare Exchange Business*" means:

1. Interval;
2. All books, records, and files relating to the Timeshare Exchange Business as operated by CUC prior to the Acquisition;
3. All copies of all customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature and advertising materials relating to the Timeshare Exchange Business as operated by CUC prior to the Acquisition;
4. All rights, titles and interests in contracts entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees relating to the Timeshare Exchange Business as operated by CUC prior to the Acquisition;
5. All rights under any trademarks used in the Timeshare Exchange Business as operated by CUC prior to the Acquisition, including, but not limited to, all rights under trademarks held by CUC Publishing, Inc.; and
6. All rights under warranties and guarantees, express or implied relating to the Timeshare Exchange Business as operated by CUC prior to the Acquisition.

K. "*HFS Timeshare Exchange Business*" means:

1. RCI;
2. All books, records and files relating to the Timeshare Exchange Business as operated by HFS prior to the Acquisition;
3. All copies of all customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature and advertising materials relating to the Timeshare Exchange Business as operated by HFS prior to the Acquisition;
4. All rights, titles and interests in contracts entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees relating to the Timeshare Exchange Business as operated by HFS prior to the Acquisition; and
5. All rights under warranties and guarantees, express or implied relating to the Timeshare Exchange Business as operated by HFS prior to the Acquisition.

L. "*IAC*" means Interval Acquisition Corp., a Delaware corporation, or an affiliate thereof, formed, and controlled, directly

or indirectly, by Willis Stein & Partners, L.P. for the purpose of acquiring the CUC Timeshare Exchange Business from CUC.

M. "*Stock Purchase Agreement*" means the stock purchase agreement entered into between CUC and IAC dated as of October 29, 1997.

N. "*Non-public member information*" means any information not in the public domain furnished by Interval to CUC prior to the effective date, or during the term, of a transition services agreement contemplated by paragraph V of this order for the purpose of securing services from CUC for Interval members. Non-public information shall not include (i) information which subsequently falls within the public domain through no violation of this order by CUC, or (ii) information which subsequently becomes known to CUC from a third party, which to the knowledge of CUC is not in breach of a confidential disclosure agreement with Interval.

O. "*RCC software*" means the computer software which has been designed and developed, or may be designed and developed, by RCI or its affiliates, in each case, for use by timeshare property developers in managing their respective timeshare properties, including, but not limited to, such software which has been offered under the names "RCC Premier" and "RCC Express."

II.

It is further ordered, That:

A. (1) Respondents shall divest, absolutely and in good faith, the CUC Timeshare Exchange Business to IAC, pursuant to the Stock Purchase Agreement, no later than ten (10) days after the Acquisition.

(2) If respondents have not divested the CUC Timeshare Exchange Business as required by paragraph II.A(1) of the order, and if the Acquisition has occurred, respondents shall divest the HFS Timeshare Exchange Business within six (6) months after the date on which respondents signed the agreement containing consent order. Respondents shall divest the HFS Timeshare Exchange Business only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

(3) Provided, however, that if respondents have divested the CUC Timeshare Exchange Business to IAC pursuant to the Stock Purchase Agreement prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that IAC is not an acceptable acquirer, or the Stock Purchase Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with IAC and shall divest within one hundred twenty

(120) days of the date the order becomes final either (a) the CUC Timeshare Exchange Business, or (b) the HFS Timeshare Exchange Business. Respondents shall divest the CUC Timeshare Exchange Business or the HFS Timeshare Exchange Business only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. The purpose of the divestiture of the CUC Timeshare Exchange Business or the HFS Timeshare Exchange Business is to ensure the continued use of the CUC Timeshare Exchange Business or the HFS Timeshare Exchange Business, as the case may be, in the same business in which it is engaged at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the CUC Timeshare Exchange Business or the HFS Timeshare Exchange Business, as the case may be, respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the CUC Timeshare Exchange Business and the HFS Timeshare Exchange Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of the CUC Timeshare Exchange Business and the HFS Timeshare Exchange Business except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith the CUC Timeshare Exchange Business or the HFS Timeshare Exchange Business pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the HFS Timeshare Exchange 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, 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 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 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(s), 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 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 have the exclusive power and authority to accomplish the divestiture described in paragraph III.A of the order.

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 for the divestiture required by this order or believes that the divestiture required by this order can be achieved within a reasonable time, then that 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 period for the divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the HFS Timeshare Exchange Business or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may 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 any divestiture caused by respondents shall extend the time for that 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 respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner consistent with the terms of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities 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 accomplishing the divestiture required by paragraph III.A.

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, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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 HFS Timeshare Exchange Business.

12. The trustee shall have no obligation or authority to operate or maintain the HFS Timeshare Exchange Business.

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

IV.

It is further ordered, That, if respondents divest the CUC Timeshare Exchange Business pursuant to paragraph II.A of the order:

A. For the period beginning on the date the sale of the CUC Timeshare Exchange Business closes ("Closing Date") and ending two years following the Closing Date (the "Extended Restricted Period"), respondents shall not:

1. Hire or solicit for employment any person who is employed with Interval either as of the date respondents sign the agreement containing consent order or as of the Closing Date;

2.a. (i) Solicit, induce or attempt to induce any customer or client (including developers) of Interval as of the date respondents sign the agreement containing consent order or the Closing Date ("Interval Client") to terminate any existing contract between such Interval Client and Interval (each, an "Existing Interval Contract"); or (ii) in the case of any Existing Interval Contract which by its terms expires or terminates during the Extended Restricted Period, solicit the Interval Client which is a party to such Existing Interval Contract to not renew such Existing Interval Contract; or

b. Solicit any Interval Client to transfer to respondents during the term of any Existing Interval Contract any projects (including adjacent locations) which are subject to such Existing Interval Contract;

provided, however, that the restrictions in this paragraph IV.A.2 shall in no event limit any activity of respondents with respect to any Existing Interval Contract after the term of such Existing Interval Contract;

3. Enter into any contract with any Interval Client with respect to any project (including adjacent locations) subject to an Existing Interval Contract during the term of such Existing Interval Contract

(except for contracts entered into in the second year of the Extended Restricted Period with any Interval Client which will not take effect with respect to any project (including adjacent locations) subject to an Existing Interval Contract during the period such project is subject to such Existing Interval Contract); or

4. Enter into any contract with respect to the Timeshare Exchange Business with any Interval Client relating to a project subject to an Existing Interval Contract which Existing Interval Contract may be terminated by such Interval Client as a result of the transactions contemplated by this agreement and is terminated pursuant to such right.

B. During the Extended Restricted Period, respondents shall make available to timeshare property developers who are, at any time during the Extended Restricted Period, actual or prospective clients of Interval, licenses for use of RCC software. Such licenses shall be at the same price or prices and on substantially the same terms with respect to:

1. The availability of any third party software which is required in connection with the use or operation of such RCC Software; and

2. The duration of the license and the availability of ongoing maintenance and support services

as respondents are, at the applicable time, then making available to those clients of RCI having substantially the same requirements, installations and other qualifications; provided, however, that such licenses of RCC software may not require that actual or prospective clients of Interval or any owners' association or other entity associated with such client enter into any timeshare exchange affiliation agreement with respondents.

C. For the period beginning on the Closing Date and ending one year following the Closing Date (the "Initial Restricted Period"), respondents shall not:

1. Solicit, induce or attempt to induce any Interval Client with an Existing Interval Contract which expires or terminates by its terms during the Initial Restricted Period, not to renew such Existing Interval Contract or otherwise to do business with the respondents with respect to projects subject to such Existing Interval Contract, whether or not the term of such Existing Interval Contract has expired or terminated; or

2. Enter into any contract with any Interval Client with respect to any project (including adjacent locations) subject to an Existing Interval Contract during the term of such Existing Interval Contract.

Nothing in this paragraph IV shall restrict respondents' ability to (1) do business with, or take action with respect to, any Interval Client to the extent such business pertains to any project or matter that is not subject to an Existing Interval Contract; or (2) make general solicitations with respect to natural persons who are members of the HFS Timeshare Exchange Business at the time of such solicitations, provided that respondents shall not intentionally target natural persons who are members of both the CUC Timeshare Exchange Business and the HFS Timeshare Exchange Business; or (3) engage in general advertising or marketing activities which are not directed at the termination of specific Existing Interval Contract(s).

V.

It is further ordered, That, if respondents divest the CUC Timeshare Exchange Business:

A. At the acquirer's request, for a period of no more than seven (7) years from the Closing Date, respondents shall supply to the CUC Timeshare Exchange Business certain services that respondents currently supply to the CUC Timeshare Exchange Business, including services relating to travel, entertainment, dining, shopping, and credit card registration (the "Services"), to enable the CUC Timeshare Exchange Business to continue to offer on an uninterrupted basis the services it provides to its members, including, but not limited to, those Services that are part of the World Card Preferred program.

B. All Services provided by respondents to the CUC Timeshare Exchange Business shall be performed substantially in the same manner in which, and the extent to which, such Services were performed prior to the date of the closing. Respondents shall utilize the same method for determining the charges for the Services that they used prior to the Acquisition.

C. Respondents shall not provide, disclose, or otherwise make available to any employee of the HFS Timeshare Exchange Business any non-public member information nor shall respondents use any non-public member information obtained by them in their capacity as a provider of services to the CUC Timeshare Exchange Business for any purpose other than providing such services to the CUC Timeshare Exchange Business.

VI.

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 the requirements of this order. 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 all substantive contacts or negotiations for the 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, all internal memoranda, and all reports and recommendations concerning the divestiture.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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 respondents that may affect compliance obligations arising out of the order.

VIII.

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. 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' notice to respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents.

Commissioner Thompson not participating.

Modifying Order

125 F.T.C.

IN THE MATTER OF

RITE AID CORPORATION

MODIFYING 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-3546. Consent Order, Dec. 15, 1994--Modifying Order, May 18, 1998*

This order reopens a 1994 consent order -- that required the respondent to divest the Bucksport asset and two other pharmacies -- and this order modifies the consent order by eliminating the requirement to divest a retail pharmacy in Bucksport, Maine, that the company acquired when it bought the LaVerdiere's chain of drug stores, and this order substitutes the prior approval requirement with prior notification and waiting period requirements.

ORDER REOPENING AND MODIFYING ORDER

On March 3, 1998, Rite Aid Corporation ("Rite Aid"), the respondent named in the above-referenced consent order ("order") issued by the Commission on December 15, 1994, filed its Petition to Reopen and Vacate Consent Order ("Petition"). Rite Aid asks that the Commission reopen and set aside the order pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. 2.51, based on changed facts and the public interest 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").¹ The thirty-day public comment period on Rite Aid's Petition ended on April 14, 1998. No comments were received.

The Commission has determined to grant, in part, Rite Aid's Petition by reopening the order and modifying it to set aside the requirements of paragraph II, but to deny the request to set aside the order in its entirety. Rather, the Commission has determined to substitute for the prior approval requirement of paragraph IV prior notification and waiting period requirements based on those of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, for all non-HSR reportable acquisitions otherwise meeting the specifications of paragraph IV.

The complaint in this matter alleges that Rite Aid's acquisition of the voting stock of LaVerdiere's Enterprises, Inc. ("LEI"), would

¹ 60 Fed. Reg. 39745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

violate Section 5 of the FTC Act and Section 7 of the Clayton Act, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in the market for the sale of prescription drugs in retail stores in the cities or towns of Bucksport, Maine; Lincoln, Maine; and Berlin, New Hampshire.

The resulting order became final on December 21, 1994.² paragraph II of the order requires Rite Aid to divest within 12 months either the LEI Pharmacy Assets or the Rite Aid Pharmacy Assets, as those assets are defined in the order, in Bucksport, Lincoln, and Berlin. Paragraph III provides for the appointment of a trustee should Rite Aid fail to divest within the required period; paragraph IV prohibits, for ten years, specified acquisitions in the three cities or towns without prior Commission approval; and paragraph V specifies Rite Aid's notification and reporting obligations. The purpose of the divestitures is to remedy the lessening of competition in the market for the sale of prescription drugs in retail stores in the three specified cities and towns.³ Rite Aid failed to divest within the time required, and the Commission approved the appointment of Mr. R. Steven Thing as trustee, on February 8, 1996.⁴ The trustee found acquirers for the Berlin, New Hampshire, and Lincoln, Maine, Pharmacy Assets, and those assets were divested on January 16, 1997, and March 10, 1997, respectively. Although his term was extended, the trustee failed to find an acquirer for the Bucksport, Maine, assets ("Bucksport Assets") before his term expired on September 12, 1997.

In its Petition, Rite Aid describes its and the trustee's efforts to divest and asserts, with supporting affidavits, that despite these efforts, an acquirer for the Bucksport Assets has not been found. The trustee believes that the value of the Bucksport Assets now is reduced to such an extent that "it is unlikely that any prudent businessperson that is capable of operating a pharmacy as a viable competitor in the local market place would purchase either Rite Aid store in Bucksport, Maine"⁵ Rite Aid also asserts that the prior approval provision of the order should be eliminated in light of the availability of the premerger notification and waiting period requirements of the HSR Act and "because there is nothing in the record to suggest that Rite

² 118 FTC 1206 (1994).

³ Order ¶ II.

⁴ Rite Aid subsequently paid civil penalties of \$900,000 to settle the Commission's allegations that it failed to divest and to comply with other provisions of the order.

⁵ Affidavit of R. Steven Thing at 3.

Aid would engage in the same acquisition as alleged in the complaint

....⁶

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4 (unpublished) ("Hart Letter").⁷

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. Hart Letter at 5.; 16 C.F.R. 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.⁸ 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." *Damon Corp.*, 101 FTC 689, 692 (1983). 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. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Id.* at 4.

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 it 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

⁶ Petition at 12.

⁷ 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.").

⁸ Letter to Joel E. Hoffman, *Damon Corp.*, C-2916 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 at 22,585 (March 29, 1983) ("Damon Letter").

specific facts demonstrating in detail the nature of the changed conditions and the reasons why these 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 required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.⁹

After Rite Aid failed to divest as required by the order, the trustee made every effort to divest the Bucksport Assets. Immediately after his appointment, he pursued inquiries made by three parties who expressed an initial interest in the Bucksport Assets. One even submitted a contract, but ultimately withdrew it after performing a more detailed evaluation. The trustee now asserts that no prudent businessperson would acquire the Bucksport Assets.

Although the fact that the passage of time has reduced the value of the assets was foreseeable and thus does not constitute the change in fact necessary to compel reopening the order, it would be futile to continue to require Rite Aid to divest and inequitable to require it to keep paying a trustee to attempt the same. Accordingly, Rite Aid has demonstrated an affirmative need to reopen the order.

Having demonstrated an affirmative need to reopen the order, Rite Aid must also demonstrate that the reasons to set aside the divestiture requirements outweigh the need to continue to impose those obligations on it. The purpose of this particular divestiture was to increase competition in Bucksport, Maine. An acquirer could not be found, however, and the evidence indicates that the value of the Bucksport Assets is now so reduced that such an acquirer will not be found, regardless of additional effort. The diligent attempts of the trustee to market the Bucksport Assets demonstrate that further attempts to divest, even at no minimum price, are likely to be fruitless.¹⁰ The continued costs imposed by this provision now

⁹ *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁰ The respondents made the same showing in *Promodes, S.A.*, Docket No. 9228, in which the trustee accomplished divestiture of only some of the supermarkets to be divested, Order Granting Request to Reopen and Modify, 117 FTC 37 (1994), and in *Cooper Industries, Inc.*, Docket No. C-3469, in which the trustee failed to find an acquirer of the license and assets to be divested, Order Reopening and Modifying Order (December 15, 1997).

outweigh any benefit to be gained from continuing to compel a divestiture that almost certainly cannot be achieved, and, accordingly, this divestiture obligation of the order should be set aside.

In its Petition, Rite Aid also asks the Commission to vacate the prior approval provisions of paragraphs IV, which prohibits Rite Aid, for ten years, from making any acquisition of interests in or assets of specified entities without the prior approval of the Commission. Rite Aid contends that the prior approval is unwarranted "because there is nothing in the record to suggest that Rite Aid would engage in the same acquisition as alleged in the complaint. . . ." ¹¹

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of the HSR Act 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, engage 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

¹¹ Petition at 12.

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 presumption is that setting aside the prior approval requirement of paragraph IV is in the public interest. The record contains no evidence suggesting that this matter presents the limited circumstances identified in the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, *i.e.*, a credible risk that, but for the prior approval provision, the respondent would attempt the same or approximately the same merger.

Prior notification, however, is appropriate for acquisitions in the markets specified because there is a credible risk that Rite Aid could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Although the acquisition leading to the order exceeded the HSR Act threshold, the relevant markets subject to the order are local, and the acquisition of an interest in or the assets of any concern that engaged in the business of selling prescription drugs at retail stores within the six months preceding such acquisition could fall below the size-of-transaction threshold in the HSR Act.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That the order be, and it hereby is, modified to eliminate the divestiture requirement of paragraph II as to the Bucksport Assets, as of the effective date of this order; 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 ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, where such concern within the six months preceding such acquisition engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J) of this order; or (B) Acquire any assets used, within six months of the offer to acquire, for (and still suitable for use for) the business of selling prescription drugs at retail stores located in any of the cities

or towns listed in paragraph I.(J) of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

The prior notification required by this 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"), 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.

IN THE MATTER OF

STONE CONTAINER CORPORATION

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

Docket C-3806. Complaint, May 18, 1998--Decision, May 18, 1998

This consent order prohibits, among other things, the Illinois-based corporation from requesting, suggesting, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties. In addition, the consent order prohibits the respondent from entering into, attempting to enter into, or maintaining any combination, conspiracy, agreement or program with any manufacturer or seller of linerboard to fix, raise, establish or maintain prices, price levels, or any other pricing action.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *William Fifield, Sidley & Austin, Dallas, TX.*

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 Stone Container Corporation, a corporation, hereinafter sometimes referred to as respondent or "Stone Container," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stone Container Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 150 N. Michigan Avenue, Chicago, Illinois. Stone Container is the largest manufacturer of linerboard in the United States.

PAR. 2. In January 1993, Stone Container unsuccessfully attempted to increase the price for all grades of linerboard by \$30 per ton, to take effect the following March. Stone Container believed

that its attempted price increase failed in significant part because Stone Container and other firms in the industry had excess inventory.

PAR. 3. Stone Container devised a strategy to invite its competitors to increase the price of linerboard. As part of the strategy to effect a coordinated price increase, Stone Container planned to take downtime at its plants, to reduce its production by approximately 187,000 tons, and contemporaneously to purchase 100,000 tons of linerboard from competitors and to reduce Stone Container's inventory by 87,000 tons.

PAR. 4. During late June and early July 1993, Stone Container conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price.

PAR. 5. Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume of linerboard from each of several competitors. The participation of high level executives in these communications was outside the ordinary course of business. The specific intent of Stone Container's communications with its competitors was to coordinate an industry wide price increase.

PAR. 6. During the second half of 1993, Stone Container communicated to competitors its intention to take mill downtime and to draw down industry inventory levels, and its belief that these actions would support a price increase. The methods of communication included private conversations and public statements, including press releases and published interviews.

PAR. 7. The acts and practices alleged herein constitute an invitation by Stone Container to its competitors to join a coordinated price increase. The invitation, if accepted, was likely to result in higher prices, reduced output, and injury to consumers. The acts and practices of Stone Container were undertaken with anticompetitive intent and without an independent legitimate business reason.

PAR. 8. The acts and practices alleged herein are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices alleged herein could be repeated in the absence of the relief requested.

Commissioner Swindle dissenting.

DECISION AND ORDER

The Federal Trade Commission ("the Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge 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 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 has 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 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 Stone Container Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 150 N. Michigan Avenue, Chicago, Illinois.

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

ORDER

I.

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

A. "*Respondent*" means Stone Container Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Stone Container

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

B. "*Linerboard*" means any grade of paperboard suitable for use in the production of corrugated containers, but excludes corrugating medium.

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

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division, employee, agent or other device, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties.

B. Entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any manufacturer or seller of linerboard to fix, raise, establish, maintain or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties.

Provided, that the following conduct by respondent as and when conducted in the ordinary course of business shall not, of itself, constitute a violation of paragraph II of this order: (1) agreeing to purchase linerboard from, or sell linerboard to, a competitor; (2) negotiating or agreeing upon the price at which linerboard will be sold to a competitor; (3) negotiating or agreeing upon the price at which linerboard will be purchased from a competitor; and (4) discussing the financial condition of Stone Container Corporation, or the condition of or the prospects for the market for linerboard, with persons who are not competitors, such as non-integrated customers, investors, shareholders, securities analysts, and news and financial reporters.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, mail by first class mail a copy of this order, to all of its directors and officers, and to all of its management employees with responsibility for the manufacture, purchase and/or sale of linerboard (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondent; and

C. For a period of three (3) years after the date on which this order becomes final, require each of its directors, officers, and Management Employees to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Stone Container Corporation to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with any manufacturer or seller of linerboard relating to mill downtime, rates or levels of production, the purchase or sale of linerboard, or any aspect of pricing for linerboard; and

C. Notify the Commission at least thirty (30) days prior to any proposed changes in Stone Container Corporation 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 that may affect compliance obligations arising out of the order.

V.

It is further ordered, That this order shall terminate on May 18, 2018.

Commissioner Swindle dissenting.

CONCURRING STATEMENT OF COMMISSIONERS ROBERT PITOFSKY,
SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

The Commission recognizes that in invitation to collude cases, a fundamental question is whether the alleged "invitation" was merely legitimate business conduct. Our colleague, Commissioner Orson Swindle, dissents in this matter on grounds that Stone Container Corporation's behavior in curtailing its own production, and simultaneously purchasing excess inventory from its competitors, was conduct that did not clearly lack an "independent legitimate business reason." As the Analysis To Aid Public Comment emphasized, however, it would have been more economical for Stone Container to keep its plants open than to purchase inventory from competitors, and competitors would have recognized that fact. This conduct and other statements by Stone Container made clear that its goal was to manipulate industry supply conditions to invite a coordinated price increase. It is for these reasons that we now have accorded final approval to the complaint and consent order.

While there may be some difference of view on the facts in this matter, we agree with Commissioner Swindle that there can be no implied invitation to collude when the actions that amount to the invitation are justified by business considerations.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the consent order but decline to join the separate statement of Chairman Pitofsky and Commissioners Anthony and Thompson. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in Dell Computer Corp., at 21-23 (Docket No. 3658, May 20, 1996).

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted against the Commission's issuance of its complaint and final order in this case because I do not believe that the facts unearthed and presented in the investigation support the allegation that Stone Container ("Stone") invited its competitors "to join a coordinated price increase."

The Commission's complaint alleges that Stone took several actions in the second half of 1993 that amounted to an invitation to

collude on linerboard prices. According to the complaint, Stone's invitation-to-collude strategy consisted at the outset of a plan "to take downtime at its plants, to reduce its production by approximately 187,000 tons, and contemporaneously to purchase 100,000 tons of linerboard from competitors and to reduce Stone Container's inventory by 87,000 tons." To carry out this plan, Stone allegedly "conducted a telephone survey of major U.S. linerboard manufacturers, asking competitors how much linerboard was available for purchase and at what price."

Pursuant to its scheme, Stone's "[s]enior officers" -- whose role in this regard is alleged to have been "outside the ordinary course of business" -- "contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases." Stone "arranged and agreed to purchase a significant volume of linerboard from each of several competitors" and is alleged to have "communicated to competitors" -- both in private conversations and through public statements -- "its intention to take mill downtime and to draw down industry inventory levels, and its belief that these actions would support a price increase." The complaint asserts that Stone's communications with its competitors on these subjects were made with "[t]he specific intent . . . to coordinate an industry wide price increase" and that Stone's actions "were undertaken with anticompetitive intent and *without an independent legitimate business reason*" (emphasis added).

I have quoted at length from the complaint because it (together with the Analysis To Aid Public Comment that accompanied acceptance of the consent agreement) is the document in which the Commission sets forth its theory of violation and, to the extent permissible, the evidence underlying that theory. As I see it, the acts and communications of Stone alleged in the complaint, as well as other evidence in this case, do not sufficiently support the Commission's theory of violation.

As 1993 approached, Stone and other firms in the linerboard industry had been and were experiencing financial difficulties, including excess production capacity, alleged excess inventory, and depressed price levels. It should hardly be surprising that Stone chose mill downtime and inventory reductions as a normal competitive response to general industry conditions. "Extraordinary" as Stone's downtime and inventory purchases may have been, it is difficult to second-guess the rationality of those actions from a business perspective. The assertion in the complaint that Stone's actions "were undertaken with anticompetitive intent and without an independent

legitimate business reason" is a considerable stretch.¹ If senior officials of Stone had been more circumspect in their statements -- particularly their public statements -- about Stone's reasons for its own downtime and purchase decisions, I doubt that the Commission would have considered this matter a worthy target of our scarce resources.

The Commission's Analysis To Aid Public Comment discussed explicit and implicit invitations to collude and placed the present situation in the latter category. I agree with that categorization as far as it goes, since no one from Stone is alleged to have contacted a competitor and baldly suggested a price increase or an output reduction (and thus this case is not a replay of American Airlines). Instead, it is the totality of Stone's *conduct* -- when judged against the backdrop of Stone's remarks concerning low prices, excess capacity, and possible inventory overhang -- that has led the Commission to conclude that Stone implicitly invited its competitors to collusively raise prices.² I am unable to place on Stone's actions (and its explanations of them) the sinister characterization that would permit me to condemn its otherwise justifiable actions. I am concerned that the Commission's decision in this case may deter corporate officials from making useful public statements (*e.g.*, in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms' financial situations, and other important subjects.

I respectfully dissent.

¹ In their Concurring Statement, my colleagues rely on the Analysis To Aid Public Comment in this case for the proposition that "it would have been more economical for Stone Container to keep its plants open than to purchase inventory from competitors . . ." With all due respect, it is precisely the truth of that assertion that I find insufficiently supported by the evidence.

² The Analysis To Aid Public Comment cited Precision Moulding Co., Inc., Docket No. C-3682, as an example of an implicit invitation to collude. According to the Analysis, Precision Moulding "informed [its] competitor that its prices were 'ridiculously low' and that the competitor did not have to 'give the product away.'" I do not consider Stone's conduct and language to have communicated a message nearly as pointed as that conveyed by Precision Moulding.

IN THE MATTER OF

EYE RESEARCH ASSOCIATES, INC., ET AL.

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

Docket C-3807. Complaint, May 18, 1998--Decision, May 18, 1998

This consent order prohibits, among other things, the two Texas-based corporations and the owner from making any false claims and requires reliable scientific evidence to substantiate any safety, success or efficacy claims for Controlled Kerato-Reformation ("CKR") orthokeratology, a non-surgical eye care treatment or procedure to correct vision. In addition, the consent order requires that the respondents possess scientific evidence to support any testimonials or endorsements concerning the expected results of CKR, or else provide a disclosure stating what consumers may generally expect to achieve and that consumers should not expect to experience similar results.

Appearances

For the Commission: *Judith Shepherd* and *Thomas Carter*.

For the respondents: *Richard Powers* and *Steven Adducci, Butler & Binion*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Eye Research Associates, Inc., d/b/a Eye Care Associates, and ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society, corporations, and Sami G. El Hage, O.D., individually and as an officer of the corporations ("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:

1. Respondent Eye Research Associates, Inc., d/b/a Eye Care Associates ("ECA"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.

2. Respondent ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society ("ICKRS"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.

3. Respondent Sami G. El Hage, O.D., is the sole owner and president of the corporate respondents. Individually, or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

4. Respondents are engaged, and have been engaged, in the promotion, offering for sale, and the sale to the public of ophthalmic services, including orthokeratology ("ortho-k") or "Controlled Kerato-Reformation" ("CKR") services, which involves the use of a series of contact lenses purportedly to reshape the cornea gradually for the treatment of myopia (or "nearsightedness"), hyperopia (or "farsightedness") and astigmatism. The contact lenses used in these CKR ortho-k services are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. In the course and conduct of their business, respondents have disseminated or have caused to be disseminated advertisements or promotional materials for the purpose of promoting the sale of CKR ortho-k services. Respondents advertise and promote their services through the use of print advertisements, free consultations, videos, brochures, and pamphlets, which are provided to patients and prospective patients, and some of which are provided to other optometrists for distribution under their own name to patients and prospective patients. Respondents' advertisements and promotional materials include, but are not necessarily limited to, attached Exhibits A through F.

7. The advertisements and promotional materials referred to above, including but not necessarily limited to attached Exhibits A through F, contain the following statements:

A. "C.K.R. CONTROLLED KERATO-REFORMATION
Using Contact Lenses to Reshape the Cornea and Improve Vision ...
THE BENEFITS OF CKR
See better without help from glasses or contact lenses
Prevents deteriorating vision in children caused by myopia
Free of surgical complications or pain
Improvement occurs rapidly -- within weeks or months
No disruption of vision while your eyesight improves
Occupational unaided vision demands may be met for careers such as pilots,
policemen, firemen, athletes, etc."

NATURAL VISION IMPROVEMENT

Imagine being able to easily read the alarm clock without your glasses, see street signs clearly, or participate in sports without lenses of any kind.... This procedure has provided corrective eye care to many thousands of patients without the risks or complications associated with surgery.... CKR utilizes a series of molds prescribed in progressive stages to gently reshape the cornea, similar to the way braces are to straighten teeth.... The process can take from six weeks to a few months or longer to complete, depending on the severity of the problem. The result is dramatically improved vision with retainer lenses being worn on a limited basis, sometimes only at night during sleep, to maintain the new shape of the cornea.

Developed in 1962, Ortho-K has been used for years to help pilots, athletes, and others who required unaided vision for their occupations. Now, with new research developments such as computerized corneal topography (mapping which provides a more accurate fit and diagnosis) and new mold designs and materials, CKR, the second generation, is becoming the eye care trend of the future.

A SAFE ALTERNATIVE TO RK SURGERY

In contrast to Radial Keratotomy surgery which involves making incisions on the eye, CKR does not leave scar tissue which may cause vision glare at night or other side effects. CKR is also free of surgical complications or pain, and there is no disruption of vision as eyesight improves.

SAVING CHILDREN'S VISION

One of the most exciting uses for CKR is controlling myopia (nearsightedness) in children. Unfortunately, nearsightedness is a progressive disease, which is why 75% of the nearsighted population have to periodically increase their prescription. As years pass, from elementary school to college and in later life, a person's vision gradually worsens. For instance, only 4% of 8 year olds are nearsighted, while over 30% of the general population is nearsighted. CKR prevents this deteriorating vision in children by actually halting myopia in its tracks.

RESULTS

Myopia (Nearsightedness): CKR is highly effective in improving myopia. Mild to moderate degrees of myopia may be corrected from 20/400 to 20/20 - 20/30. Higher degrees of myopia can be controlled to allow functional vision without lenses.

Astigmatism: CKR usually either eliminates or greatly reduces mild astigmatism. Higher amounts of astigmatism can also be improved to enhance vision.

Hyperopia (Farsightedness): Occasionally may be improved....

SAFETY

Four university research studies have shown Corneal Reformation to be safe and effective, with no harmful side effects. These studies include the University of Houston College of Optometry (5 years), University of California at San Diego Medical School (7 years), University of California at Berkeley College of Optometry (3 years), and Pacific University College of Optometry (5 years)....

FIND OUT IF CKR IS RIGHT FOR YOU

If CKR is determined to be right for you, then you might also be one of the many who are no longer dependent on glasses or contacts. . . ."

[Exhibit A, Patient Brochure]

B. "WHAT IS CKR? INFORM YOUR PATIENT"

Both Dr. El Hage and Dr. Norman Leach appear on the video. Their participation is acknowledged with the thanks of the producer, ICKRS. Statements on the video including representations by Leach that 95% of those who complete CKR achieve "functional vision" and that CKR may be beneficial for farsighted individuals. The announcer describes CKR as an idea "very much like braces for teeth." The video also contains a number of patient testimonials, including the following:

"...I was looking for an option that was very safe and that was going to give me the results, and CKR gave me the results. I now have 20/20 vision without my contacts and get along absolutely great [The] FAA requires that we maintain 20/20 vision corrected.... [S]o I was looking for a way to improve uncorrected vision.... They're very comfortable, very easy to wear, and you don't know that the procedure is taking place.... It took about four to five months for me to get from 20/100 vision to 20/20 uncorrected. So progress comes very rapidly.... Hey, leave your contacts at home. Go -- go do what you want to do, ride your bicycle with the kids or climb mountains or scuba dive. It gives you so much more freedom than having to hassle with glasses or contacts."

Jay Redmon (commercial pilot, photographed with passenger jet)

"My vision just kept getting better and better and at night when I'd take my contacts out to sleep, then I'd notice I could see -- see things that I couldn't see before without my glasses.... [A]fter however long it takes for your vision to get corrected they give you retainer lenses. And the retainer lenses are lenses that you only have to wear for, like, certain amount of hours a week, whatever the doctor tells you to.... I never thought I'd have close to perfect vision again...."

Hani Shafi (young boy)

"I told my friends they give you a pair of contacts, and they -- um, they're going to start helping your eyes and to make them 20/20. But it will take a while, it won't take that long, but it will take a little while.... I would tell them to not be afraid because it's all easy and it works very good." *Carolina Araya (young girl)*

"And then I had regular glasses for when I didn't have my lenses on and then all of a sudden I had to get reading glasses, and then you've got sunglasses.... Everything I do outdoors I can now do without any lenses. And before I could not do anything, I could not walk without lenses or glasses.... It's wonderful. I can see again."

Sheryl Noble

[Exhibit B, Video promotion]

C. "CKR SUCCESS STORIES"

In just a couple of weeks I was able to see 20/20 without glasses or my special contacts. It's wonderful!! I no longer have to worry about taking my glasses on or off. I can even wear really 'cool' sunglasses without having to have them prescription made!...AY

I am able to read and see at distance with 20/20 acuity. I have been able to fly my plane without corrective lenses and I passed all required vision tests....VP [commercial airline pilot]

My vision has changed from needing corrective lenses to 20/20 in ten days. I am apprehensive about quick remedies for any kind of ailment, but I will not only

verify, I will spread the good news about the changes I have experienced with all my friends. I am a sports enthusiast and now I can get involved without the restrictions of glasses....GWM

I can see now!! I thought I would be prisoner to my contacts/glasses for the rest of my life. I am now enjoying normal vision for the first time in approximately 25 years. CKR gave me my freedom back!! At the very beginning of my treatment, I had my doubts. It sounded too good to be true. I am now a BELIEVER!! I no longer have a strong reliance on vision correction to see. It is such a delight to be able to see without correction. It has opened a whole new world!! I am no longer visually handicapped....CJC

Changes have been dramatic. I typically tested around 20/60 to 20/80 on yearly eye tests associated with my job and now I test 20/20. I now have greater freedom and flexibility of not having to wear lenses from sun up to sun down....KH

I have seen my vision improve dramatically since starting CKR. My vision went from reading the big E on the eye chart to seeing 20/20 without glasses. I also believe that the overall health of my eyes have greatly improved. No longer is there anxiety when taking physicals for my job. Along with better vision and healthier eyes, there is an increased self-confidence in all aspects of my life - especially so in my professional career. To make gains such as I have, without surgery - and especially the risks associated with surgery, is, without a doubt, the only way to go....JR [commercial airline pilot]."

[Exhibit C, promotional handout provided to Optometrists]

D. "IMPROVE VISION WITHOUT SURGERY

Adults and children now have the option to non-surgically correct nearsightedness and astigmatism. It is called Controlled Kerato-Reformation, or CKR for short.

CKR uses specially designed contact lenses that correct vision and reshape the cornea simultaneously. The CKR lenses, or molds, are worn daily, in place of glasses or other contact lenses. Within a period of a few days to a few months vision can be restored to 20/20 or close to 20/20 as possible, so that the patient can obtain good, functional vision without dependence on glasses or contacts, and without the risk and side effects commonly associated with surgical procedures.

'My vision improved the very first time I put the contacts on. And I had 20/20 vision about two weeks after I started wearing them.'

Edwin V.

'.... Within the first 24 hours, my vision was improved to about 20/30.... Since that initial change, my vision has progressed to 20/20, and I can see quite well during the day after taking my lenses out in the morning. This is the first time in 20 years that I have been able to go about my daily routine without the assistance of glasses or contacts.'

Amy D.

'Prior to correction I could not see clearly beyond arm's length... now I can drive without contacts or eyeglasses.... This is a painless, corrective procedure, scientifically proven, without the potential complications/ramifications of RFK [sic]... My vision has improved from 400/300 to 30/20. I can see again!'

Hank N. (in the Nov. '95 issue only)

[Exhibit D, *Houston Health and Fitness Sports Magazine*, February, 1996, and November, 1995]

E. "HOUSTON RESIDENT ENJOYS IMPROVED VISION THROUGH A REVOLUTIONARY EYECARE PROCEDURE!

Sylvia's vision was 20/400 when she began treatment in November 1994. Today her vision is 20/20 unaided! Sylvia observes: 'I had forgotten what it was like to drive at night without so much glare that everything looked blurry. I wake up in the morning and I can see clearly. Softball, volleyball and swimming are all much more fun now that I don't have to wear glasses or contacts...'

'The procedure offers remarkable results for patients with nearsightedness, giving them freedom from glasses and contacts for everyday living,' says Dr. El Hage.... 'It's very exciting for me to be able to offer a safe and effective alternative to surgery for my patients.'

CKR is also used to treat astigmatism and farsightedness to a certain degree...."
[Exhibit E, *Houston Health & Fitness Sports Magazine* April, 1996]

F. "IMPROVED VISION WITHOUT SURGERY

Although millions of people suffer from nearsightedness and astigmatism, until recently there have not been many options for improved vision without lenses. A revolutionary procedure called Controlled Kerato-Reformation, (CKR for short), is changing the lives of many people who have relied on daily wear of glasses or contacts. CKR is a non-surgical procedure and an alternative to the well known surgical procedure, Radial Keratotomy.

.... Dr. El Hage is also the founder and president of the International Controlled Kerato-Reformation Society, which trains doctors to become CKR practitioners and updates them on the latest techniques in CKR.

.... Called "Braces for the Eyes," CKR actually gently reshapes the cornea through a series of specially designed, rigid gas permeable contact lenses, or molds. This process takes place over a period of two to twelve months, on average, after which retainer lenses, worn several hours per week, can maintain the new shape of the cornea on a long-term basis. In addition, CKR has been proven as safe as wearing traditional contacts....

One of the most valuable applications for CKR is controlling myopia (nearsightedness) in children. Nearsightedness is progressive for most people and becomes worse as the years pass. CKR can stop this progression of Myopia, preventing deteriorating vision as children grow older.

'The procedure offers remarkable results for patients with nearsightedness, giving them freedom from glasses and contacts for everyday living,' says Dr. El Hage, the inventor of a highly acclaimed computerized corneal topographer that maps the surface of the eye. 'It's very exciting for me to be able to offer a safe and effective alternative to surgery for my patients.'

CKR can also correct astigmatism and farsightedness to a certain degree...."
[Exhibit F, Newspaper advertisement, 2/28/96]

8. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that:

A. CKR ortho-k corrects nearsightedness and astigmatism thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses, for nearsightedness and astigmatism.

B. All or most people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear CKR ortho-k devices occasionally or at night.

C. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), prove that CKR ortho-k is safe and effective in correcting, controlling, or improving nearsightedness, farsightedness, and astigmatism.

D. Testimonials from consumers appearing in the advertisements for respondents' CKR ortho-k services reflect the typical or ordinary experience of members of the public who receive those services, which experience is that respondents' CKR patients typically achieve 20/20 vision and no longer need corrective eyewear.

9. In truth and in fact,

A. CKR ortho-k does not correct nearsightedness and astigmatism thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses, for nearsightedness and astigmatism.

B. All or most people cannot achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear CKR ortho-k devices occasionally or at night.

C. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), do not prove that CKR ortho-k is safe and effective in correcting, controlling, or improving nearsightedness, farsightedness, and astigmatism.

D. Testimonials from consumers appearing in the advertisements for respondents' CKR ortho-k services do not reflect the typical or ordinary experience of members of the public who receive those services, which experience is that respondents' CKR patients typically achieve 20/20 vision and no longer need corrective eyewear.

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

10. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eight A and B, at the time the representations were made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eight A and B, at the time the representations were made. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

12. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that:

A. A significant number of people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear CKR ortho-k devices occasionally or at night.

B. All or most people will experience stabilized vision after only a few weeks or months of CKR ortho-k treatments.

C. CKR ortho-k prevents and reverses deteriorating nearsightedness in children.

D. CKR ortho-k is as safe as contact lenswear.

E. CKR ortho-k is as effective as refractive surgical methods in correcting, controlling, or improving nearsightedness, farsightedness, and astigmatism.

F. CKR ortho-k has helped thousands of people achieve normal vision.

G. CKR ortho-k provides pilots and other career professionals with stable 20/20 vision thereby enabling them to meet occupational requirements for unaided vision.

13. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph twelve, at the time the representations were made.

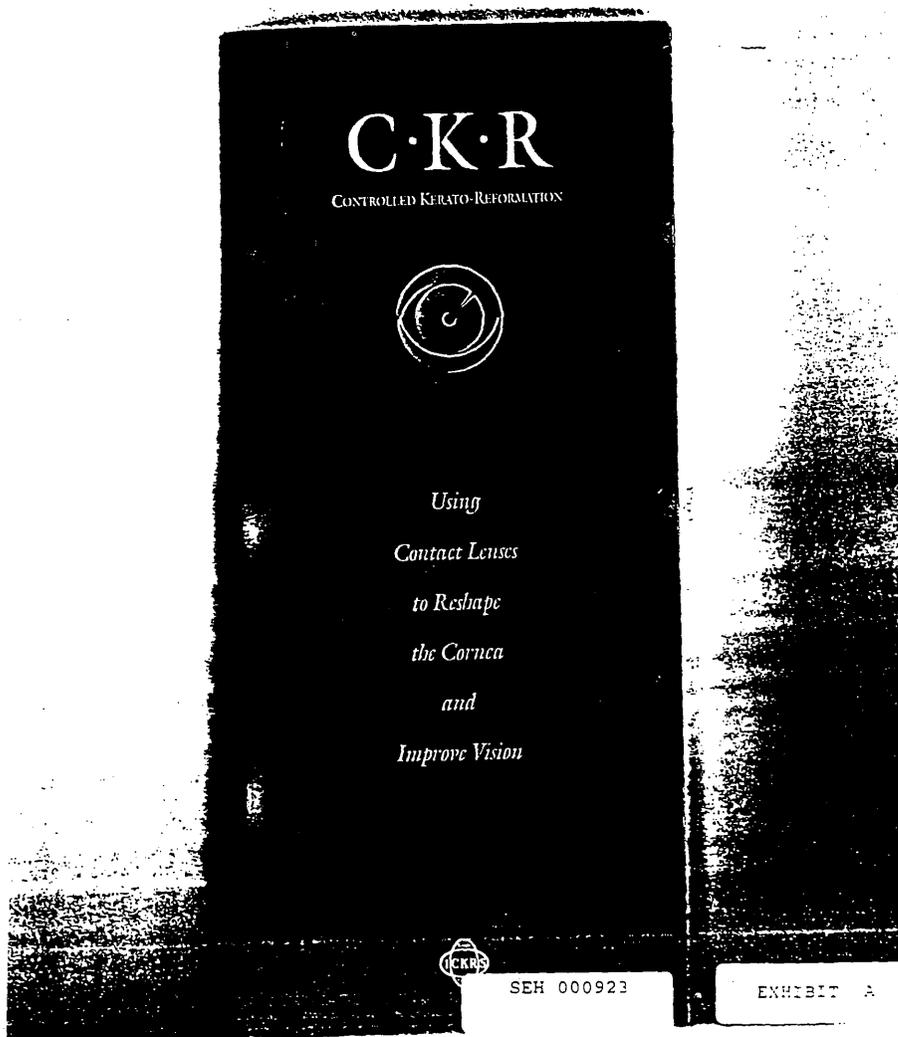
14. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph twelve, at the time the representations were made. Therefore, the representation set forth in paragraph thirteen was, and is, false or misleading.

15. 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



Complaint

125 F.T.C.

EXHIBIT A

SAMI EL HAGE, O.D., Ph.D., D.Sc.

For the past 30 years, Dr. Sami El Hage has been involved in research, teaching, clinical practice, and professional activities. His practice is well established as one of the most prominent in Houston. An internationally acclaimed writer and lecturer, he has written over 50 articles and chapters in scientific jour-



nals and books, and co-authored a book titled *The Optics Of The Eye* with professor Yves Le Grand. He has presented his research at over 100 university lectures and medical congresses worldwide. Dr. El Hage has taught over 20 differ-

ent university courses in optometry and speaks five languages. A leader in advanced eye care technologies, he has been featured in local, regional, national, and international publications. In addition to his literary successes, Dr. El Hage is the inventor of a computerized corneal topographer for which he holds four patents.

TRAINING AND EXPERIENCE

Dr. El Hage has had extensive academic experience in addition to his professional accomplishments. He received his O.D. degree from the Pennsylvania College of Optometry, and Ph.D and D.Sc. from the University of Paris. He also taught at the University of Paris and The University of Houston College of Optometry, where he was a tenured full professor and

Complaint

EXHIBIT A



graduate faculty member at the age of 33. Dr. El Hage has also lectured extensively, nationally and internationally. In 1967, he was invited by the British Council to the City University in London for post doctoral work. Dr. El Hage also founded the Corneal Research Laboratory with Professor Herbert Schlober "Institut für Medizinische Optik Der Universität München", in 1968. In 1969, he received a fellowship from the "Istituto Nazionale Di Ottica" Florence-Arezzo. He was also elected as an Honorary Fellow of the Colegio de Optometristas de Venezuela in 1974. He received the Grand Honors award from the National Eye Research Foundation in 1980. He is currently a consultant to many eye care organizations and is the founder and president of CKRS (International Committee for Keratoconus Research).

TECHNOLOGICAL ADVANCEMENTS

Dr. El Hage's invention of the Corneal Topographer is the result of more than 10 years of research and has revolutionized the way we measure the surface of the eye. Because the topographer measures the eye's surface or cornea, it can be used to measure nearsightedness, astigmatism, and farsightedness. The Corneal Topographer is an excellent tool for pinpointing the extent of a vision problem. Accurate measurement of the cornea is also essential in the fitting of contact lenses. This is especially important in CKR since it allows Dr. El Hage to monitor changes in the shape of the cornea and provide the best fit possible.

SEH 000924

Complaint

125 F.T.C.

EXHIBIT A

NATURAL VISION IMPROVEMENT

Imagine being able to easily read the alarm clock without your glasses, see street signs clearly, or participate in sports without lenses of any kind. These are just a few of the ways peoples' lives are changing after

THE BENEFITS OF CKR

See better without help from glasses or contact lenses

Prevents deteriorating vision in children caused by myopia

Free of surgical complications or pain

Improvement occurs rapidly - within weeks or months

No disruption of vision - your eyesight improves

Occupational unaided vision demands may be met for careers such as pilots, policemen, firemen, athletes, etc.

undergoing the procedure known as Controlled Kerato-Refraction, or CKR.

CKR is a non-invasive procedure that dramatically improves natural vision by reshaping the front curvature of the eye (called the cornea) with specially designed contact lenses, or molds. This procedure has provided corrective eye care to many thousands of patients without the risks or complications associated with surgery. Visual defects known as nearsightedness (myopia), farsightedness (hyperopia), and astigmatism occur when light rays entering the cornea focus incorrectly, producing blurred vision. Often by changing the shape of the cornea the defect

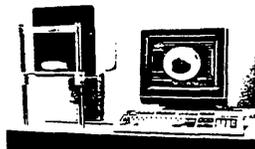
can be resolved. CKR utilizes a series of molds prescribed in progressive stages to gently reshape the cornea, similar to the way braces are used to straighten teeth. The lenses consist of a highly oxygen permeable material with a special design that encourages the natural tissue of the cornea to conform to the correct curvature of the lens. The changes are permanent and

Complaint

EXHIBIT A

the patient enjoys clear comfortable vision at all times.

The CKR procedure involves thorough examinations, mold changes, and/or mold modifications as needed until desired results are obtained. The process



can take from six weeks to a few months or longer to complete, depending on the severity of the problem. The result is dramatically

improved vision with retainer lenses being worn on a limited basis, sometimes only at night during sleep, to maintain the new shape of the cornea.

Developed in 1962, Ortho-K has been used for years to help pilots, athletes, and others who required unaided vision for their occupations. Now, with new research developments such as computerized corneal topography (mapping which provides a more accurate fit and diagnosis) and new mold designs and materials, CKR, the second generation, is becoming the eye care trend of the future.

A SAFE ALTERNATIVE TO RK SURGERY

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SEE SOURCE

Complaint

125 F.T.C.

EXHIBIT A

SAVING CHILDREN'S VISION

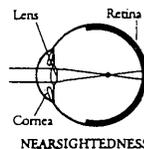
One of the most exciting uses for CKR is controlling myopia (nearsightedness) in children. Unfortunately, nearsightedness is a progressive disease, which is why 75% of the nearsighted population have to periodically increase their prescription. As years pass, from elementary school to college and in later life, a person's vision gradually worsens. For instance, only 4% of 8 year olds are nearsighted, while over 30% of the general population is nearsighted. CKR prevents this deteriorating vision in children by actually halting myopia in its tracks.

RESULTS

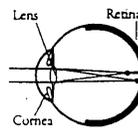
Myopia (Nearsightedness): CKR is highly effective in improving myopia. Mild to moderate degrees of myopia may be corrected from 20/400 to 20/20-20/30. Higher degrees of myopia can be controlled to allow functional vision without lenses.

Astigmatism: CKR usually either eliminates or greatly reduces mild astigmatism. Higher amounts of astigmatism can also be improved to enhance vision.

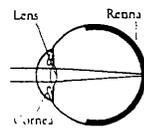
Hyperopia (Farsightedness): CKR usually improves



NEARSIGHTEDNESS



ASTIGMATISM



FARSIGHTEDNESS

Complaint

EXHIBIT A

Presbyopia ("Reading Vision"): This is due to a normal aging process by which the lens inside the eye does not respond to accommodation and therefore is not correctable with these procedures.

SAFETY

Four university research studies have shown Corneal Refraction to be safe and effective, with no harmful side effects. These studies include the University of Houston College of Optometry (5 years); University of California at San Diego Medical School (7 years); University of California at Berkeley College of Optometry (3 years); Pacific University College of Optometry (5 years).

A NEW LOOK ON LIFE

CKR enables people to participate in activities that were previously difficult or even impossible without lenses, such as contact sports and swimming. The procedure also provides functional vision without glasses or contacts, so that simple tasks such as reading an alarm clock or clearly seeing street signs are not difficult anymore.

FIND OUT IF CKR IS RIGHT FOR YOU

Call for an appointment to view an informative film and receive a free consultation and color computerized map of your eye to help determine if you are a candidate for this procedure.

If CKR is determined to be right for you, then you might also be one of the many who are no longer dependent on glasses or contacts.

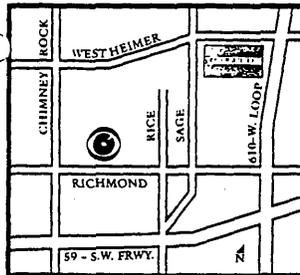
Call 1-800-821-9001 for more information.

SEE US FIRST

Complaint

125 F.T.C.

EXHIBIT A



"I am a sports enthusiast and now I can get involved without the restrictions of glasses." -G.M.

"I have been through the program and I am very happy with it, and I am bringing my daughter in to do it." -A.S.

"I never realized how precious the gift of sight was until I went through this procedure." -A.S.

"I am very happy with the program and I would recommend it with no reservation." -D.M.



Eye Care Associates

SAMUEL HAGE O.D., Ph.D., D.Sc.

5520 Richmond Avenue
Houston, Texas 77056
(713) 621-9001

SEE DIRECT

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EXHIBIT B

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 9523405

TITLE ORTHO-KERATOLOGY PROVIDERS

DATE RECORDED: UNKNOWN
TRANSCRIBED: DECEMBER 14, 1996
CORRECTED: MARCH 5, 1997

PAGES 1 THROUGH 12

VIDEO-TAPED ENTITLED:
"WHAT IS CKR? INFORM YOUR PATIENT"

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

EXHIBIT B

EXHIBIT B

1 FEDERAL TRADE COMMISSION

2

3 In the Matter of:)

4 Ortho-Keratology Providers) Matter No. 9523405

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12 The following transcript was produced from a video-tape
13 provided to For The Record, Inc. on December 13, 1996.

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EXHIBIT B

3

P R O C E E D I N G S

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3

HANI SHAFI (Young Boy): And I left them on a brown couch when I was over at a friend's house and then for some reason -- I think we went swimming, and then when I came in, I sat down on them and I broke the arm right off. And so I was wearing my glasses with only one arm for about six months.

PATI MARIK: Glasses are -- are limiting. You know, they get catty-whampus, you know, they're not -- they're -- they get greasy.

CAROLINA ARAYA (Young Girl): All the time you have to clean them because they look all gross on the outside.

PATI MARIK: You have to be wiping them and then you scratch them.

HANI SHAFI (Young Boy): I finally got some new glasses, which were then too big. And then I got hit with a basketball and then that made my glasses all crooked.

SHERYL NOBLE: And then I had regular glasses for when I didn't have my lenses on and then all of a sudden I had to get reading glasses, and then you've got sunglasses.

HANI SHAFI (Young Boy): I'll either have to wear glasses or contacts the rest of my life and that really kind of bummed me out to have to worry about glasses and just getting thicker and thicker lenses.

ANNOUNCER: Glasses can make a person cross, one

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125 F.T.C.

EXHIBIT B

4

1 minute they're there and the next they're lost. Red marks on
2 your nose, ears that get sore. Buying new specks, money,
3 headaches galore. They scratch, they blur, they hide your
4 face. Wouldn't it be wonderful to keep them in their case?

5 JAY REDMON (Commercial Pilot): I don't trust
6 anybody putting a scalpel to my eyeballs. They're my
7 livelihood. They're how I make a living. So I was looking
8 for an option that was very safe and that was also going to
9 give me the results and CKR gave me the results. I now have
10 20/20 vision without my contacts and get along absolutely
11 great.

12 SHERYL NOBLE: Everything I do outdoors I can now do
13 without any lenses. And before I could not do anything, I
14 could not walk without lenses or glasses.

15 HANI SHAFI (Young Boy): When I go and talk to a
16 girl that I think is, like, pretty or something, you know,
17 like, before I was like oh, my gosh, my glasses are so dorky.
18 And, you know, it's just kind of like embarrassing. But now
19 you can just pretty much feel a bit more self-confidence.

20 ANNOUNCER: CKR, which stands for Controlled Kerato-
21 Reformation is a nonsurgical procedure that gradually reshapes
22 the cornea, thus dramatically improving one's natural vision.
23 The idea is very much like braces for the teeth.

24 DR. SAMI G. EL HAGE (Founder of ICKRS): Same idea,
25 like the braces for the eyes. Actually, some of our patients

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EXHIBIT B

5

1 come and ask us about it and call it the braces of the eye.
2 Indeed, we do change the curvature of the cornea, so people
3 with myopia on each side of 20/400 can see at, or close to,
4 20/20.

5 ANNOUNCER: Your eyes' ability to focus properly is
6 dependent on the lens and the cornea. Under normal
7 circumstances the images you see are projected on the light
8 sensitive part of the eye, which is called the retina.

9 The retina is like a film camera. An average shaped
10 cornea bends light so that the images you see land right on
11 the retina. For far-sighted people the images are projected
12 behind the retina, for near-sighted people the images are
13 projected in front. With astigmatism images are focused on
14 two different points. In all three cases vision is blurred.

15 CKR uses specially designed rigid gas-permeable
16 contact lenses, often referred to as molds. They're called
17 molds because of the way they change the shape of the cornea.
18 Changing the cornea's shape allows images to be focused on the
19 retina. That's when clear vision is achieved.

20 CAROLINA ARAYA (Young Girl): I told my friends that
21 they give you a pair of contacts and they -- um, they're going
22 to start helping your eyes and to make them 20/20. But it
23 will take a while, it won't take that long, but it will take a
24 little while.

25 SHERYL NOBLE: First time I noticed the difference

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125 F.T.C.

EXHIBIT B

6

1 in my vision was probably a week after I started. I mean,
2 immediately, I thought something was wrong because I couldn't
3 see out of these lenses anymore, and what it was doing was
4 changing my eyes.

5 NORMAN LEACH (Associate Professor, U of H College of
6 Optometry): CKR is -- is beneficial in patients who are
7 nearsighted and have small to moderate amounts of astigmatism,
8 and occasionally a far-sighted purpose -- person will benefit
9 from that as well. But mostly it's for those people who are
10 near-sighted.

11 DR. SAMI G. EL HAGE: That is not to say that we can
12 give everyone 20/20 vision, but in most cases we can give them
13 functional vision and less dependency on glasses and contact
14 lenses.

15 PATI MARIK (Teacher): Well, I just was not
16 satisfied at all with the way that I that could see things and
17 I knew there must be a better way some place, but I didn't
18 know where.

19 JAY REDMON: Of course, FAA requires that we
20 maintain 20/20 vision corrected and we also are tested
21 uncorrected and we have to meet standards there and right now
22 it's at 20/200 corrected to 20/20. And I could squeak out
23 2200, but it was a little nerve -- nerve-wracking, so I was
24 looking for a way to improve uncorrected vision.

25 DR. SAMI G. EL HAGE: CKR is the second generation

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Complaint

EXHIBIT B

1 of a procedure called ortho-keratology. It has been studied
2 by four universities, patient was monitored for over 40 years
3 closely and it proved to be a safe procedure.

4 Now, where CKR differs from ortho-keratology is that
5 we take the topography of the cornea. Like the topography of
6 the cornea behind me, the slide projected behind me, it shows
7 the hills and valleys of the cornea. It shows the asperisity
8 of the cornea. It shows the shape factor of the cornea.

9 From these measurements we design the specific mold.
10 These molds are based on the total topography, they do reshape
11 the cornea, modify and reform the cornea, and reduce near-
12 sightedness and improve vision.

13 In the past they used to guess about the shape of
14 the cornea. With this topographer we can measure up to 8300
15 points over the cornea.

16 ANNOUNCER: This is the cornea topographer that
17 Doctor El Hage invented. It's used to determine what kind of
18 molds a patient's cornea needs for reshaping.

19 NORMAN LEACH: This instrument reflects a series of
20 rings off the front of your eye and a computer then analyzes
21 these reflective rings and we get a color map of what the
22 cornea looks like.

23 By having this instrument then we can measure what
24 the corneal shape is to start with and then we can monitor the
25 changes that we're making as we go through the program. And

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1 as you improve in your vision then we will need to make
2 subsequent changes in the contact lenses, or the corneal
3 molds, so that we can keep the process going.

4 JAY REDMON: They're very comfortable, very easy to
5 wear, and you don't know that the procedure is taking place,
6 that he's making the improvements, because all -- you're just
7 wearing your contacts on a daily basis.

8 HANI SHAFI: My vision just kept getting better and
9 better and at night when I'd take my contacts out to sleep,
10 then I'd just notice that I could see -- see things that I
11 couldn't see before without my glasses.

12 JAY REDMON: It took about four to five months for
13 me to get from my 20/100 vision to 20/20 uncorrected. So
14 progress comes very rapidly.

15 DR. EL HAGE: The molding process, or re-formation
16 of the cornea, varies from one patient to another. It depends
17 on the near-sightedness or myopia of the patient and the
18 corneal rigidity of the patient. Everyone is different.

19 NORMAN LEACH: All a patient needs to be able to do
20 -- once they're determined to be a good candidate -- is to be
21 able to put on lenses, contact lenses, take off contact
22 lenses, follow the doctor's instructions carefully, and
23 maintain their follow-up visits.

24 HANI SHAFI: And then after however long it takes
25 for your vision to get corrected they give you retainer

861

Complaint

EXHIBIT B

9

1 lenses. And the retainer lenses are lenses that you only have
2 to wear for, like, certain amount of hours a week, whatever
3 the doctor tells you to, and then that's just to keep your
4 eyes in the shape they are so you can keep your vision.

5 NORMAN LEACH: The benefits of CKR attract people of
6 all ages from all walks of life with various vision
7 requirements. The thing that attracts them the most, perhaps,
8 is the fact that it's a nonsurgical procedure.

9 SHERYL NOBLE: I investigated a lot of things before
10 I decided on CKR, but I had a lot of friends try RK. I found
11 that it worked sometimes, it didn't sometimes. Sometimes you
12 had to go back and do it again. I don't like surgery.

13 PATI MARIK: It was painless, let me tell you that
14 off the bat.

15 CAROLINA ARAYA: I would tell them to not be afraid
16 because it's all easy and it works very good.

17 NORMAN LEACH: The only risks or side effects
18 associated with CKR are -- are those -- those same risks and
19 side effects that are associated with rigid gas-permeable
20 contact lenses. And those can be avoided, or certainly
21 reduced, by following proper hygiene in care of your lenses
22 and also by certainly following your doctors' instructions on
23 how to wear the contact lenses.

24 About 95 percent of those patients who complete the
25 CKR program do, in fact, achieve functional vision.

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125 F.T.C.

EXHIBIT B

10

1 ANNOUNCER: If you read through the comments we've
2 received from patients who have completed their CKR programs
3 with us, you'd see the words "thank you" written over and over
4 again. Thank you for the chance to play sports unencumbered.
5 Thank you for taking the pressure off my ears and nose. Thank
6 you for giving me my face back.

7 If you want to see better without glasses or contact
8 lenses CKR could be the answer for you. You'll see
9 improvement quickly with no surgery, no pain, and no
10 disruption to your vision as the improvements occur. What a
11 wonderful life it is not being so dependent on glasses and
12 contacts.

13 HANI SHAFI: I think sight is the most important
14 thing because that involves everything you do.

15 SHERYL NOBLE: I think the better you can see, the
16 better you feel.

17 CAROLINA ARAYA: I don't like wearing glasses when
18 I'm ice skating because they bother me.

19 JAY REDMON: Hey, leave your contacts at home. Go
20 -- go do what you want to do, ride your bicycle with the kids
21 or climb mountains or scuba dive. It gives you so much more
22 freedom than having to hassle with glasses or contacts.

23 PATI MARIK: You know, you really don't know what
24 you're missing until you see what you're missing.

25 HANI SHAFI: I never thought I'd have close to

861

Complaint

EXHIBIT B

11

1 perfect vision again, you know.
 2 SHERYL NOBLE: It's wonderful. I can see again.
 3 (Whereupon, the vide-tape was concluded.)
 4

12

1 C E R T I F I C A T I O N O F T Y P I S T
 2
 3 DOCKET/FILE NUMBER: 9523405
 4 CASE TITLE: ORTHO-KERATOLOGY PROVIDERS
 5 TAPING DATE: UNKNOWN
 6 TRANSCRIPTION DATE: 12/14/96

7
 8 I HEREBY CERTIFY that the transcript contained herein is
 9 a full and accurate transcript of the tapes transcribed by me
 10 on the above cause before the FEDERAL TRADE COMMISSION to the
 11 best of my knowledge and belief.

DATED: December 14, 1996

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 15
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 KATHY J. DE MENT

C E R T I F I C A T I O N O F P R O O F R E A D E R

18
 19
 20 I HEREBY CERTIFY that I proofread the transcript for
 21 accuracy in spelling, hyphenation, punctuation and format.

22
 23
 24


 DEBRA ARNOLD

Complaint

125 F.T.C.

EXHIBIT C

CKR Success Stories

In just a couple of weeks I was able to see 20/20 without glasses or my special contacts. It's wonderful!! I no longer have to worry about taking my glasses on or off. I can even wear really "cool" sunglasses without having to have them prescription made! ... AY

My eyesight is much better. I am totally independent of my glasses. In fact, I can't see out of them. For those people who hate glasses like I do, this is an alternative to eye surgery. ... SW

I now can see clearer than I ever have without glasses. I drove without any corrective aids for the first time this week. No more glasses after removing my contacts. Even without contacts, I can function almost normally. I look forward to each visit with anticipation and I can see results daily. Several of my friends are charting my progress with intentions to have this done also. It's great! ... CN

My vision has improved dramatically. I don't have to be on top of my mirror to put make up on in the morning. I'm not constantly pushing my glasses back up on my nose and dealing with pressure from behind my ears. It is an extremely easy and painless procedure with a big payoff. I feel more confident without my glasses. I like not being dependent on them. ... DS

I am able to read and see at distance with 20/20 acuity. I have been able to fly my plane without corrective lenses and I passed all required vision tests. ... VP

I can see leaves on trees and I can see to drive at night where before I couldn't. It (CKR) has brought me out of a fog. ... RMH

My vision has improved dramatically. I am very close to 20/20. CKR has given me confidence, as I was growing increasingly concerned about my vision. Seeing is believing! ... DC

EXHIBIT C

SEH 000155

861

Complaint

EXHIBIT C

CKR Success Stories

When I came to your office I could not see my alarm clock from my bed, or watch television without my glasses. I can now read the time from across the room, watch television from all the way across my living room and into my kitchen, and best of all, play sports without glasses or contacts to worry about breaking, slipping, or losing. I've been able to play softball and volleyball eye wear free. For scuba diving, it has made the biggest difference, since I never wanted to wear contacts in my mask. I genuinely like the concept of correcting my vision without cutting on my delicate, irreplaceable eyes. I look forward to water and snow skiing this year!! ... CEB

My eyesight got progressively better every week, and within two months I could see without the help of eyeglasses or contacts. ... HH

When I started the program, I could not see the "Big E" on the eye chart. Now without my lenses in I can see 20/40 and can enjoy reading a book. I can function and see with or without lenses. Many of my friends are excited about beginning the program. ... RR

Changes have been just amazing. No more squinting, walking around feeling for my glasses. It feels like the fog has finally lifted and all is clear. I thought surgery was the only way to get rid of my contacts and dispose of my glasses. Boy was I ever wrong! I've told my co-workers how remarkable this process is. ... JR

I'm beginning to notice (see) things I never realized I was missing and everything is so clear! My visual acuity has definitely improved. I no longer fear losing my sight altogether. My vision had begun to deteriorate rapidly and I was afraid I would be blind within the next few years. It's painless and the results are extraordinary. ... CW

SER 000156

Complaint

125 F.T.C.

EXHIBIT C

CKR Success Stories

After about 4 days I noticed when jogging that I could read the "Lotto" sign from 100's of yards, not possible before. I also could watch TV from a distance not possible prior to the treatment. I no longer have to rely on glasses and each year or two changing prescriptions or frames. I will pay for this treatment over and over. The savings goes into my pocket not having to buy glasses. ... JT

I feel better about myself. It has changed my life by giving me a sense of freedom and joy that I have not experienced in years due to the burden of eyeglasses. I'm no longer self conscious of my appearance in glasses because I don't need them. ... LH

My vision has changed from needing corrective lenses to 20/20 in ten days. I am apprehensive about quick remedies for any kind of ailment, but I will not only verify, I will spread the good news about the changes I have experienced with all my friends. I am a sports enthusiast and now I can get involved without the restrictions of glasses. ... GWM

I can see now!! I thought I would be prisoner to my contacts/glasses for the rest of my life. I am now enjoying normal vision for the first time in approximately 25 years. CKR gave me my freedom back!! At the very beginning of my treatment, I had my doubts. It sounded too good to be true. I am now a BELIEVER!! I no longer have a strong reliance on vision correction to see. It is such a delight to be able to see without correction. It has opened a whole new world!! I am no longer visually handicapped. ... CJC

I can see things I never have been able to see before. I really noticed a big difference this past week. I felt I could almost see as good with the lenses in as I could with them out! I really felt I made progress. I can swim now and see everything around me! I can see the alarm clock in the middle of the night without bringing it close to my face! I can even read the directions on the shampoo bottles in the shower!! I recommend it (CKR) to my students, family, and friends. They all follow my progress almost as closely as I do! ... RP

SEH 000157

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Complaint

EXHIBIT C

CKR Success Stories

I have 20/20 vision without corrective eye wear! Three and a half months ago my vision was 20/400. I can now see the birds and squirrels playing on the wires and in neighboring yards without corrective eye wear. No more glasses sliding down my nose when I'm working outside. No more sore ears from ill fitting glasses. I now have freedom. I can see at concerts, etc. without having a line from my bifocals. No more tilting my head at angles to avoid the bifocal line when going down steps. ... SJ

Since starting the program 3 months ago, I have felt my vision improve dramatically. I have not been as dependent on contact lenses as I was before; and I no longer have to worry about going swimming or playing sports with contacts. Because of CKR, I will have 20/20 vision for the rest of my life. ... MM

In the first 7 days, I went from 20/100 left eye to 20/60, then in 11 days I went to 20/15 left eye. The right eye was 20/200 from the start and in 7 days went to 20/150 - no change in 14 days. Also, the astigmatism in both eyes is completely gone. I am excited about being able to see clearly without needing surgery, because I don't like pain and there is nothing painful about CKR. I absolutely recommend this service to others because, "why see a little when you can alot!" When I see people in restaurants with thick glasses, I want to go up to them and tell them about CKR. ... AW

My eyesight has improved to a point that I can go without contacts for periods of time. I can drive, play sports, and watch TV without contacts. I can do things without concern about losing a contact. Water activities in the lake and pool are much more enjoyable. ... PB

Drastic changes! I started the program not being able to read huge billboards. To this point, I can almost read street signs. Now I can hopefully get my aviation medical without restrictions. I believe this really works, I'm proof!! ... Ki

SER 000153

Complaint

125 F.T.C.

EXHIBIT C

CKR Success Stories

Changes have been dramatic. I typically tested around 20/60 to 20/80 on yearly eye tests associated with my job and now I test 20/20. I now have greater freedom and flexibility of not having to wear lenses from sun up to sun down. ... KH

I have seen my vision improve dramatically since starting CKR. My vision went from reading the big E on the eye chart to seeing 20/20 without glasses. I also believe that the overall health of my eyes have greatly improved. No longer is there anxiety when taking physicals for my job. Along with better vision and healthier eyes, there is an increased self-confidence in all aspects of my life - especially so in my professional career. To make gains such as I have, without surgery - and especially the risks associated with surgery, is, without a doubt, the only way to go. ... JR

EXHIBIT D

...and skin care
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1350. 526-5665.

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...smeic surgery. He has been practicing in
...Houston since 1975 and is affiliaed
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IMPROVE VISION WITHOUT SURGERY

Sami El Hage O.D., Ph.D., D.Sc.

EYE CARE associates

Adults and children now have the option to non-surgically correct nearsightedness and astigmatism. It is called Controlled Kerato-Reformation, or CKR for short.

CKR uses specially designed contact lenses that correct vision and reshape the cornea simultaneously. The CKR lenses, or molds, are worn daily, in place of glasses or other contact lenses. Within a period of a few days to a few months vision can be restored to 20/20 or close to 20/20 as possible, so that the patient can obtain good, functional vision without dependence on glasses or contacts, and without the risk and side effects commonly associated with surgical procedures.

The results of CKR have been phenomenal and life changing for my patients, says Dr. El Hage. Here's what just a few of them had to say about the remarkable improvement in their vision.

Sami El Hage O.D., Ph.D., D.Sc. creator of CKR

"My vision improved the very first time I put the contacts on. And I had 20/20 vision about two weeks after I started wearing them."
Edwin V.

The initial change was very dramatic. Within the first 24 hours, my vision was improved to about 20/20. Since that initial change, my vision has progressed to 20/20, and I can see quite well during the day after taking my lenses out in the morning. This is the first time in 20 years that I have been able to go about my daily routine without the assistance of glasses or contacts...

...I was initially quite skeptical about the ability of a non-invasive procedure to achieve a significant improvement in my vision. Now I recommend CKR to anyone who will stand still long enough for me to tell them about my experience!...

...Anyone who has to wear glasses or contacts understands the difference that good, unaided vision would make in their lives. This program is the single most important thing I have ever done to simplify and remove stress from my life."
Amy D.

"I can see TV without any lenses on. I can drive during the day without contacts. This is wonderful! Just by being able to see better, 20/20, I can get up in the morning and not have to wear my glasses or contacts. A great feeling indeed!"
Sylvia D.

Complaint

125 F.T.C.

EXHIBIT D

Nov. 95

IMPROVE VISION WITHOUT SURGERY

Adults and children now have the option to non-surgically correct nearsightedness and astigmatism. It is called Controlled Kerato-Reformation, or CKR for short.

CKR uses specially designed contact lenses that correct vision and reshape the cornea simultaneously. The CKR lenses, or molds, are worn daily, in place of glasses or other contact lenses. Within a period of a few days to a few months vision will be restored to 20/20 or close to 20/20 as possible, so that the patient will obtain good, functional vision without dependence on glasses or contacts, and without the risk and side effects commonly associated with surgical procedures.



Sam El Hage O.D., Ph.D., D.Sc.



The results of CKR have been phenomenal and life changing for my patients, says Dr. El Hage. Here's what just a few of them had to say about the remarkable improvement in their vision.
Sam El Hage O.D., Ph.D., D.Sc. creator of CKR

"My vision improved the very first time I put the contacts on. And I had 20/20 vision about two weeks after I started wearing them."
Edwin V.

"The initial change was very dramatic. Within the first 24 hours, my vision was improved to about 20/30. Since that initial change, my vision has progressed to 20/20, and I can see quite well during the day after taking my lenses out in the morning."

"This is the first time in 20 years that I have been able to go about my daily routine without the assistance of glasses or contacts... I was initially quite skeptical about the ability of a non-invasive procedure to achieve a significant improvement in my vision. Now I recommend CKR to anyone who will stand still long enough for me to tell them about my experience."

"Anyone who has to wear glasses or contacts understands the difference that good, unaided vision would make in their lives. This program is the single most important thing I have ever done to simplify and remove stress from my life."

Amy D.

"Prior to correction I could not see clearly beyond arm's length now I can drive without contacts or eyeglasses... This is a painless, corrective procedure, scientifically proven, without the potential complications/ramifications of RK... My vision has improved from 400/300 to 30/20. I can see again!"

Hank N.

To find out more about CKR, please contact our office. For more information and a free consultation, call (713) 621-9001 (Galleria Area)

prior to the event." At Vaseline on all joints, in ankles, hips, and elbows. After the race, I consume a carbohydrate. This will improve grip and help bring about turn. Hydration remains you cross the finish line race festivities, make ment a priority. (To c dration, weigh yourself ounces of fluid for e during the race.) We help prevent leg cramp ce massage can be

FAUX

Runner Jill Was rector of nutrition Twelve Oaks Hospi runners on their di

• During pre-runners do not ge hydrates, particu three days.

Good high choices include rice, pasta, pot cakes. "If they're a high-carbohydr they just need to pasta a day, and says Washburn.

Read pack according to 600 carb grams "If they're not ge and junk foods u ce hard to get orates," says W.

• Don't co during pre-ma carbocadin, weight gain. " gain's vege "The... Washburn.

• Continue...

BALDNESS...

You can live with it, or your answer could be...

LINE GRAFTING



"It's remarkable. You owe it to yourself to find out more... What have you got to lose, you haven't already lost!"



SEE 000814

By RICHARD L. BRARKE
New York Times

Eight weeks after Republicans assumed control of Congress, Americans are dubious about central elements of the party's legislative agenda on issues that include welfare, crime, military spending and the federal budget deficit, according to the latest New York Times/CBS News Poll.

Republicans are generally more supportive than Democrats and independents of what the new leadership in Congress is trying to do. But Republicans too express misgivings about the course taken by House Speaker Newt Gingrich and his allies. Most Americans believe that Congress should stress jobs and crime — issues that have not been top priorities — and health care, which has not been on the agenda of the new Congress at all.

People took exception to major parts of the Republicans' crime policy. A substantial majority favored the ban on assault weapons that the Republicans have vowed to overturn, and most objected to a House bill that would give towns and cities more discretion in spending money that was targeted by President Clinton specifically for more police officers.

One of the most dramatic examples of the gap between public opinion as measured by the poll and the priorities of congressional Republicans, is over the balanced-budget amendment to the Constitution. The amendment, already approved by the House, is scheduled for what appears to be a close vote in the Senate today.

Seventy-nine percent said they favor such an amendment. But that support shrinks to only 22 percent when Americans are told that it will require cuts in Social Security, as many analysts say. The Republicans have debated efforts to remove Social Security from the budget-balancing equation.

The poll also found that 43 percent approve of President Clinton's overturn, and most objected to a House bill that would give towns and cities more discretion in spending money that was targeted by President Clinton specifically for more police officers.

Even more striking was a sharp improvement in the popularity of Sen. Bob Dole of Kansas, the majority leader, who is making a run for the 1996 Republican presidential nomination. With 83 percent of Americans having an opinion of Dole, 40 percent hold favorable views — double his favorable rating last month — and 23 percent unfavorable.

Gingrich is not nearly as popular. Of the 55 percent who express an opinion 21 percent hold a favorable opinion and 22 percent unfavorable. The nationwide telephone poll of 1,100 adults, which was taken Wednesday through Saturday, has a margin of sampling error of plus or minus three percentage points.

More than half of Americans say they know nothing about the "Contract with America," the House Republicans' political manifesto. But the number of people who have some familiarity with the contract has risen to 41 percent, from 21 percent in December.

SPECIALS from 4.25
MARGARITAS from 4.50¢
MONDAY TO FRIDAY 11:00 AM TO 1:00 PM
5505 E. 1940 WEST (at Greenwood) 832-1400
7267 JULIEN 7268 WESTMINSTER
CITY CENTER 923-2209 975-9815

WE LOAN CASH IMMEDIATELY!
No Credit Check, No Work, No Applications
FAST, HASSLE FREE LOANS ON ALMOST ANYTHING
WE MUST LOAN \$100,000.00 IN CASH
ON DIAMONDS
*1,000 Loan for only *20 a month
Family Owned and Operated
"Established Reputation of Integrity"
1020 Gessner
One Block North of I-10 468-0795

IMPROVED VISION WITHOUT SURGERY
FOR INFORMATION REGARDING APPEARING IN THIS FEATURE CONTACT: NENT McLEOD 713-3142 PAID ADVERTISING



Dr. Sami El Hage shown explaining Controlled Kerato-Reformation or "Braces for the Eyes".

Although millions of people suffer from nearsightedness and astigmatism, until recently there have not been many options for improved vision without lenses. A revolutionary procedure called Controlled Kerato-Reformation, (CKR for short), is changing the lives of many people who have relied on daily wear of glasses or contacts. CKR is a non-surgical procedure and an alternative to the well known surgical procedure, Radial Keratotomy.

CKR is being introduced in the Houston area by local doctor, Sami El Hage, O.D., Ph.D., D.Sc. Dr. El Hage is a specialist in CKR and a former professor of the University of Houston college of Optometry as well as the University of Paris. Dr. El Hage is also the founder and president of the International Controlled Kerato-Reformation Society, which trains doctors to become CKR practitioners and updates them on the latest techniques in CKR.

Advanced Procedure Means Good Solution For Moderately Severe Buntions

CKR is the second generation of Orthokeratology which four university studies have proven safe and effective. In contrast to RK surgery, CKR does not leave the scar tissue which may cause vision glare at night or other side effects. CKR is free of surgical complications or pain, and there is no disruption of vision as eyesight improves.

EXHIBIT F
SEN 000911

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, 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.a. Respondent Eye Research Associates, Inc., d/b/a Eye Care Associates ("ECA"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.

1.b. Respondent ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society ("ICKRS"), is a corporation formed under the laws of the state of Texas, with its principal office or place of business located at 5320 Richmond Avenue, Houston, TX.

1.c. Respondent Sami G. El Hage, O.D., is the sole owner and President of the corporate respondents. Individually, or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents. His principal office or place of business is the same as that of the corporate respondents.

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

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

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. 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.

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

3. "*Controlled Kerato-Reformation*" ("CKR") service shall mean the ophthalmic service or procedure using contact lenses or similar devices designed to reshape the cornea to reduce or eliminate visual defects known as nearsightedness (myopia), farsightedness

(hyperopia), and astigmatism (distorted vision), as trademarked by Sami G. El Hage.

4. "*Substantially similar service*" shall mean any ophthalmic service or procedure using contact lenses or similar devices to reshape the cornea to reduce or eliminate visual defects known as nearsightedness (myopia), farsightedness (hyperopia), and astigmatism (distorted vision).

5. For purposes of this order, "*respondents*" shall mean ECA and ICKRS, corporations, their successors and assigns and their officers; Sami G. El Hage, O.D., individually and as an officer of the corporations; and each of the above's agents, representatives and employees.

6. "*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 partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of Controlled Kerato-Reformation ("CKR") services or any substantially similar service, in or affecting commerce, shall not represent, in any manner, expressly or by implication that:

A. Such service corrects nearsightedness and astigmatism thereby permanently eliminating the need for all corrective eyewear, including eyeglasses and contact lenses, for nearsightedness and astigmatism;

B. All or most people can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear devices used with such service occasionally or at night; or

C. Studies at the University of Houston College of Optometry (1976-77), University of California at San Diego Medical School (1980), University of California at Berkeley College of Optometry (1982-83), and Pacific University College of Optometry (1984), prove that such service is safe and effective in correcting, controlling, or improving nearsightedness, farsightedness, and astigmatism.

II.

It is further ordered. That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of CKR services or

any substantially similar service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The number of people who can achieve normal vision without eyeglasses or contact lenses on a permanent basis if they wear devices used with such service occasionally or at night;

B. The number of people who will experience stabilized vision after only a few weeks or months of treatments under such service;

C. The ability of such service to prevent or reverse deteriorating nearsightedness in children;

D. The comparative safety of such service and contact lenswear;

E. The comparative effectiveness of such service and refractive surgical methods in eliminating nearsightedness, farsightedness, or astigmatism;

F. The number of people whom such service has helped achieve normal vision; or

G. The ability of such service to provide pilots or other career professionals with stable visual acuity sufficient to meet occupational vision requirements;

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 partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or 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.

IV.

It is further ordered, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or 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 service, procedure, or product represents the typical or ordinary experience of

members of the public who use the service, procedure, or product, unless:

A. The representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; 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 service, procedure, or 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 C.F.R. 255.0(b).

V.

It is further ordered, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of ophthalmic services, procedures, or products, purporting to treat, mitigate, or cure visual defects known as nearsightedness (myopia), farsightedness (hyperopia), or astigmatism (distorted vision), in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute efficacy, performance, benefits, safety, or success of any such service, procedure, or product, unless the representation is true and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VI.

It is further ordered, That respondents, directly or through any partnership, corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, sale, or distribution of any service, procedure, or product in or affecting commerce, shall:

A. Not disseminate to any optometrist or eye care provider any advertising, promotional, or related marketing material containing any representations prohibited by this order;

B. Send by certified mail, return receipt requested, an exact copy of the notice attached hereto as Attachment A to each optometrist or eye care provider that attended a seminar on CKR services at which respondents taught since January 1, 1994, within thirty (30) days of the date this order becomes final, to the extent that such persons are known to respondents through a diligent search of their records, including but not limited to computer files, sales records, and inventory lists. The mailing shall not include any other documents; and,

1. In the event that respondents receive any information that subsequent to receipt of Attachment A any optometrist or eye care provider mentioned in subpart B of this part is using or disseminating any advertisement or promotional material furnished by a respondent that contains any representation prohibited by this order, if respondents have any agreement with that optometrist or eye care provider to market and/or perform CKR services, respondents shall immediately notify the optometrist or eye care provider that respondents will terminate said optometrist or eye care provider's right to market and/or perform CKR services if he or she continues to use such advertisements or promotional materials; and,

2. If respondents have any agreement with that optometrist or eye care provider to market and/or perform CKR services, respondents shall terminate any optometrist or eye care provider mentioned in subpart B of this part about whom respondents receive any information that such person has continued to use advertisements or promotional materials furnished by a respondent that contain any representation prohibited by this order after receipt of the notice required by subpart B of this part; and

C. For a period of three (3) years following service of this order, send by certified mail, return receipt requested, an exact copy of the notice attached hereto as Attachment A to each optometrist or eye care provider to whom respondents teach a seminar on CKR services after the date of service of this order who has not previously received the notice. Such notices shall be sent no later than the earliest of: (1) the execution of a sales or training agreement or contract between respondents and the prospective optometrist or eye care provider; or (2) the receipt and deposit of payment from a prospective optometrist or eye care provider of any consideration in connection with the sale of any service or rights associated with CKR. The mailing shall not include any other documents.

VII.

It is further ordered, That respondents ECA and ICKRS and their successors and assigns, and respondent Sami G. El Hage, O.D., shall, for three (3) 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 such representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondents ECA and ICKRS, and their successors and assigns, and respondent Sami G. El Hage, O.D., 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, independent contractors 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, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

It is further ordered, That respondents ECA and ICKRS, and their successors and assigns, for a period of five (5) years after the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in their legal form of organization, including but not limited to dissolution, assignment, sale or other change that would result in the emergence of a successor partnership(s) or corporation(s), 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 respondents' name or address. Provided, however, that, with respect to any proposed change in respondents' legal form 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 Sami G. El Hage, O.D., 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 businesses or employment, or of his affiliation with ECA or ICKRS, or of his affiliation with any new business or employment. The notice shall include the 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 respondents ECA and ICKRS, and their successors and assigns, and respondent Sami G. El Hage, O.D., 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 May 18, 2018, 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 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 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 ICKRS, Inc. letterhead]

[date]

Dear [optometrist or eye care provider]:

Eye Research Associates, Inc., d/b/a Eye Care Associates, ICKRS, Inc., d/b/a International Controlled Kerato Reformation Society, and Sami G. El Hage, O.D., recently settled a civil dispute with the Federal Trade Commission (FTC) involving advertising claims for our Controlled Kerato-Reformation (CKR) service. As a part of the settlements, we must make sure that you stop using or distributing advertisements or promotional materials that include these claims. Please see the attached settlement agreement for detailed information.

Our settlement with the FTC prohibits us from making false or unsubstantiated claims for CKR or any "substantially similar service," defined as "any ophthalmic service or procedure using contact lenses or similar devices to reshape the cornea to reduce or eliminate visual defects known as nearsightedness (myopia), farsightedness (hyperopia), and astigmatism (distorted vision)." Although we do not admit that the FTC's allegations are true, we have agreed to send this letter as a part of our settlement.

Sincerely yours,

Sami G. El Hage, O.D.
President
ICKRS, Inc.

Complaint

125 F.T.C.

IN THE MATTER OF

LANDAMERICA FINANCIAL GROUP, INC.

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-3808. Complaint, May 20, 1998--Decision, May 20, 1998

This consent order requires, among other things, the Virginia-based corporation to divest, to Commission-approved acquirers, prior to the acquisition of Reliance Group, all of its rights, title and interest in certain title plants serving designated areas. In addition, the consent order requires the respondent to also divest all user or access agreements pertaining to each divested title plant, and to continue to provide computer and other services previously provided for each divested title plant.

Appearances

For the Commission: *Patrick Roach, Michael Antalics and William Baer.*

For the respondent: *John Graybeal, Parker, Poe, Adams & Bernstein, Raleigh, N.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of 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 respondent LandAmerica Financial Group, Inc., formerly known as Lawyers Title Corporation ("LTC"), a corporation subject to the jurisdiction of the Commission, directly and through one of its subsidiaries, has entered into an agreement for the acquisition of certain assets that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and that such acquisition, 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 Federal Trade Commission Act; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions apply:

a. "*Respondent*" or "*LTC*" means LandAmerica Financial Group, Inc., formerly known as Lawyers Title Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by LandAmerica Financial Group, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

b. "*Reliance Group*" means Reliance Group Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Reliance Group Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

c. "*Title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

d. "*Title plant services*" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

II. LANDAMERICA FINANCIAL GROUP, INC.

2. LTC is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its office and principal place of business located at 6630 West Broad Street, Richmond, Virginia.

3. LTC is the sole owner of Lawyers Title Insurance Corporation.

4. LTC is, and at all times relevant herein has been, 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).

III. THE ACQUISITION

5. On December 11, 1997, LTC and its subsidiary Lawyers Title Insurance Corporation entered into an Amended and Restated Stock Purchase Agreement pursuant to which LTC agreed to purchase the

title insurance operations of Reliance Group, including Commonwealth Land Title Insurance Company and Transnation Title Insurance Company.

IV. TRADE AND COMMERCE

6. The relevant line of commerce is the production and/or sale of title plant services. Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes.

7. The relevant sections of the country are:

Washington, District of Columbia
Brevard County, Florida
Broward County, Florida
Clay County, Florida
Indian River County, Florida
Pasco County, Florida
St. Johns County, Florida
St. Lucie County, Florida
Ingham County, Michigan
Oakland County, Michigan
Wayne County, Michigan
St. Louis City & County, Missouri

8. The relevant markets set forth in paragraphs six and seven are highly concentrated.

9. There are no commercially reasonable substitutes for title plant services in the relevant markets set forth in paragraphs six and seven.

10. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the acquisition described in paragraph five.

11. LTC and Reliance Group, through its title insurance operations, are actual competitors in the relevant markets set forth in paragraphs six and seven.

V. EFFECT OF THE ACQUISITION

12. The effect of the acquisition 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 competition between LTC and Reliance Group in the relevant markets;
- b. By increasing the likelihood that LTC will unilaterally exercise market power in the relevant markets; and
- c. By increasing the likelihood of collusion in the relevant markets.

13. 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.

VI. VIOLATIONS CHARGED

14. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

15. The acquisition described in paragraph five, 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 Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by the respondent LandAmerica Financial Group, Inc., formerly known as Lawyers Title Corporation, of certain assets of Reliance Group Holdings, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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. LandAmerica Financial Group, Inc., formerly known as Lawyers Title Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its office and principal place of business located at 6630 West Broad Street, Richmond, 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

I.

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

A. "*Respondent*" or "*LTC*" means LandAmerica Financial Group, Inc., formerly known as Lawyers Title Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by LandAmerica Financial Group, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. The term "*Reliance Group*" means Reliance Group Holdings, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Reliance Group Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

D. The term "*title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

E. The "*Acquisition*" means the acquisition of the title insurance operations of Reliance Group by LTC, in exchange for the acquisition by Reliance Group of a minority voting interest in LTC and other

consideration, as described in the Amended and Restated Stock Purchase Agreement dated as of December 11, 1997.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within six months from the date the agreement containing consent order is signed by respondent, all of its rights, title and interest in the properties described below:

1. For each of the following counties or other local jurisdictions, either the rights, title and interest prior to the Acquisition of LTC or the rights, title and interest prior to the Acquisition of Reliance Group in all title plants serving such county or local jurisdiction:

- Washington, District of Columbia
- Brevard County, Florida
- Broward County, Florida
- Clay County, Florida
- Indian River County, Florida
- Pasco County, Florida
- St. Johns County, Florida
- St. Lucie County, Florida
- Ingham County, Michigan
- Oakland County, Michigan
- Wayne County, Michigan
- St. Louis City & County, Missouri

2. Respondent shall also divest all user or access agreements pertaining to each divested title plant. At the acquirer's option at the time of purchase, and at a commercially reasonable price, LTC shall continue to provide computer and other services previously provided for each divested title plant by LTC or Reliance Group, for a period up to three years from the date such title plant is divested, and shall assist the buyer in transferring the computer and other services to any other provider of such services.

B. Respondent shall divest the properties specified in paragraph II.A only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued use of the divested title plants as ongoing, viable title plants used in the production and/or sale of title information, and

to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the properties as specified in paragraph II.A, respondent shall take such actions as are necessary to maintain the viability and marketability of such properties and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the properties. LTC shall comply with the following requirements with respect to all title plants serving the counties or other local jurisdictions listed in paragraph II.A in which either LTC or Reliance Group has any rights, title or interest, during the period prior to the completion of the required divestiture for each such county or other local jurisdiction:

1. LTC shall cause the title plants to be maintained, including but not limited to updating the records and/or indices contained in the title plants, to the extent and in the manner maintained prior to the Acquisition.

2. LTC shall cause to be maintained in good faith all contracts or agreements for access to the title plants subject to the terms, conditions and stipulations of those contracts, and will refrain from taking any action toward terminating those contracts other than that which would be commercially reasonable under the terms of such contracts or agreements.

3. LTC shall cause access to the title plants to continue to be provided to accessors whose contracts or agreements for access to the title plants expire by their terms prior to the completion of the required divestiture, in good faith on terms, conditions and stipulations identical to those set forth in such contracts or agreements.

III.

It is further ordered, That:

A. If LTC has not divested, absolutely and in good faith and with the Commission's prior approval, all of the properties specified in paragraph II.A within six months from the date the agreement containing consent order is signed by respondent, the Commission may appoint a trustee to accomplish the required divestitures. 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, LTC 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 a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestiture of the properties specified in paragraph II.A that have not been divested by LTC, including the authority, subject to the approval of the Commission, with respect to any of the listed counties or local jurisdictions as to which divestiture has not been completed by LTC, to determine whether to divest the rights, title and interest prior to the Acquisition of LTC or the rights, title and interest prior to the Acquisition of Reliance Group in title plants serving such county or local jurisdiction.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to accomplish the divestitures 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 divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the properties specified in paragraph II.A that have not been divested by LTC, and to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the trustee's period 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 expeditiously the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's completing divestiture of the properties specified in paragraph II.A that have not been divested by LTC.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the properties specified in paragraph II.A that have not been divested by LTC.

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

IV.

It is further ordered, That:

A. For a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving any county or other local jurisdiction specified in paragraph II.A, where at the time of the acquisition the respondent has a direct or indirect ownership interest in any title plant serving the same county or local jurisdiction; or

2. Acquire any assets (other than in the ordinary course of business) or ownership interest in a title plant serving any county or other local jurisdiction specified in paragraph II.A, where at the time of the acquisition the respondent has a direct or indirect ownership interest in any title plant serving the same county or local jurisdiction.

Notification is not required to be made pursuant to this paragraph IV with respect to any acquisition by respondent of a copy of title records or other information from a person or entity which thereafter retains the original information in its ownership and control, and

where competition in the ordinary course between the parties is not otherwise restrained.

B. Notification pursuant to this paragraph 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. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, the respondent shall submit the following supplemental information in respondent's possession or reasonably available to respondent:

1. The name of each county or local jurisdiction to which the terms of paragraph IV.A.1 or 2 are applicable;
2. A description of the title plant assets or interests that are being acquired; and
3. With respect to each title plant serving each county or local jurisdiction to which the terms of paragraph IV.A.1 or 2 are applicable (including title plants in which the respondent has a direct or indirect ownership interest as well as other title plants known to the respondent) the names of all persons or entities who hold any direct or indirect ownership interest in the title plant and the percentage interest held by each; the time period covered by each category of title records contained in the title plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records; and the names of all persons, including but not limited to title insurers or agents, who have access to the title plant.

C. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. 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, 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 paragraph IV of this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation 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, upon written request, 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 days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

IN THE MATTER OF

ROCHE HOLDING LTD.

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-3809. Complaint, May 22, 1998--Decision, May 22, 1998

This consent order requires, among other things, the Switzerland-based corporation to divest Corange Limited's U.S. and Canadian Retavase businesses to Centecor Inc., and divest, to a Commission-approved acquirer, Corange's worldwide drug abuse testing reagent business, which uses Cloned Enzyme Donor Immuno-Assay ("CEDIA") reagents, and grant a non-exclusive license to all other CEDIA reagents.

Appearances

For the Commission: *Christina Perez, Andrew Topps, Ann Malester and William Baer.*

For the respondent: *Ronan Harty, Davis, Polk & Wardwell, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Roche Holding Ltd ("Roche"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire 100% of the voting stock of Corange Limited ("Corange"), a corporation 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, 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. "*Cardiac Thrombolytic Agents*" means all thrombolytic agents used to dissolve blood clots.
2. "*DAT Reagents*" means all diagnostic reagents used to test for any drug of abuse.

II. RESPONDENT

3. Respondent Roche is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002.

4. Respondent is engaged in, among other things, the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents.

5. 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.

III. THE ACQUIRED COMPANY

6. Corange is a corporation organized, existing, and doing business under and by virtue of the laws of Bermuda, with its headquarters located at 22 Church Street, P.O. Box HM 2026, Hamilton, HM HX Bermuda.

7. Corange is engaged in, among other things, the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents.

8. Corange 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

9. On May 24, 1997, Roche entered into a Stock Purchase Agreement with Corange to acquire 100% of Corange's voting stock for approximately \$11 billion ("Acquisition").

V. THE RELEVANT MARKETS

10. 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 Cardiac Thrombolytic Agents; and
- (b) The research, development, manufacture and sale of DAT Reagents used in workplace testing.

11. 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 lines of commerce.

VI. STRUCTURE OF THE MARKETS

12. The market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post merger HHI is 8,698 points, which is an increase of 3,220 points over the premerger HHI level. Roche and Corange are the two leading suppliers of Cardiac Thrombolytic Agents in the United States and produce the safest and most effective products on the market.

13. Roche and Corange are actual competitors in the relevant market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents in the United States.

14. The market for the research, development, manufacture and sale of DAT Reagents used in workplace testing is highly concentrated as measured by the HHI. The post merger HHI is 4,878 points, which is an increase of 704 points over the premerger HHI level. Roche and Corange are two of only four suppliers of DAT Reagents used in workplace testing in the United States.

15. Roche and Corange are actual competitors in the relevant market for the research, development, manufacture and sale of DAT Reagents used in workplace testing in the United States.

VII. BARRIERS TO ENTRY

16. Entry into the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph eighteen because of, among other things, the time-consuming nature of research, development and U.S. Food and Drug Administration approval of these products.

17. Entry into the market for the research, development, manufacture and sale of DAT Reagents used in workplace testing is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph eighteen because of, among other things, the difficulty of developing a full panel of DAT Reagents, as well as gaining brand name recognition and customer acceptance.

VIII. EFFECTS OF THE ACQUISITION

18. The effects of the Acquisition, if consummated, 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 FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) By eliminating actual, direct, and substantial competition between Roche and Corange in the markets for the research, development, manufacture and sale of Cardiac Thrombolytic Agents and DAT Reagents used in workplace testing;

(b) By increasing the likelihood that Roche will unilaterally exercise market power in the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents;

(c) By increasing the likelihood that consumers in the United States will be charged higher prices for Cardiac Thrombolytic Agents and DAT Reagents used in workplace testing;

(d) By reducing the likelihood of innovation in the market for the research, development, manufacture and sale of Cardiac Thrombolytic Agents; and

(e) By enhancing the likelihood of collusion or coordinated interaction between or among the firms in the market for the research, development, manufacture and sale of DAT Reagents used in workplace testing.

IX. VIOLATIONS CHARGED

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

20. The Acquisition described in paragraph nine, 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 100% of the voting stock of Corange Limited ("Corange"), 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 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 agreement containing consent order 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 Roche Holding Ltd ("Roche") is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002. Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche Holding Ltd, is located at 340 Kingsland Street, Nutley, New Jersey.

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. "*Roche*" or "*respondent*" means Roche Holding Ltd, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Roche, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Corange*" means Corange Limited, a corporation organized, existing and doing business under the laws of Bermuda with its headquarters located at 22 Church Street, P.O. Box HM 2026,

Hamilton, HM HX Bermuda, including its predecessors, subsidiaries, divisions, groups and affiliates controlled by Corange, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Acquirer*" means Centocor, Inc., a corporation organized, existing and doing business under the laws of Pennsylvania with its principal place of business located at 200 Great Valley Parkway, Malvern, Pennsylvania, or the entity to whom Roche shall divest the Reteplase Assets pursuant to paragraph II of this order, as applicable.

D. "*Acquisition*" means the acquisition by Roche, through a subsidiary, of 100% of the voting stock of Corange pursuant to a Stock Purchase Agreement dated May 24, 1997.

E. "*CEDIA Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities at the Penzberg Plant, as of the date of the Divestiture Agreement described in paragraph V.B of this order, relating to the research, development, manufacture or sale of products that utilize the CEDIA Patents. "CEDIA Assets" also include, but are not limited to, all machinery, fixtures, equipment and other tangible real and personal property, trade names, trademarks, brand names, formulations, inventory, contractual rights, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the New Reagent Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals relating to CEDIA Reagents.

F. "*CEDIA Method*" means a general detection principle used in diagnostic applications based on the bacterial enzyme B-galactosidase, where the enzyme has been genetically engineered into two fragments: the enzyme donor and the enzyme acceptor.

G. "*CEDIA Patents*" means all of the Patents and know-how world-wide, which cover the CEDIA Method, whether granted or applied for that are not divested pursuant to paragraph V.A.(i).

H. "*CEDIA Reagents*" means all of Corange's diagnostic reagents researched, developed, manufactured or sold that are based on the CEDIA Method, including, but not limited to, drugs of abuse testing, therapeutic drug monitoring, thyroid analysis, testing for anemia, and hormone testing.

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

J. "*Contract Manufacture*" means the manufacture of Reteplase or any CEDIA Reagents supplied pursuant to a Divestiture Agreement, as applicable, by Roche for sale to the Acquirer, New Acquirer, Reagent Acquirer, or New Reagent Acquirer, as applicable.

K. "*Cost*" means average direct per unit cost or, if the Acquirer is Centocor, the cost as stated in the Asset Purchase Agreement between Roche and Centocor, dated February 11, 1998.

L. "*DAT Applications*" means all diagnostic applications based on the CEDIA Patents for use in drugs of abuse testing.

M. "*DAT Reagent Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities at the Penzberg Plant, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of DAT Reagents throughout the world. "DAT Reagent Assets" also include, but are not limited to, all machinery, fixtures, equipment and other tangible real and personal property, trade names, trademarks, brand names, formulations, inventory, U.S. Patent 5,573,955 and any other Patent that is related solely to the manufacture or sale of DAT Reagents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Reagent Acquirer or New Reagent Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals relating to DAT Reagents.

N. "*DAT Reagents*" means all Corange diagnostic reagents researched, developed, manufactured or sold for DAT Applications.

O. "*Designee*" means any entity that will manufacture Reteplase or any CEDIA Reagent for the Acquirer, New Acquirer, Reagent Acquirer, or New Reagent Acquirer, as applicable.

P. "*Divestiture Trustee*" means the trustee(s) appointed pursuant to paragraphs IV or VII of this order, as applicable.

Q. "*FDA*" means the United States Food and Drug Administration.

R. "*Governance Agreement*" means the Amended and Restated Governance Agreement dated October 25, 1995, between Roche Holdings, Inc. and Genentech, Inc. and any and all amendments thereof.

S. "*Interim Trustee*" means the trustee(s) appointed pursuant to paragraphs III or VI of this order, as applicable.

T. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the world-wide Reteplase Assets pursuant to paragraph IV of this order.

U. "*New Reagent Acquirer*" means the entity to whom the Divestiture Trustee shall divest the CEDIA Assets pursuant to paragraph VII of this order.

V. "*Non-DAT Applications*" means all diagnostic applications based on the CEDIA Patents other than DAT Applications.

W. "*Non-Reteplase Applications*" means any human pharmaceutical application that is not a Reteplase Application.

X. "*Patent*" means the patent and patent right, and patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent right and any and all continuations and continuations-in-part.

Y. "*Penzberg Plant*" means the current Corange facility located in Penzberg, Germany, or any Roche facility, that is used to manufacture Reteplase.

Z. "*Reagent Acquirer*" means the entity to whom respondent shall divest the DAT Reagent Assets and grant (i) an exclusive license to the CEDIA Patents for DAT Applications, and (ii) a non-exclusive license to the CEDIA Patents for Non-DAT Applications in the United States pursuant to paragraph V of this order.

AA. "*Reteplase*" means recombinant reteplase ("rPA"), a recombinant, nonglycosylated plasminogen activator, containing amino acids 1-3 and 176-527 of the amino acid sequence of the tissue-type plasminogen activator or any future presentation, formulation, application or therapeutic use of the active ingredient.

BB. "*Reteplase Applications*" means all applications based on the Reteplase Patents, that contain the Reteplase active ingredient or any future presentation, formulation, application or therapeutic use of the active ingredient.

CC. "*Reteplase Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of Reteplase for sale in the United States and Canada. "Reteplase Assets" also include, but are not limited to, all trade names, trademarks, brand names, formulations, inventory, U.S. Patent 5,223,256, U.S. Patent 5,510,330, U.S. Patent 5,500,411 and any other U.S. or Canadian Patent related solely to the manufacture or sale of Reteplase, trade secrets, technology, know-how, specifica-

tions, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information), and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States and Canada relating to Reteplase.

DD. "*Reteplase Patents*" means: (1) all of the Patents and know-how, as of the date the agreement containing consent order becomes final, that are related to the manufacture or sale of Reteplase and are not divested pursuant to paragraph II.A.(i); and (2) any new Patent or know-how that respondent uses to manufacture Reteplase during the term of the Contract Manufacturing of Reteplase unless the changes are being made solely to obtain regulatory approval outside the United States or Canada.

EE. "*World-wide Reteplase Assets*" means all of Corange's assets, business, goodwill and rights that are not part of Corange's physical facilities, as of the date this agreement containing consent order becomes final, relating to the research, development, manufacture and sale of Reteplase throughout the world. "world-wide Reteplase Assets" also include, but are not limited to, all trade names, trademarks, brand names, formulations, inventory, all world-wide Patents related solely to the manufacture or sale of Reteplase, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information), and all data, contractual rights, materials and information relating to FDA and other government or regulatory approvals for the United States and Canada relating to Reteplase.

II.

It is further ordered, That:

A. Respondent shall: (i) divest, absolutely and in good faith, the Reteplase Assets as a competitively viable, on-going product line; (ii) grant an exclusive, royalty-free license, in perpetuity, to the Reteplase Patents for Reteplase Applications in the United States and Canada, and (iii) grant a royalty-bearing, non-exclusive license, in perpetuity, to the Reteplase Patents for Non-Reteplase Applications in the United

States and Canada to: (1) Centocor, in accordance with the Asset Purchase Agreement dated February 11, 1998; or (2) at no minimum price, 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 ninety (90) days of the date on which this order becomes final. The purpose of the divestiture of the Reteplase Assets is to ensure their continued use in the research, development, manufacture, and sale for the treatment of acute myocardial infarction and other applications that may be further developed or found in the future and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

B. Respondent's agreement with the Acquirer or the New Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Acquirer or the New Acquirer in a timely manner and under reasonable terms and conditions, a supply of Reteplase, specified in the Divestiture Agreement at cost for a period not to exceed four (4) years from the date the Divestiture Agreement is approved, or three (3) months after the date the Acquirer or the New Acquirer obtains all necessary FDA approvals to manufacture and sell Reteplase in the United States, whichever is earlier; provided, however, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to exceed two (2) years.

2. After respondent commences delivery of Reteplase to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing arrangement for Reteplase, referred to in paragraph II.B of this order, respondent will make inventory of Reteplase available for sale or resale (i) in the United States or Canada only to the Acquirer or (ii) world-wide only to the New Acquirer.

3. Respondent shall make representations and warranties that the Reteplase supplied pursuant to the Divestiture Agreement meets the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Reteplase supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the

defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by respondent to the Acquirer or the New Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure by respondent to deliver Reteplase in a timely manner as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, respondent shall make available to the Interim Trustee all records that relate to the manufacture of Reteplase.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer to respondent, respondent shall provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the Designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell Reteplase; (b) assistance to the Acquirer or New Acquirer (or the Designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the Designee thereof) to manufacture Reteplase in substantially the same manner and quality employed or achieved by Corange; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until the Acquirer or New Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Reteplase. Such assistance shall include on-site inspections of the Penzberg Plant, at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract Manufacturing. Respondent may require reimbursement from the Acquirer or New Acquirer for all its direct out-of-pocket

expenses incurred in providing the services required by this paragraph II.B.6.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within 10 days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell Reteplase.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell Reteplase obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell Reteplase. The Divestiture Agreement shall require the first such report 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 the New Acquirer to manufacture and sell Reteplase in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of Reteplase obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase in the United States. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture Reteplase or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, Reteplase in the United States prior to obtaining all necessary FDA approvals to manufacture and sell Reteplase in the United States; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell Reteplase in the United States within four (4) years from the date the Commission approves the Divestiture Agreement between respondent and the Acquirer or the New Acquirer; provided, however, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to

exceed an additional two (2) years if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Reteplase Assets shall revert back to Roche and the world-wide Reteplase Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

C. During the pendency of any Patent dispute that: (1) challenges or seeks to render invalid any of the Patents divested or licensed pursuant to paragraph II.A; (2) could affect the manufacture or sale of Reteplase; and (3) is brought by Genentech, Inc., Boehringer Ingelheim, or Roche, including, but not limited to, the *Genentech Inc. v. Boehringer Mannheim* patent litigation, Civil Action 96-11090, respondent shall commit to satisfying the following:

1. Respondent shall provide, at its own expense, cooperation and assistance in connection with the pursuit or defense of such dispute as requested by the Acquirer or New Acquirer, including but not limited to:

(a) Full access to and cooperation from any employee or agent of Corange for the purposes of this paragraph II.C, including ensuring that the availability of such individuals shall not be interfered with by reason of their employment with respondent;

(b) Continued cooperation and assistance, to the extent of respondent's best efforts, of any Corange employee who has left the employ of Corange or Roche, including, but not limited to, expenses related to obtaining cooperation of any former Corange employee no longer employed by respondent and agreeing to reimburse the former employee's new employer for all reasonable direct out-of-pocket expenses associated with cooperating with and assisting the Acquirer or New Acquirer pursuant to this paragraph II.C;

(c) Copies of all documents, as requested by the Acquirer or New Acquirer, in the possession, custody or control of Corange relevant to, or likely to lead to information relevant to, the pursuit or defense of such dispute, along with information in respondent's possession or control sufficient to legally authenticate such documents; and

(d) Reimbursement for half of all expenses relating to the dispute submitted in the manner specified in paragraph II.C.5 of this order, including, but not limited to, fees paid to attorneys (who are not employees of the Acquirer or the New Acquirer) and fees paid to agents, experts, and courts.

2. Respondent shall not enter into any new agreement, or enforce any existing agreement, with any employee or former employee regarding confidential information that would otherwise prevent or hinder an employee or former employee from providing cooperation and assistance in connection with any dispute referred to in this paragraph II.C.

3. Respondent shall be financially responsible for any payments determined to be owed as a result of any sales of Reteplase prior to divestiture of the Reteplase Assets pursuant to this order, and for any sales of Reteplase outside of the United States or Canada.

4. Respondent shall ensure that no employee of respondent is penalized in any manner as a result of his or her full cooperation with the Acquirer or New Acquirer in connection with the obligations imposed pursuant to this order.

5. All requests for payments due from respondent pursuant to this paragraph II.C shall be submitted to the Interim Trustee or an agent of the Interim Trustee for verification. The Interim Trustee shall submit verified costs to respondent on a periodic basis. Such submissions shall contain only aggregate information about expenses incurred that reveals no privileged or confidential information. Respondent shall make payments to the Acquirer or New Acquirer pursuant to the Interim Trustee's submissions in a timely manner as specified by the Interim Trustee.

6. Respondent shall not, absent the prior written consent of the Acquirer or New Acquirer, provide, disclose or otherwise make available to Genentech, Inc. any information relating to any Patent dispute involving the Reteplase Assets.

7. In the event that the Governance Agreement allows respondent to control Genentech, Inc. or respondent obtains 100% of the stock of Genentech, Inc., respondent shall cause to be dismissed, with prejudice, any pending litigation by Genentech, Inc. against the Acquirer or New Acquirer regarding Patent rights for the research, development, manufacture or sale of Reteplase and shall refrain from instituting any new litigation against the Acquirer or New Acquirer challenging or seeking to render invalid any of the Patents divested or licensed pursuant to paragraph II.A.

D. By the time the Divestiture Agreement between respondent and the Acquirer or New Acquirer of the Reteplase Assets is signed, respondent shall provide the Acquirer or New Acquirer with a complete list of all employees who were engaged in the sale or marketing of Reteplase on the date of the Acquisition, as well as all employees engaged in the sale or marketing of Reteplase on the date

of the Divestiture Agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the Reteplase Assets. Respondent shall provide the Acquirer or New Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

E. Following the signing of the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Acquirer or New Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.D of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Acquirer or New Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

F. Respondent shall provide all employees identified in paragraph II.D of this order with reasonable financial incentives to continue in their employment positions pending divestiture of the Reteplase Assets in order that such employees may be in a position to accept employment with the Acquirer or New Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the Reteplase Assets that apply to any employee identified in paragraph II.D who accepts employment with any Acquirer or New Acquirer.

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

H. Prior to divestiture, respondent shall not transfer, without consent of the Acquirer or New Acquirer, any of the individuals identified in paragraph II.D of this order to any other position.

I. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to

manufacture and sell Reteplase; (2) to maintain the viability and marketability of the world-wide Reteplase Assets consistent with general practices in the pharmaceutical industry, as well as all tangible assets, including respondent's facilities, used to manufacture and sell Reteplase; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the world-wide Reteplase Assets and the Penzberg Plant, except for ordinary wear and tear.

III.

It is further ordered, That:

A. At any time after respondent signs the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to ensure that respondent and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph III:

1. The Commission shall select the Interim Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

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

4. The Interim Trustee shall serve until such time as the Acquirer or New Acquirer has received all necessary FDA approvals to manufacture and sell Reteplase.

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

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim 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 Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph III.A.1 of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Acquirer or New Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the

Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture and sell Reteplase. The Interim Trustee shall report in writing, concerning compliance by respondent and the Acquirer or New Acquirer with the provisions of paragraphs II and III to the Commission every two (2) months from the date the Divestiture Agreement is signed until the Acquirer or New Acquirer obtains, or abandons efforts to obtain, all necessary FDA approvals to manufacture and sell Reteplase in the United States. Such reports shall include at least the following:

- a. Whether respondent has supplied Reteplase in conformity with the requirements of paragraph II.B of this order;
- b. Whether respondent has given the Interim Trustee access to records pursuant to paragraph II.B.5 of this order;
- c. Whether the Acquirer or New Acquirer has given the Interim Trustee reports and access pursuant to paragraph II.B.8 of this order;
- d. Whether the Acquirer or New Acquirer is making good faith efforts to sell Reteplase and obtain all necessary FDA approvals to manufacture and sell Reteplase and whether these actions meet the projections of the business plan of the Acquirer or New Acquirer as required by paragraphs II.B.7 and II.B.8 of this order;
- e. If three (3) years and six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Acquirer or New Acquirer has not obtained all necessary FDA approvals to manufacture and sell Reteplase in the United States, whether such approvals are likely to be obtained if the Commission extends the four (4) year period specified in paragraph II.B.9 of this order; and
- f. Whether respondent has maintained the world-wide Reteplase Assets as required in paragraph II.I of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.B.9 of this order, the Commission may direct the Divestiture Trustee to seek a New Acquirer, as provided for in paragraph IV of this order.

IV.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the Reteplase Assets and to comply with the requirements of paragraph II of this order, or if the Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals in the manner set out in paragraph II.B.9, then any executed Divestiture Agreement between respondent and the

Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest the world-wide Reteplase Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the world-wide Reteplase Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph IV.A 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 a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph IV.A to divest the world-wide Reteplase Assets to a New Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed Divestiture Trustee, respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the world-wide Reteplase Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) 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 Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the world-wide Reteplase Assets to a

New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3 of this order to divest the world-wide Reteplase Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the world-wide Reteplase Assets or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable 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 and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph II.B; to assure that respondent complies with the remaining provisions of paragraph IV of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture and sell Reteplase. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and

customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph IV 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 Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the world-wide Reteplase Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two months concerning his or her efforts to divest the relevant assets, respondent's compliance with the terms of this order, and the New Acquirer's efforts to obtain all necessary FDA approvals to manufacture and sell Reteplase.

V.

It is further ordered, That:

A. Within two (2) months of the date on which this order becomes final respondent shall: (i) divest, absolutely and in good faith, at no minimum price, the world-wide DAT Reagent Assets as a competitively viable, on-going product line; (ii) grant an exclusive, world-wide royalty-free license, in perpetuity, to the CEDIA Patents for DAT Applications, and (iii) grant a non-exclusive, royalty-free license, in perpetuity, to the CEDIA Patents for Non-DAT Applications in the United States, to a Reagent Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the DAT Reagent Assets is to ensure the continued research, development, manufacture, and sale of the DAT Reagents as a viable competitive alternative for screening for the use of drugs of abuse, to establish a viable competitor and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint. In the event that the Reagent Acquirer does not choose to acquire all of the physical assets included in the DAT Reagent Assets because the Reagent Acquirer does not require such assets in order to engage in the manufacture and sale of DAT reagents, respondent shall not be required to divest such assets.

B. Respondent's agreement with the Reagent Acquirer or New Reagent Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Reagent Acquirer or New Reagent Acquirer in a timely manner, a supply of all of the CEDIA Reagents specified in the Divestiture Agreement at cost for a period not to exceed one (1) year from the date the Divestiture Agreement is approved, or three (3) months after the date the Reagent Acquirer or the New Reagent Acquirer obtains all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents in the United States, whichever is earlier; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed one (1) year. In the event that the Reagent Acquirer does not choose to have all of the CEDIA Reagents Contract Manufactured because the Reagent Acquirer does not require such reagents in order to manufacture or sell DAT Reagents in a competitive manner, respondent shall not be required to Contract Manufacture those reagents the Reagent Acquirer does not require.

2. After respondent commences delivery of all of the CEDIA Reagents to the Reagent Acquirer or the New Reagent Acquirer pursuant to the Divestiture Agreement required by paragraph V.B of this order, all inventory of the DAT Reagents acquired by respondent through the Acquisition may be made available by respondent only to the Reagent Acquirer or the New Reagent Acquirer.

3. Respondent shall make representations and warranties to the Reagent Acquirer or the New Reagent Acquirer that all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement by respondent to the Reagent Acquirer or the New Reagent Acquirer meet the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Reagent Acquirer or the New Reagent Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of any of the CEDIA Reagents supplied to the Reagent Acquirer or New Reagent Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Reagent Acquirer or the New Reagent Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Reagent Acquirer or the New Reagent Acquirer or for any representations and warranties, express or implied, made by the Reagent Acquirer or the New Reagent Acquirer that exceed the representations and warranties made by respondent to the Reagent Acquirer or the New Reagent Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Reagent Acquirer or New Reagent Acquirer for any liabilities or loss of profits resulting from the failure by respondent to deliver in a timely manner any of the CEDIA Reagents as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Reagent Acquirer or the New Reagent Acquirer, upon request by the Reagent Acquirer, New Reagent Acquirer or the Interim Trustee, respondent shall make available to the Interim

Trustee all records that relate to the manufacture of any of the CEDIA Reagents supplied pursuant to the Divestiture Agreement.

6. Upon reasonable notice and request from the Reagent Acquirer or the New Reagent Acquirer to respondent, respondent shall provide in a timely manner: (a) assistance and advice to enable the Reagent Acquirer or the New Reagent Acquirer (or the Designee of the Reagent Acquirer or New Reagent Acquirer) to obtain all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement; (b) assistance to the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) as is necessary to enable the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) to manufacture all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement in substantially the same manner and quality employed or achieved by Corange at the time this agreement containing consent order is signed; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Reagent Acquirer's or the New Reagent Acquirer's choosing until the Reagent Acquirer or New Reagent Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Reagent Acquirer or New Reagent Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of all of the CEDIA Reagents supplied pursuant to the Divestiture Agreement. Such assistance shall include on-site inspections of the Roche facility, at the Reagent Acquirer's or New Reagent Acquirer's request, that is the specified source of supply of the Contract Manufacturing. Respondent may require reimbursement from the Reagent Acquirer or New Reagent Acquirer for all its direct out-of-pocket expenses incurred in providing the services required by this paragraph V.B.6.

7. The Divestiture Agreement shall require the Reagent Acquirer or the New Reagent Acquirer to submit to the Commission, at the same time that respondent submits its application for approval of divestiture, a certification attesting to the good faith intention of the Reagent Acquirer or the New Reagent Acquirer, including a plan by the Reagent Acquirer or the New Reagent Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell DAT Reagents.

8. The Divestiture Agreement shall require the Reagent Acquirer or the New Reagent Acquirer to submit to the Commission and the Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Reagent Acquirer or the New Reagent

Acquirer to sell DAT Reagents obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell DAT Reagents. The Divestiture Agreement shall require the first such report to be submitted sixty (60) days from the date the Divestiture Agreement is approved by the Commission and every ninety (90) days thereafter until all necessary FDA approvals are obtained by the Reagent Acquirer or the New Reagent Acquirer to manufacture and sell DAT Reagents. The Divestiture Agreement shall also require the Reagent Acquirer or the New Reagent Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale of all or substantially all of the DAT Reagents obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. The Reagent Acquirer or New Reagent Acquirer shall provide the Interim Trustee access to all records and facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture any of the CEDIA Reagents or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Reagent Acquirer or the New Reagent Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, all or substantially all of the DAT Reagents prior to obtaining all necessary FDA approvals to manufacture and sell DAT Reagents; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell the DAT Reagents; or (c) fails to obtain all necessary FDA approvals to manufacture and sell DAT Reagents in the United States within one (1) year from the date the Commission approves the Divestiture Agreement between respondent and the Reagent Acquirer or the New Reagent Acquirer; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed an additional one (1) year if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the DAT Reagent Assets shall revert back to respondent, all licences to the CEDIA Patents shall be rescinded, and the CEDIA Assets shall be divested by the Divestiture Trustee to a New Reagent Acquirer pursuant to the provisions of paragraph VII of this order.

C. By the time the Divestiture Agreement between respondent and the Reagent Acquirer or New Reagent Acquirer is signed, respondent shall provide the Reagent Acquirer or New Reagent

Acquirer with a complete list of all employees of respondent who were engaged in the sale, marketing, or production of CEDIA Reagents on the date of the Acquisition, as well as all employees engaged in the sale, marketing or production of CEDIA Reagents on the date of the Divestiture Agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the CEDIA Reagents. Respondent shall provide the Reagent Acquirer or New Reagent Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

D. Following the signing of the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Reagent Acquirer or New Reagent Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph V.C of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Reagent Acquirer or New Reagent Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

E. Respondent shall provide all employees identified in paragraph V.C of this order with reasonable financial incentives, if necessary, to continue in their employment positions pending compliance with paragraph V.A of this order, in order that such employees may be in a position to accept employment with the Reagent Acquirer or New Reagent Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the CEDIA Assets that apply to any employee identified in paragraph V.C who accepts employment with the Reagent Acquirer or New Reagent Acquirer.

F. For a period of one (1) year commencing on the date of the individual's employment by the Reagent Acquirer or New Reagent Acquirer, respondent shall not re-hire any of the individuals identified in paragraph V.C of this order who accept employment with the Reagent Acquirer or New Reagent Acquirer, unless such

individual has been separated from employment by the Reagent Acquirer or New Reagent Acquirer against that individual's wishes.

G. Prior to divestiture, respondent shall not transfer, without consent of the Reagent Acquirer or New Reagent Acquirer, any of the individuals identified in paragraph V.C of this order to any other position.

H. Respondent shall not enforce against the Reagent Acquirer or New Reagent Acquirer any exclusivity provision of the Agreement on the Distribution of Instruments (hereinafter "Distribution Agreement") with Hitachi Ltd. dated November 20, 1987. Within ten (10) days after respondent signs the Divestiture Agreement, respondent shall inform Hitachi Ltd. that, as to the Reagent Acquirer or New Reagent Acquirer, it waives all exclusivity provisions of the Distribution Agreement.

I. While the obligations imposed by paragraphs V, VI or VII of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture and sell all of the CEDIA Reagents; (2) to maintain the viability and marketability of the CEDIA Assets, as well as all tangible assets, including the Roche facilities used to manufacture and sell all of the CEDIA Reagents; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the CEDIA Assets and the Roche facilities, used to manufacture and sell CEDIA Reagents, except for ordinary wear and tear.

VI.

It is further ordered, That:

A. At any time after respondent signs the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to monitor that respondent and the Reagent Acquirer or New Reagent Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph:

1. The Commission shall select the Interim Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed

to have consented to the selection of the proposed trustee. This trustee may be the same trustee appointed pursuant to paragraphs III or IV of this order.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Reagent Acquirer or New Reagent Acquirer.

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

4. The Interim Trustee shall serve until such time as the Reagent Acquirer or New Reagent Acquirer has received all necessary FDA approvals to manufacture and sell all of the DAT Reagents.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of any CEDIA Reagent supplied pursuant to the Divestiture Agreement, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of any of the CEDIA Reagents. Respondent shall cooperate with any reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs V and VI of this order and the Divestiture Agreement between respondent and the Reagent Acquirer or the New Reagent Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim 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 Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages,

liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph VI.A.1 of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Reagent Acquirer or New Reagent Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Reagent Acquirer or the New Reagent Acquirer with respect to the efforts of the Reagent Acquirer or the New Reagent Acquirer to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. The Interim Trustee shall report in writing, concerning compliance by respondent and the Reagent Acquirer or New Reagent Acquirer with the provisions of paragraphs V and VI, to the Commission every two (2) months from the date the Divestiture Agreement becomes final until the Reagent Acquirer or New Reagent Acquirer obtains or abandons efforts to obtain all necessary FDA approvals to manufacture and sell DAT Reagents. Such reports shall include at least the following:

a. Whether respondent has supplied all of the CEDIA Reagents in conformity with the requirements of the Divestiture Agreement entered into pursuant to paragraph V.B of this order;

b. Whether respondent has given the Interim Trustee access to records as required by paragraph V.B.5 of this order;

c. Whether the Reagent Acquirer or New Reagent Acquirer has given the Interim Trustee reports and access pursuant to paragraph V.B.8 of this order;

d. Whether the Reagent Acquirer or New Reagent Acquirer is making good faith efforts to sell DAT Reagents and obtain all necessary FDA approvals to manufacture and sell DAT Reagents and whether these actions meet the projections of the business plan of the Reagent Acquirer or New Reagent Acquirer as required by paragraphs V.B.7 and V.B.8 of this order;

e. If six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Reagent Acquirer or New Reagent Acquirer has not obtained all necessary FDA approvals to manufacture and sell DAT Reagents, whether such approvals are likely to be obtained if the Commission extends the one (1) year period specified in paragraph V.B.9 of this order; and

f. Whether respondent has maintained the CEDIA Assets as required in paragraph V.I of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph V.B.9 of this order, the Commission may direct the Divestiture Trustee to seek a New Reagent Acquirer, as provided for in paragraph VII of this order.

VII.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the DAT Reagent Assets and to grant the licenses required by paragraph V of this order, or if the Reagent Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals in the manner set out in paragraph V.B.9, then any executed Divestiture Agreement between respondent and the Reagent Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest all of the CEDIA Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph V of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the CEDIA Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph VII.A 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 a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph VII.A to divest the CEDIA Assets to a New Reagent Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed Divestiture Trustee, respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the CEDIA Assets to a New Reagent Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Reagent Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) 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 Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the CEDIA Assets to a New Reagent Acquirer and to enter into a Divestiture Agreement with the New Reagent Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VII.B.3 of this order to divest the CEDIA Assets and to enter into a Divestiture Agreement with the New Reagent Acquirer that satisfies the requirements of paragraph V of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the CEDIA Reagents or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with

or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable 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 and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph V.B; to assure that respondent complies with the remaining provisions of paragraph VII of this order; and to assure that the New Reagent Acquirer obtains all necessary FDA approvals to manufacture and sell CEDIA Reagents. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Reagent Acquirer in the manner set forth in paragraph V of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

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

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph VII.B.1 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 Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the CEDIA Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two (2) months concerning his or her efforts to divest the relevant assets, respondent's compliance with the terms of this order, and the New Reagent Acquirer's efforts to obtain all necessary FDA approvals to manufacture and sell the CEDIA Assets.

VIII.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II through VII of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form of which it intends to comply, is complying, and has complied with these paragraphs of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreements required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreements required by paragraphs II and V of this order.

B. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order or until the Acquirer or New Acquirer has

obtained all necessary FDA approvals to manufacture and sell Reteplase in the United States, 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 this order.

C. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order or until the Reagent Acquirer or New Reagent Acquirer has obtained all necessary FDA approvals to manufacture and sell DAT Reagents, 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 this order.

IX.

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 and on reasonable notice to respondent, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to any facilities and access 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 consent order; and

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

X.

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

IN THE MATTER OF

SCHNUCK MARKETS, INC.

MODIFYING 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-3585. Consent Order, June 8, 1995--Modifying Order, June 2, 1998

This order reopens a 1995 consent order -- that required the respondent to divest 24 stores to Commission-approved purchasers -- and this order modifies the consent order by permitting Schnuck to donate used equipment from its store in Granite City, Illinois, for use in the St. Louis Community College Culinary Studies Program, and this order also substitutes the prior approval requirement with prior notification and waiting period requirements.

ORDER REOPENING AND MODIFYING ORDER

On March 6, 1998, Schnuck Markets, Inc. ("Schnuck"), the respondent named in the consent order issued by the Commission on June 8, 1995, in Docket No. C-3585, filed its "Petition to Reopen and Modify Consent Order" ("Petition"), seeking to modify the order to divest and to cease and desist from certain acts and practices. For the reasons stated below, the Commission has determined to grant the Petition.

The order requires respondent to divest 24 supermarkets located in the St. Louis MSA. Schnuck has completed the divestitures required by the order. In addition to the divestiture requirements, the order requires Schnuck to refrain from certain conduct. Paragraph IV of the order requires Schnuck for ten years to obtain the Commission's approval before acquiring any supermarkets, or any stock in any firm owning or operating a supermarket, in the St. Louis MSA. Paragraph V.B of the order prohibits Schnuck from removing any equipment from a supermarket owned by Schnuck prior to a sale, sublease, assignment or change in occupancy, except for replacement or relocation of such equipment in or to another supermarket owned by Schnuck.

Schnuck made its request to modify the order under the public interest standard. It did not assert any change of fact or law. Schnuck has received a request from the St. Louis Community College ("College") for a donation of used equipment for use in its Culinary Studies Program. Schnuck has equipment that would meet the needs of the College at its Granite City store, located in Granite City,

Illinois, which has been closed since the June, 1995 acquisition of assets of National Holdings, Inc. Exhibit 2 to the Petition contains the request. Exhibit 3 contains a list of the equipment to be donated. Schnuck requested that the order be modified to allow it to donate the requested equipment.

Schnuck also requested that the prior approval requirements of paragraph IV of the order be converted to prior notice, pursuant to the Commission's June 21, 1995, Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement").¹ Schnuck states that there is nothing to rebut the Prior Approval Policy Statement's presumption that the prior approval provision should be modified.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.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."³

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, engage in an otherwise unreportable anticompetitive merger."⁴

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

² Prior Approval Policy Statement at 2.

³ *Id.*

⁴ *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."⁵ 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.⁶

The Commission has determined that it is in the public interest to reopen and modify the order as requested by Schnuck. There does not appear to be any reason to retain paragraph V.B as written to preclude the donation proposed by Schnuck.⁷ Paragraph V.B was designed to make it more likely that any supermarket closed by Schnuck would be reopened as a supermarket by someone else. However, nothing in the order requires Schnuck to sell or lease any stores that it closes, and the Granite City store has been closed for almost three years. The possible detrimental impact on Schnuck's positive public image, and the public benefits to the College, outweigh the seemingly slight possibility that someone would want to acquire the Granite City store as a supermarket only if the to-be-donated equipment were still in the store. Further, the State of Illinois, with which Schnuck has agreed to make the Granite City store available to supermarket operators, does not object to the donation. Therefore the reasons to modify the order outweigh the reasons to retain it as written.

Additionally, paragraph IV of the order is modified to replace the prior approval requirement with prior notice. Nothing has been shown to rebut the presumption that the order should be modified.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

⁵ *Id.* at 4.

⁶ *Id.*

⁷ Schnuck has not requested that the order be modified to allow all donations to charity, but only this particular donation.

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, Schnuck 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 Schnuck to purchase 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 St. Louis MSA.

Provided, however, that this paragraph IV shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schnuck or the purchase or lease by Schnuck 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 Schnuck 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 Schnuck and not of any other party to the transaction. Schnuck 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, Schnuck 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. Schnuck 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; and

It is further ordered, That paragraph V.B of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

Respondent shall not remove any equipment from a supermarket owned or operated by respondent in the St. Louis MSA prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondent in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket. Provided, however, that nothing in this provision shall prevent respondent from transferring equipment in response to the October 7, 1996, request from St. Louis Community College, including equipment from its store at 34707 Nameoki Street, Granite City, Illinois.

Commissioner Azcuenaga not participating.

Complaint

125 F.T.C.

IN THE MATTER OF

CIVIC DEVELOPMENT GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3810. Complaint, June 5, 1998--Decision, June 5, 1998*

This consent order prohibits, among other things, the two organizations and the officers of each organization from engaging in deceptive charitable solicitations on behalf of local law enforcement agencies. In addition, the consent order requires both organizations to set up an education and monitoring program for employees.

*Appearances*For the Commission: *Mona Spivack and Eileen Harrington.*For the respondents: *Errol Copelivitz, Copelivitz & Canter,*
Kansas City, MO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Civic Development Group, Inc. and Community Network, Inc., corporations, and Scott Pasch and David Keezer, individually and as officers of Civic Development Group, Inc., and Richard McDonnell, individually and as an officer of Community Network, Inc. ("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 Civic Development Group, Inc. ("CDG") is a New Jersey corporation with its principal office or place of business at 655 Florida Grove Road, Hopelawn, New Jersey. By itself or in concert with others, CDG controls the acts or practices of Community Network, Inc., including the acts or practices alleged in this complaint.

2. Respondent Community Network, Inc. ("CNI") is a Delaware corporation with its principal office or place of business at 655 Florida Grove Road, Hopelawn, New Jersey.

3. Respondent Scott Pasch is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

4. Respondent David Keezer is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

5. Respondent Richard McDonnell is an officer of CNI. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CNI, including the acts or practices alleged in this complaint. His principal office or place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

6. Respondents have solicited consumers by telephone and direct mail to contribute to a non-profit organization, the American Deputy Sheriffs' Association ("ADSA").

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 FTC Act.

8. Respondents have solicited consumers by telephone and direct mail to contribute to the ADSA. During these solicitations, respondents have represented, expressly or by implication, that:

A. Money contributed to the ADSA by consumers in the past had benefitted law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers had been used in the past to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers had been used in the past to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

9. In truth and in fact, in numerous instances:

A. Money contributed to the ADSA by consumers in the past had not benefitted law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers had not been used in the past to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers had not been used in the past to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

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

10. During the solicitations described above, the respondents have also represented, expressly or by implication, that:

A. Money contributed to the ADSA by consumers would be used to benefit law enforcement offices in the town, city, county or state in which the consumers reside;

B. Money contributed to the ADSA by consumers would be used to purchase bullet-proof vests for law enforcement offices in the town, city, county or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers would be used to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

11. In truth and in fact, in numerous instances:

A. Money contributed to the ADSA by consumers is not used to benefit law enforcement offices in the town, city, county, or state in which the consumers reside;

B. Money contributed to the ADSA by consumers is not used to purchase bullet-proof vests for law enforcement offices in the town, city, county, or state in which the consumers reside; and

C. Money contributed to the ADSA by consumers is not used to pay death benefits to the survivors of deceased law enforcement officers who resided or worked in the town, city, county, or state in which the consumers reside.

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

12. 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.

Commissioner Swindle not participating.

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 violations 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 findings and enters the following order:

1. Respondent Community Network, Inc. ("CNI") is a Delaware corporation with its principal place of business at 655 Florida Grove Road, Hopelawn, New Jersey.

2. Respondent Richard McDonnell is an officer of CNI. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CNI. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

3. Respondent Civic Development Group, Inc. ("CDG") is a New Jersey corporation with its principal place of business at 655 Florida Grove Road, Hopelawn, New Jersey. By itself or in concert with others, CDG formulates, directs, or controls the policies, acts, or practices of CNI, including the acts or practices alleged in this complaint.

4. Respondent Scott Pasch is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or practices alleged in this complaint. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

5. Respondent David Keezer is an officer of CDG. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of CDG and CNI, including the acts or

practices alleged in this complaint. His principal place of business is 655 Florida Grove Road, Hopelawn, New Jersey.

6. 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.

7. 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. "*Material*" means likely to affect a person's choice of, or conduct regarding, their decision to contribute to a charity.

2. Unless otherwise specified, "*respondents*" means Civic Development Group, Inc., a corporation, its successors and assigns and its officers; Community Network, Inc., a corporation, its successors and assigns and its officers; Richard McDonnell, individually and as an officer of Community Network, Inc., and Scott Pasch and David Keezer, individually and as officers of Civic Development Group, Inc., and each of the above's agents, representatives, and employees.

3. "*Person*" means a natural person, organization, or other legal entity, including a corporation, partnership, proprietorship, association, cooperative, government agency, or any other group or combination acting as an entity.

4. "*Charity*" means any person which is, or is represented to be, a non-profit entity or which has, or is represented to have, a charitable purpose.

5. "*Charitable contribution*" means money or any item of value that any person gives or transfers to a respondent, charity, or other person following a representation by a respondent that the money or item of value would be given, in whole or in part, to a charity or would benefit, either in whole or in part, a law enforcement organization, law enforcement personnel or a law enforcement program.

6. "*Telephone solicitation*" means soliciting charitable contributions by telephone.

7. "*Telephone solicitor*" means any person who, in connection with telephone solicitation, initiates or receives telephone calls to or from a customer.

8. "*Affiliated company*" means any corporation, partnership, sole proprietorship, unincorporated entity or other organization of any kind owned or controlled, directly or indirectly, by any of the respondents in this matter.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, the purpose for which charitable contributions have been or will be used.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, the geographic location of the charity, organization or program that has benefitted or will benefit from charitable contributions.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with telephone solicitation, shall not misrepresent, in any manner, expressly or by implication, any fact material to the decision of any person to make any charitable contribution.

IV.

It is further ordered, That respondents, in connection with telephone solicitation directly or through any corporation, subsidiary, division or other device, shall adopt an education and monitoring program designed to ensure compliance with paragraphs I, II and III of this order. Such program shall include, but is not limited to:

A. Providing the brochure attached hereto as Exhibit 1 to all current and future employees, agents and representatives of respondents and any affiliated companies, and securing from each such person a signed and dated statement acknowledging receipt of the brochure. Respondents shall deliver this brochure to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities;

B. Obtaining, from each charity for which the respondents directly or through any corporation, subsidiary, division, or other device, solicit charitable contributions prior to any charitable solicitation on behalf of any such charity and again every six months until respondents terminate all charitable solicitation on behalf of that charity:

1. Written notices that all sales, verification, rebuttal and any other telephone solicitation scripts used in connection with any such charitable solicitation on behalf of such charity do not misrepresent:
 - a. The identity or occupation of the telephone solicitor;
 - b. The program or programs aided by the solicited contributions; and
 - c. The geographic area or areas of the program's focus.
2. Written reports detailing the goods or services provided by the charity in support of each affirmative representation contained in each telephone solicitation sales script used in connection with soliciting charitable contributions on behalf of such charity.

Such notices and written reports shall not be effective for purposes of paragraph V of this order in the event the respondents know or reasonably should know that any representation in any telephone solicitation sales scripts used in connection with soliciting charitable contributions is false or misleading.

C. Monitoring, in each location from which the respondents solicit charitable contributions, a random and representative sample of all employees and agents of the respondents involved in charitable solicitation, at all times during which such employees and agents engage in charitable solicitation, to ensure that they comply with paragraphs I, II and III of this order;

D. So long as this order is in effect, taping a random and representative sample of all telephone solicitation calls in all locations from which such calls are placed and reviewing a random sample of no fewer than one thousand such calls every thirty days to determine whether the employees or agents of respondents or their affiliated companies have made representations in violation of paragraphs I, II or III of this order;

E. Providing written notice to each employee or agent of the respondents who makes any representation in violation of paragraphs I, II or III of this order, and terminating any employee or agent of the respondents who makes more than one material representation in

violation of paragraphs I, II or III of this order in any consecutive twelve month period.

V.

It is further ordered, That in any action brought by the Commission to enforce this order, unless respondents either know or reasonably should know of violations of this order other than those addressed pursuant to paragraph IV(E) of this order, there shall be a rebuttable presumption that the respondents have exercised good faith in complying with paragraphs I, II and III of this order, if the respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in paragraph IV; provided, however, that the presumption shall only apply to all telephone solicitation calls emanating from those locations where respondents have conducted taping pursuant to paragraph IV(D) of this order.

VI.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, maintain and permit representatives of the Federal Trade Commission access to their business premises to inspect and copy all documents relating in any way to any conduct subject to this order, including but not limited to:

A. All scripts used by respondents in connection with the solicitation of charitable contributions directly or through any subsidiary, division or other device and all other promotional material used in the solicitation and collection of any charitable contribution;

B. All complaints and other communications with consumers and governmental or consumer protection organizations; provided, however, that respondents shall keep all complaints, inquiries or other notations accompanying consumers' contributions for one year;

C. All notices and reports pursuant to paragraph IV(B) of this order;

D. All tape recordings required to be reviewed by respondents pursuant to paragraph IV(D) of this order, together with all documents detailing the locations at which the respondents conduct such taping, and all other tape recordings made by respondents pursuant to paragraph IV (D) to be kept by respondents for a period of one year,

E. All records of violations of paragraphs I, II or III of this order respondents discovered as a result of its monitoring, taping, other compliance program pursuant to paragraph V of this order, or for any

other reason, including the date, the name of the employee or agent, the subject of the telephone solicitation call, the misrepresentation, the number of times the employee or agent has violated paragraphs I, II or III of this order in the preceding twelve months, and a copy of the written warning or termination notice resulting from such violation; and

F. All statements required to be obtained pursuant to paragraph VII, below.

The Commission may otherwise monitor any respondents' compliance with this order by all lawful means available, including the use of investigators posing as consumers or clients.

VII.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, permit representatives of the Commission to interview and depose, under oath, at the respondents' business premises, the officers, directors, or employees of any such business with regard to compliance with the terms of this order. Such officers, directors, or employees may have counsel present. The respondents shall refrain from interfering with duly authorized representatives of the Commission who wish to interview the respondents' officers, directors, or employees relating in any way to any conduct subject to this order.

VIII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, shall not provide means and instrumentalities to, or otherwise assist or facilitate, any person who respondents know or should know makes false or misleading representations about the purpose for which charitable contributions have been or will be used, the geographic location of the charity, organization or program that has benefitted or will benefit from charitable contributions, or any other fact material to the decision of any person to make any charitable contribution.

For purposes of this paragraph, "assist or facilitate" includes but is not limited to:

- Providing or arranging for the provision of telephone service or equipment;
- Providing or arranging for the provision of computer hardware or software;

Providing or assisting in the development of telephone scripts or other marketing material;
Mailing or arranging for the mailing of any solicitation or marketing material; or
Providing or arranging for the provision of names of prospective contributors.

IX.

It is further ordered, That respondents shall, for a period of five (5) years from the date of entry of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers of respondents or of any affiliated companies 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 such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondents Civic Development Group, Inc. and Community Network, Inc. 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 paragraph 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 Community Network, Inc., Civic Development Group, Inc., and their successors and assigns and respondents Scott Pasch, David Keezer, and Richard McDonnell, within sixty (60) days after the date of service of this order, and again

180 days following entry of this order, and again 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. The reports 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.

XII.

It is further ordered, That respondents Scott Pasch, David Keezer, and Richard McDonnell, 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 respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. 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.

XIII.

This order will terminate on June 5, 2018, 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.

Commissioner Swindle not participating.

EXHIBIT 1

WHAT ARE MY OBLIGATIONS AS A PROFESSIONAL FUNDRAISER?

As a professional telemarketer raising funds for nonprofit or charitable entities, you have a legal obligation and a moral responsibility to tell the truth. In fact, your obligation to tell the truth is especially important because your company has entered into an order with the Federal Trade Commission prohibiting misrepresentations when soliciting donations. Violations of this order may result in the termination of your employment and a law enforcement action.

When you lie to consumers, you not only expose yourself and your company to legal liability, but you harm the credibility of all charitable or nonprofit organizations that rely on donations, including the ones we represent.

Simply put, you **may not** misrepresent any fact a person would rely on in deciding to give money. For example:

1. You may not falsely claim that money has gone or will go to purchase a specific item, such as bullet proof vests.
2. You may not falsely claim that money has gone or will go for a specific purpose, such as to pay for death benefits for families of fallen police officers.
3. You may not falsely claim that money has gone or will go to an organization in a particular location.
4. You may not lie about your occupation or employer, such as by saying you are a police officer, state trooper or deputy sheriff, if you do not hold such a position, or by claiming that you are a member of an organization if you are not.

WHAT DO I DO IF I KNOW THE SCRIPT IS FALSE OR MISLEADING?

You may be liable for violations of law if you knowingly make false statements to consumers. In addition, the Federal Trade Commission order with your company requires the company to terminate your employment if you lie to consumers.

HOW DO I RESPOND TO QUESTIONS?

Do not make up answers under any circumstances. Stop the presentation and ask your employer for the correct answer. A false rebuttal is every bit as serious as a false initial presentation, and may subject you to legal action and the termination of your employment.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONER SHEILA F. ANTHONY

Today, we finalize the attached administrative settlement following public comment. The agreement resolves serious allegations about misrepresentations made by respondents in connection with their telephone fundraising efforts on behalf of a non-profit organization. We present our views on one particular provision in the order to ensure that it is not misconstrued to suggest to some that the Commission is steering in a new direction.

Part V of the order provides respondents with a limited rebuttable presumption that they have exercised good faith in complying with key injunctive provisions of the order, if respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in Part IV. In this case, including this provision is acceptable.

Part IV of the order establishes numerous and significant monitoring and education requirements designed to ensure that respondents make no deceptive representations in connection with any charitable solicitations by telephone. These requirements include, but are not limited to: disseminating a brochure that discusses the obligations of a professional fundraiser to current and future employees and agents (Part IV.A); monitoring a random and representative sample of employees and agents in each location from which solicitations are made to ensure compliance with the injunctive provisions (Part IV.C); and taping a random and representative sample of telephone solicitations in each location in which solicitations are made and reviewing a random sample of at least 1000 such calls every 30 days to ensure compliance with the injunctive provisions (Part IV.D). Part IV.E further requires that respondents terminate any employee or agent who makes more than one material representation that violates the injunctive provisions in any consecutive twelve-month period.

Given the circumstances of this case as well as the strength and scope of the monitoring and education requirements in Part IV, we are of the view that the limited rebuttable presumption delineated in Part V is acceptable. (Under current law, good faith is among those

factors relevant to determining an appropriate civil penalty amount where an order has been violated. See *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 998, 993-94 (11th Cir. 1984); *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967-68 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982)). This provision does not establish a defense to any subsequent enforcement actions. Similarly, it in no way precludes the Commission from taking action should it determine that respondents are not in full compliance with any final order. Furthermore, the Commission continues to adhere to its Policy Statement Concerning Errors and Omissions Clauses in Consent Decrees, 59 Fed. Reg. 34440 (July 5, 1994). We consider it highly unlikely that other facts would present themselves -- in the administrative or federal court context -- that would warrant application of the same or a similar rebuttable presumption.

STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON

I am writing to concur with the Statement of Chairman Robert Pitofsky and Commissioner Sheila F. Anthony on the final administrative settlement in Civic Development Group, Inc. I have voted to support this agreement in recognition of the allegation of serious harm caused by respondents through their fraudulent telemarketing fundraising and the need to place such respondents under order. However, one provision of the order raises issues addressed by my two aforementioned colleagues and that I wish also to address through this Statement.

Part V of the order in Civic Development Group states that in any Commission action to enforce the order, "there shall be a rebuttable presumption that the respondents have exercised good faith in complying with [substantive provisions of the order] if the respondents show, by a preponderance of the evidence, that they have established and maintained the education and compliance program mandated in paragraph IV of the order. . . ."

I question the propriety of accepting a consent agreement that results in shifting the burden of proof to benefit a party that the Commission is claiming engaged in unlawful conduct. There are serious risks in permitting any party or adjudicative body to interfere with the Commission's well-supported prosecutorial discretion, and it could be argued that the limited rebuttable presumption in Part V allows respondent's compliance with the procedural requirements to detract from the Commission's ability to pursue substantive violations.

For purposes of this case only, I accept the order's burden-shifting provision and concur with the Chairman, Commissioner Anthony, and staff that this order is acceptable based on the unique and specialized aspects of this case. Accordingly, in my view, the order presented here should not be regarded as having precedential value.

I trust that staff will continue to work closely with the company to monitor its compliance with the stringent requirements of Part IV as well as all other requirements of the order.

IN THE MATTER OF

MEGA SYSTEMS INTERNATIONAL, INC., ET AL.

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

Docket C-3811. Complaint, June 8, 1998--Decision, June 8, 1998

This consent order requires, among other things, the Illinois-based corporation and its officer to pay \$500,000 in consumer redress and to disclose that their television and radio programs are paid advertisements. In addition, the consent order requires the respondents to substantiate claims regarding the benefits, performance or efficacy of any product or program they advertise, promote, sell or distribute in the future.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew and C. Steven Baker.*

For the respondents: *Barry Cutler, Baker & Hostetler, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Mega Systems International, Inc., a corporation, and Jeffrey Salberg, 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 Mega Systems International, Inc. is an Indiana corporation with its principal office or place of business at 2025 East 175th Street, Lansing, Illinois.

2. Respondent Jeffrey Salberg 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 Mega Systems International, Inc.

3. Respondents have advertised, offered for sale, sold, and distributed products to the public, including but not limited to, Eden's Secret Nature's Purifying Product, Sable Hair Farming System, Kevin Trudeau's Mega Memory System, Dr. Callahan's Addiction Breaking System, and Jeanie Eller's Action Reading.

4. Eden's Secret Nature's Purifying Product and Sable Hair Farming System are "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. Respondents' advertisements include, but are not limited to, program-length radio and television commercials which run for 30 minutes or less and fit within normal radio and television broadcasting time slots. Respondents' television commercials were and are broadcast on network, independent and cable television stations throughout the United States. Several of the television commercials are identified as "The Danny Bonaduce Show" and "A Closer Look..". The Danny Bonaduce Show purports to be a television talk show similar to "Late Night with David Letterman." The set consists of a band playing off to the side, a live audience, and a back drop of city skyline silhouette. Danny Bonaduce performs a monologue before interviewing a guest who is actually a promoter of a Mega Systems, Inc. product. A Closer Look purports to be a television talk show similar to "Larry King Live." The set consists of a desk similar to the desk used in "Larry King Live." Respondents' radio commercials were and are broadcast on network and independent radio stations throughout the United States. Kevin Trudeau acts as the host or guest in most, but not all, of respondents' radio and television commercials.

6. 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.

EDEN'S SECRET NATURE'S PURIFYING PRODUCT

7. Respondents have disseminated or have caused to be disseminated advertisements for Eden's Secret Nature's Purifying Product, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. Trudeau: "That cleansing my body has had a dramatic impact on my body and life. I feel brighter and more alert for longer periods of time than I have in years, and there's no question that my immune system has dramatically improved."

Wright: "...a body that is cleansed and purified of toxic waste matters, colon waste, fatty arterial deposits, the ph balance of the blood's better, the microflouron of the colon's better, you're simply enhancing the overall integrity of your body."

Trudeau: "... I honestly believe that people try, they can't lose weight. And it is really amazing because I have friends that I see what they eat, and they try to exercise. They try to, and they still can't lose the weight."

Wright: "That's right."

Trudeau: "What's the problem here?"

Wright: "Well, step number one is if you don't cleanse the system out, your body is constantly hungry. Why? It is not getting nutrients. It's not getting fed. The colon wall gets lined with some sort of a type of, it's old fecal matter, it's old gluey plaque like substance. The wall of the colon gets compromised in such manner that a lot of the nutrients that you're eating, the foods that you're eating don't transfer."

Wright: "So what we're doing is cleaning out the digestive tract, the colon and aiming at cleaning and purifying the blood all at the same time. So between the two of these, what we're initiating, Kevin, is a complete biological interwashing. When you assist the body's own eliminative channels, help open them up -- "

Trudeau: "Right."

Wright: "The body has an ability to restore itself. The integrity of the cells themselves on a cellular level becomes higher because there's not a lot of junk in there. There's not a lot of plaque in the way. They're opening up the transfer of nutrients and oxygen so your cells can live again."

Trudeau: "And one of the things that everybody said, I asked them, I said what is your weight situation, and everyone said they have lost weight."

Wright: "Right."

Trudeau: "They're losing pounds."

Wright: "Right."

Trudeau: "Now this is obviously, we are not claiming to lose weight with the product, but this is cleansing, something is happening here."

Wright: "Your blood stream's impure, the PH balance is off, and it's exactly like a girl who has PMS. The blood stream gets impure before her cycle, it's reabsorbed back into the blood stream, she's experiencing, she goes AHHH!!! She goes crazy, just like my wife used to until we founded this formula. This is the same kind of experience. Your stress level gets nuts."

Trudeau: "So are you telling me that people that have -- women that have a bad PMS syndrome, if they started cleansing their system, that could perhaps be relieved in some -- to some degree?" (Exhibit A; Radio Infomercial Script.)

B. This 100% natural, herbal purifying program is designed to cleanse your body quickly and easily of accumulated, harmful toxins. **I guarantee you'll feel energized and revitalized!** And many experts now believe that detoxification may even help you avoid premature aging and ill health.

Worse yet, these man-made toxins eventually overwhelm our bodies' natural cleansing abilities and accumulate in our cells and tissues. As recent medical research indicates, the waste that remains is linked to declining appearance, premature aging and ill health.

Your body's cry for help

Although this news may come as a surprise to you, **your body has probably been trying to tell you for years that it's "toxic"!** Just a few symptoms you may experience include fatigue, indigestion, headaches, being bloated or overweight, irritability, irregularity, depression, arthritis, insomnia and immune suppression. If you suffer from any or all of these conditions, it's time to listen to your body **now**. . . before your health suffers further.

**The Nature's Pure Body Program helps your body
purify itself, quickly and easily**

My exclusive purifying program gives your body the added help it needs to clear out the toxins that rob you of your energy and good health.
(Exhibit B; Promotional Brochure.)

8. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that:

A. Eden's Secret Nature's Purifying Product causes significant weight loss.

B. Eden's Secret Nature's Purifying Product will prevent or cure illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome.

C. Eden's Secret Nature's Purifying Product will cleanse the body of harmful toxins.

D. Eden's Secret Nature's Purifying Product will purify the body's blood supply.

9. In truth and in fact:

A. Eden's Secret Nature's Purifying Product will not cause significant weight loss.

B. Eden's Secret Nature's Purifying Product will not prevent or cure illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome.

C. Eden's Secret Nature's Purifying Product will not cleanse the body of harmful toxins.

D. Eden's Secret Nature's Purifying Product will not purify the body's blood supply.

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

10. Through the means described in paragraph seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eight, at the time the representations were made.

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

SABLE HAIR FARMING SYSTEM

12. Respondents have disseminated or have caused to be disseminated advertisements for Sable Hair Farming System, including but not necessarily limited to the attached Exhibit C. This advertisement contains the following statements:

Sabal: "So I found a combination of herbs that, when mixed with cleansers like witch hazels and alcohols, can deep clean underneath the surface of the scalp, and clean out all the debris that prevents the hair or blocks the hair from reaching the surface."

"And the amazing thing that was happening is that after we cleaned, as we looked at the scalp, hair sprouted out."

"[T]he hair that sprouts out measures five years, for instance, that it's been growing under the scalp, from the blood, from the protein in the blood."

"[W]e had live subjects tested in a laboratory here in south Florida, and they counted the hairs as they came in on every test subject every day that they used the product."

"So we have a wonderful product that cleans the scalp. And if you learn to do that, first of all, you'll never lose your hair."

"I should be in most of the major medical journals in the world in the next few months, which will finally end baldness in the human race. And I'm very proud of that. A hundred percent on my testing. And that will be announced, I would say, before the end of the June."

"And everyone should have all their hair back in six months to a year, permanently, painlessly, and never have to purchase anything again."

Trudeau: "And you're saying that if the follicles were cleaned properly -"

Sabal: "They would never lose their hair."

Sabal: "[W]e could actually end hair loss in the human race. No one would become bald any more."

"Well, the doctors that have tested with us, that amazed them. That was the very first thing that amazed them. They said they saw more in five minutes with our product than they did with any other product they've ever tested. And that includes the Rogaine and Minoxidil products."

"You don't ever have to be bald any more. You don't ever have to go bald, if you're a young person who's just starting to lose their hair. And there's a lot of help that we can give you. So I hope you do give us a call." (Exhibit C; Radio Infomercial Script.)

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that:

A. Sable Hair Farming System will stop, prevent, cure, relieve, reverse or reduce hair loss.

B. Sable Hair Farming System will promote the growth of hair where hair has already been lost.

C. Sable Hair Farming System is superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

14. In truth and in fact:

A. Sable Hair Farming System will not stop, prevent, cure, relieve, reverse or reduce hair loss.

B. Sable Hair Farming System will not promote the growth of hair where hair has already been lost.

C. Sable Hair Farming System is not superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

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

15. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

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

17. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that scientific studies demonstrate that Sable Hair Farming System is effective in stopping hair loss and promoting hair growth.

18. In truth and in fact, scientific studies do not demonstrate that Sable Hair Farming System is effective in stopping hair loss and promoting hair growth. Therefore, the representation set forth in paragraph seventeen was, and is, false or misleading.

KEVIN TRUDEAU'S MEGA MEMORY SYSTEM

19. Respondents have disseminated or have caused to be disseminated advertisements for Kevin Trudeau's Mega Memory

System, including but not necessarily limited to the attached Exhibits D through F. These advertisements contain the following statements:

A. Trudeau: "[W]e teach people all around the world how to release the photographic memory that people have right now, or instant recall memory."

"All these little absent minded things we help people when we develop and release the photographic memory that they have."

"Every single person has a photographic memory right now lying dormant. It's an ability that everyone has. You, see, you remember everything that you see, hear and think about. If it comes through the senses it is remembered. The problem though is recalling information."

"Yeah, that's one of the things about Mega Memory that's very unique is that fact that it only takes only a few hours to learn the technology and when you release that photographic memory"

"We took an entire seventh grade class in the beginning of last school year. They went through the Mega Memory system, just took a few days, a couple of hours, very easy and at the end of the school year they had a big problem on their hands. Eight months ahead of their school curriculum, lowest grade point average A minus, and they test the vocabulary levels of the seventh graders and they found to be those of sophomores in college because they could remember all the words and definitions. I can't wait until they take their SAT's. They were three years ahead in Spanish, because foreign languages, if you ever wanna learn foreign languages, it has a lot to do with memory, you know."

"I then met a fellow who did a research report in 1975 at the Oklahoma School for the Blind in Muskogee, Oklahoma, V. R. Carter was the Superintendent back then, and he took thirty-five blind children and he improved their memory. These kids were blind from birth, by the way, and he improved, in just five days, fifteen percent recall ability to ninety percent in just one week. They were so impressed that they tested the kids six and eight months later to see if it stuck and most of the kids improved to ninety-five and ninety-eight percent recall. So, it stuck. We duplicated the results with retarded kids with IQ's of only fifty and sixty and the results were almost identical, lower memory in the beginning, dramatic improvement in the nineties just a week later and a year later in testing almost a hundred percent recall ability with slow, retarded kids. Obviously we know at this point if we can teach blind and retarded kids it had to be an ability, a powerful memory, that everyone had. So I took that raw data and put together, invented, if you will, over the next year the entire Mega Memory system that we have today, founded the institute and just in the last couple of years over two million people now, uh, Danny, have gone through the Mega Memory home study course to improve their own memory."

"...ADD and we're getting letters and calls more on this subject than anything else and there are millions of people, children and adults who are afflicted with this problem, and when I started looking at that because it has a lot to do with memory, attention span, So I started doing the research and we tested five thousand kids with ADD. there's a lot of controversy 'bout this, by the way because the drug

Ritalin is the drug of choice to give. And we don't agree with that as an option, but uh we think through dietary change and we discuss this in Mega Memory, some of the things and options that people can take to dramatically improve."

(Exhibit D; Television Infomercial Script.)

B. Help Sheet - Overcoming Common Objections

4.) Can this work for people with learning disabilities, ADD, dyslexia, or head injuries?

These techniques were perfected with blind and retarded children back in the early 70's. Through research, we've found that everyone can improve their memory with this program (except Alzheimer's patients). (Exhibit E; Telephone Sales Script.)

C. Kevin Trudeau's breakthrough techniques were developed while working with blind and mentally handicapped students. Their recall ability increased from 15% to 90% in just 5 days! Because these methods have been proven under the most difficult circumstances, they're guaranteed to work for you! Kevin's breakthrough techniques that you'll learn in this course allow you to release your own perfect photographic memory ... effortlessly. (Exhibit F; Promotional Brochure.)

20. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that Kevin Trudeau's Mega Memory System will enable users to achieve a photographic memory.

21. In truth and in fact, Kevin Trudeau's Mega Memory System will not enable users to achieve a photographic memory. In fact, Kevin Trudeau's Mega Memory System simply consists of standard memory techniques. Therefore, the representation set forth in paragraph twenty was, and is, false or misleading.

22. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that Kevin Trudeau's Mega Memory System is effective in causing adults or children with learning disabilities or attention deficit disorder to substantially improve their memory.

23. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs twenty and twenty-two, 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 paragraphs twenty and twenty-two, at the time the representations were made. Therefore, the representation set forth in paragraph twenty-three was, and is, false or misleading.

25. Through the means described in paragraph nineteen, respondents have represented, expressly or by implication, that:

A. Scientific studies of Kevin Trudeau's Mega Memory System on seventh-grade students demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their academic performance and grades.

B. Scientific studies of Kevin Trudeau's Mega Memory System on blind children demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability to a level of 95% to 98%.

C. Scientific studies of Kevin Trudeau's Mega Memory System on children with IQ's of fifty to sixty demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability to a level of almost 100%.

D. Scientific studies of Kevin Trudeau's Mega Memory System on children with attention deficit disorder demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their memory.

26. In truth and in fact:

A. Scientific studies of Kevin Trudeau's Mega Memory System on seventh-grade students do not demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their academic performance and grades.

B. Scientific studies of Kevin Trudeau's Mega Memory System on blind children do not demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability by 95% to 98%.

C. Scientific studies of Kevin Trudeau's Mega Memory System on children with IQ's of fifty to sixty do not demonstrate that Kevin Trudeau's Mega Memory System will improve their recall ability by almost 100%.

D. Scientific studies of Kevin Trudeau's Mega Memory System on children with Attention Deficit Disorder do not demonstrate that Kevin Trudeau's Mega Memory System will substantially improve their memory.

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

DR. CALLAHAN'S ADDICTION BREAKING SYSTEM

27. Respondents have disseminated or have caused to be disseminated advertisements for Dr. Callahan's Addiction Breaking System, including but not necessarily limited to the attached Exhibits G through I. These advertisements contain the following statements:

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A. Trudeau: "He [Dr. Callahan] has been a best-selling author whose revolutionary treatment for losing weight and quitting smoking takes less than three minutes with 95 percent success. If you smoke and want to quit, or if you want to lose weight once and for all, today's show could be an answer to your prayers."

 "[T]he treatments that you discovered, that you invented get rid of addictions like food addictions so people can lose weight easily without trying to diet. They can just lose the weight because they reduce the urge to overeat. You can reduce smoking, alcoholism, any type of compulsion, depression, jealousy."

Callahan: "It's revolutionary because it works with a high success rate that's never before been possible."

Trudeau: "[I]f you have any addiction, whether it be for food, if you're overweight, if you have a smoking addiction, if your children are addicted to drugs -- any compulsion, anything whatsoever, we recommend you call the 800 number..."

Callahan: "What we mean is that their addictive urge, that uncontrollable urge is gone, completely gone, and they feel fine."

 "And when we eliminate the anxiety, they don't need the heroin; they don't need the alcohol. The withdrawal is gone." (Exhibit G; Television Infomercial Script.)

B. Trudeau: "We're going to be sharing Dr. Callahan's revolutionary breakthrough that he had discovered while studying quantum physics. Dr. Callahan came up with a breakthrough that in 60 seconds can eliminate your addictive urge to overeat, to smoke cigarettes, to do any compulsion, any type of addicted behavior, whether it be alcohol, drugs, cigarettes, food, maybe picking your thumb, any type of compulsive behavior, and eliminate all the stress and anxiety in your body. Now this technique will take 60 seconds to apply and works in virtually 100 percent of the time."

 "Dr. Callahan, while studying quantum physics, figured out that he has this technique that in 60 seconds you can break up the stress and anxiety in your body and eliminate totally the addictive urge. Now what will that mean to you? That means you can lose weight easily, effortlessly, because you don't have any urge to overeat when you're not hungry. The urge is gone."

 "While I was on another time, a gal called up on the phone. She said, "Kevin, I saw you about a month ago and I bought your program." This is right on tape. We have this on film. Right on national TV. She said, "I want you to know, I got it a month ago and here's what happened. I was addicted because of food. I would overeat when I wasn't hungry. So late at night when I wanted to eat food, I used the technique. It took only 60 seconds. I just used it one time. I relaxed, I felt fantastic. I slept better than I have in years because all the stress was gone." She goes, "I was just feeling great and the urge was gone. I didn't eat the food. I didn't want it." She goes, "Since then, I've lost over 10 pounds, but I'm not trying to lose weight." She said, "I eat ice cream, I eat cookies, I eat cake, I eat everything I want. But I'm just losing weight." And I said, "Are you trying to lose weight." And she says, 'No.'"

"The best thing about this technique if you're overweight, you can eat everything you want. You can eat pizza, you can eat ice cream, you can eat anything and everything you want. You're just not going to want it. The urge is going to be gone. The uncontrollable urge is gone."

"When I was on Value Vision, the home shopping club, a gal called up and said she does work in an alcohol and drug treatment center with alcoholics, heroin addicts, cocaine addicts. That's how Dr. Callahan actually started this work. He worked with some of these major additions. Here's the interesting thing. Whether your addiction is cocaine, heroin, alcohol or pizza or chocolate or cigarettes, it's all caused by the exact same thing. The stress and anxiety energy field. She told me that she's getting this program and for the first time in her life she can actually help people, because in 60 seconds she knocks out the urge, the uncontrollable urge."

"Another gal called up on the same day on Value Vision and said this. She brought the program 30 days ago. She had lost weight -- and after she used it once, she lost weight. But her husband was an alcoholic. He used the program. He hasn't had a drink in 30 days. Why? Because it knocked out the addictive urge. Dr. Callahan was in a grocery store in California where he lives. A guy ran up to him and said, "Dr. Callahan?" He said, "Yes." He said, "I saw you on TV three years ago when you were talking about this technique, and I got your book where it describes it." He said, "I was an alcoholic my whole life, over 28 years. I used your technique and I haven't had a drink, Doctor, in three years, and I feel so wonderful." (Exhibit H; Television Infomercial Script.)

C. ... by placing your order today you're taking the most important step to eliminate your addiction(s) for the rest of your life.

Dr. Callahan's addiction breaking system is a video taped program that will instantly teach you how to break any addictive urge you want to eliminate by using a simple and easy to use 15 minute technique.

BENEFITS TO YOUR CUSTOMER:

QUIT SMOKING BREAK ADDICTIVE URGES LOSE WEIGHT
(Exhibit I; Telephone Sales Script.)

28. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that for all or virtually all users:

A. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss.

B. Dr. Callahan's Addiction Breaking System reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System cures addictions and compulsions, including but not limited to, smoking, eating, and using alcohol or heroin.

29. In truth and in fact:

A. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss.

B. Dr. Callahan's Addiction Breaking System does not reduce an individual's compulsive desire to eat, and as such, Dr. Callahan's Addiction Breaking System does not lead to significant weight loss without the need to diet or exercise.

C. Dr. Callahan's Addiction Breaking System does not cure addictions and compulsions, including but not limited to, smoking, eating and using alcohol or heroin. Indeed, Dr. Callahan's Addiction Breaking System simply consists of a video tape in which Dr. Callahan demonstrates a series of tapping one's face, chest, and hand, rolling one's eyes, and humming.

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

30. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph twenty-eight, at the time the representations were made.

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

32. Through the means described in paragraph twenty-seven, respondents have represented, expressly or by implication, that testimonials with regard to consumers' use of Dr. Callahan's Addiction Breaking System reflect the typical or ordinary experience of members of the public who use the product.

33. In truth and in fact, testimonials with regard to consumers' use of Dr. Callahan's Addiction Breaking System do not reflect the typical or ordinary experience of members of the public who use the product. Therefore, the representation set forth in paragraph thirty-two was, and is, false or misleading.

JEANIE ELLER'S ACTION READING

34. Respondents have disseminated or have caused to be disseminated advertisements for Jeanie Eller's Action Reading, including but not necessarily limited to the attached Exhibits J and K. These advertisements contain the following statements:

A. Trudeau: "According to my guest, Jennie Eller, every single person -- if they can see, hear and talk -- can learn to read, guaranteed. She also claims that her revolutionary approach to teaching reading is easy, quick and works 100 percent of the time."

Eller: "That is the program I took back. We started using it in the Anchorage School District. Every child that went through it learned to read."

 "And when you go through this program, you start at the beginning and you take every logical step right through it. And when you come out, you are a fluent, independent reader. And I've put my 30 years of teaching credibility on the line. It absolutely is guaranteed to work."

 "[B]ut any child that you show them how that code works, you can't stop them from reading. They crack that code. And that code is the key."

Trudeau: "But you're talking about this secret code. The government says -- you were mentioning to me -- that teaches (sic) certain kids just can't read, and you're saying that's hogwash."

Eller: "It is. It's absolute hogwash. I've been teaching for 30 years and I've never had anyone not learn to read."

Trudeau: "Because I just (sic) watching a show the other day on -- on -- on TV and they were saying, this guy's trying to read. He's tried -- he tried a phonics program himself. He -- he still can't read. He's frustrated. He thinks he's dumb. And they said -- they made the statement, the only way he can read is by hard, hard work, and he still may never learn how to read."

Eller: "No, that is absolutely not true, and I hope he's watching this show, because if he'll get this program, I guarantee you he'll learn to read."

 "[I]f you tell them what the words are, they know those words. They speak those words. The people that I taught to read on the Oprah Show, as soon as they could decode, decipher the newspaper, they knew those words. They were articulate people. They spoke the language. They understood the language. They just could not decipher the language."

 "Absolutely, because it not only teaches the decoding, the phonics part, it teaches comprehension." (Exhibit J; Television Infomercial Script.)

B. For Adults

Easier and quicker for adults to learn, because most already know the vocabulary - they just need to learn how to "decode" written words and sentences.

 1. How can it improve comprehension?

Even though we've heard a lot of words before in conversation, a person who can't read wouldn't recognize them. Action Reading teaches you how to read words for

their meaning. (It's like putting a persons (sic) face to their name, when you have only spoken to them on the telephone.)

6. Does Jeanie guarantee that she can teach anyone to read?

Action Reading can teach anyone who can see, hear, think and talk to read...
(Exhibit K; Telephone Sales Script.)

35. Through the means described in paragraph thirty-four, respondents have represented, expressly or by implication, that Jeanie Eller's Action Reading is successful in teaching reading 100% of the time.

36. Through the means described in paragraph thirty-four, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph thirty-five, at the time the representation was made.

37. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph thirty-five, at the time the representation was made. Therefore, the representation set forth in paragraph thirty-six was, and is, false or misleading.

DECEPTIVE FORMAT

38. Through the advertisement and dissemination of respondents' television infomercials including, but not limited to, "The Danny Bonaduce Show" (Exhibit D) and "A Closer Look" (Exhibits G, H, and J), and radio infomercials (Exhibits A and C), respondents have represented, directly or by implication, that these commercials are independent television and radio programs and not paid commercial advertising.

39. In truth and in fact, respondents' television and radio infomercials are not independent television and radio programs and are paid commercial advertising. Therefore, the representation set forth in paragraph thirty-eight was, and is, false or misleading.

40. 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.

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this complaint.

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Complaint

EXHIBIT A

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: EDEN'S SECRET NATURE'S PURIFYING
PRODUCT RADIO INFOMERCIAL

PAGES: 1 THROUGH 27

MSI/SALBERG COMPLAINT EXHIBIT A
TRUDEAU COMPLAINT EXHIBIT A
WRIGHT COMPLAINT EXHIBIT A

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EXHIBIT A

1 P R O C E E D I N G S

2 And it's Kevin Trudeau. Let's Talk America.

3 Today's topic, I've been talking about it all week long
4 and I'm really looking forward to this show. If you're listening
5 in, you're going to get excited about this program.6 We're talking about energy. We're talking about
7 health. We're talking about cleansing the body and feeling good.
8 Boy, it sounds like an interesting program, doesn't it.9 My guest, live in the studio, is the founder of Eden
10 Secret, a company that he started out in California, and he
11 invented a program called the Purifying Program. Ken Wright is
12 my guest. Welcome, Ken. Thanks for being on the show.

13 MR. WRIGHT: Hey! Thanks for having me.

14 MR. TRUDEAU: Listen, you know we're talking about
15 health, we're talking about cleaning the body, and I've got to
16 read this because, you know, so many people, my producers say
17 let's put this person on as a guest, let's put this person on --
18 and we're very particular about who we put on.19 But I got this stuff you sent me and I couldn't believe
20 it. I'm reading this and it said, "I've noticed I have more
21 energy upon awakening and no longer need a pot of coffee to get
22 going in the morning."

23 MR. WRIGHT: (Laughter)

24 MR. TRUDEAU: And this one here said, "The most
25 dramatic differences since I started is appeared in my skin. I

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Complaint

EXHIBIT A

2

1 have a problematic dry skin problem. My face and eyes and hair
2 have become radiant, my nails become stronger, and my energy
3 level is better than ever."

4 This one here is by. This is a PhD who wrote this
5 letter who said, "For the last 15 years or so, I have been
6 experiencing increasingly painful body aches and pains, which I
7 believe to be rheumatism, increasingly stronger, more frequent
8 sinus headaches, and a growing sense of fatigue and weakness."

9 And after they started going and cleansing out the body
10 as you discuss and we'll show people how to do, it said, "my
11 energy level is up 50 to 70 percent" --

12 MR. WRIGHT: Isn't that incredible.

13 MR. TRUDEAU: "And at 43, I feel healthier than I have
14 since my early 20's." And this is by a PhD. And this one here
15 was hysterical. It says, "I can unequivocally say --

16 MR. WRIGHT: (Laughter)

17 MR. TRUDEAU: That cleansing my body has had a dramatic
18 impact on my body and life. I feel brighter and more alert for
19 longer periods of time than I have in years, and there's no
20 question that my immune system as dramatically improved.
21 Recently the flow of -- with the cold and flu epidemic going
22 around, I was able to shake a cold in three days."

23 MR. WRIGHT: Alright.

24 MR. TRUDEAU: "I've never in my life been able to shake
25 a cold that simply." Now these people, when I looked at this, I

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EXHIBIT A

1 said, wait a minute. This guy must know something about
2 cleansing the body --

3 MR. WRIGHT: (Laughter)

4 MR. TRUDEAU: And about giving people, you know, some
5 techniques so they can use to feel good and have energy and so
6 forth.

7 Now my question to you is, tell me about how you got
8 involved with this. I know you have an herbal formula that you
9 invented, the Purifying Program, but how did you get involved in
10 this whole business?

11 MR. WRIGHT: Well, I really got into this sort of
12 backwards. I had a typical kind of American diet. I was eating
13 too much fast food, fried food, like you know, the typical
14 listener out there listening has a poor diet, is pretty
15 sedentary. I was traveling a lot, under a lot of stress. And
16 personally, I had really bad digestion and got constipated, you
17 know, too frequently.

18 Consequently, my hair got really, really brittle and
19 bad --

20 MR. TRUDEAU: Un-huh.

21 MR. WRIGHT: My skin got really crumby.

22 MR. TRUDEAU: Like gray?

23 MR. WRIGHT: As people get older, your skin just
24 doesn't look healthy. You don't have that glow of health. And I
25 just lost all my energy.

EXHIBIT A

1 MR. TRUDEAU: Un-huh.

2 MR. WRIGHT: And in high school, I was a really
3 energetic, vibrant guy. I had a lot of energy, a lot of fun. I
4 played and, you know, enjoyed myself, and I just started feeling
5 all this fatigue. It just wasn't acceptable to me.

6 And like a lot of people, I travel around. I'm flying
7 on business here and there. And I was -- actually, I was in the
8 Philippines and I just was talking to some people about it and
9 complaining about this. I was saying I just feel like crumb.

10 MR. TRUDEAU: Right.

11 MR. WRIGHT: And (laughter) somebody said you should go
12 see this herbalist. What are herbs? I didn't know anything
13 about herbs.

14 MR. TRUDEAU: Right. Right.

15 MR. WRIGHT: So I go to an herbalist. They give me
16 this, basically it's a potent, a recipe, a formula kind of a
17 thing. And I was there for three weeks and started taking this
18 formula. And, I mean, I felt better. I mean, I had had horrible
19 digestion. I had had horrible constipation, and my skin would be
20 so crummy. I mean I just lacked energy.

21 MR. TRUDEAU: Yeah.

22 MR. WRIGHT: And I started cleansing all this toxic
23 stuff out of my body. So I came back to America and I went to
24 every health food store I could find. I went to this health food
25 store, that health food store, trying to find something that was

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EXHIBIT A

1 similar. I couldn't find anything.

2 Another trip, fast forward, I'm in Africa. There's
3 someone on an airplane. I'm not sleeping. I'm eating all this
4 hotel food, airplane food, that kind of thing. I'm in Africa
5 again. I go to an herbalist now. Now I'm thinking, I've got to
6 find out more about herbs. Same exact thing, I find another kind
7 of formula that works.

8 I come back to America. I go to the library and do all
9 the massive research. I go to health food stores and try to find
10 out how can I actually put something together to actually cleanse
11 the body.

12 The long story short, I know I'm getting long winded
13 here, a body that is cleansed and purified of toxic waste
14 matters, colon waste, fatty arterial deposits, the Ph balance of
15 the blood's better, the microflouron of the colon's better,
16 you're simply enhancing the overall integrity of the body.

17 What does that give you? What are the benefits? The
18 benefits of that are: allow more energy, better circulation,
19 better skin, hair and nails, much more overall increased sense of
20 vitality. That kind of a thing.

21 MR. TRUDEAU: So what you're saying is when the body --
22 people out there, because when you were talking about fatigue and
23 things, I'm thinking, yeah you know, people are probably sitting
24 home going he's talking about me.

25 MR. WRIGHT: Oh, yeah.

EXHIBIT A

6

1 MR. TRUDEAU: I have a hard time getting up in the
2 morning.

3 MR. WRIGHT: Oh, yeah.

4 MR. TRUDEAU: I need like this woman said, I need a pot
5 of coffee to get going, and I'm not a morning person. I just
6 don't have any energy.

7 MR. WRIGHT: Oh yeah, same like me. You're all foggy
8 in the morning. You get up first thing in the morning, the alarm
9 clock goes off, what do you do? You lay there and want to throw
10 a shoe at it. Well, if you clean all that stuff out, you may
11 just jump out of bed.

12 MR. TRUDEAU: You have energy?

13 MR. WRIGHT: You just have a lot of energy. Just jump
14 out of bed, go to work and focus better. You can attack what
15 you're doing with more zest.

16 We get cards and letters from around the country. We
17 sell this product around the United States to chiropractors,
18 detox centers, holistic healers, and natural paths, colon
19 therapists, you name it. And uniformly, we get the kind of
20 results and benefits that is just really unbelievable.

21 It's dramatic just by -- when a system is cleansed of
22 waste matter, a person looks and feels terrific. Their vitality
23 is restored. It's amazing.

24 MR. TRUDEAU: Unbelievable. Now I know that you've
25 been on hundreds of radio talk shows all across the country.

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EXHIBIT A

1 MR. WRIGHT: Yeah.

2 MR. TRUDEAU: Because I've talk to several of the
3 producers and managers and say, you've had this guy on --

4 MR. WRIGHT: Right.

5 MR. TRUDEAU: He seems to know what he's talking about,
6 and he invented this program that helps the body cleanse itself,
7 is that right?

8 MR. WRIGHT: Right. It's just when a body is cleansed,
9 it completely will help rejuvenate itself. However, what you
10 first have to do is get all the old stuff out. It's that simple.

11 MR. TRUDEAU: So getting the stuff out is the key?

12 MR. WRIGHT: Getting the stuff out of your system is
13 the key. I mean, people have heard of colonics. You've heard of
14 enemas. You've heard of three day fasts. You've heard of juice
15 fasts. You've heard of fasting. Jesus, so to speak. Jesus went
16 and He fasted for forty days before he had to make his big
17 decisions. It's talked about in the Bible. Cleanse and purify
18 yourself and I will exalt ye to the throne of power. What are
19 they talking about? They're talking about a restoration of your
20 personal power, of personal energies.

21 MR. TRUDEAU: Now let me ask you this. You say
22 cleanse the stuff out. What specifically -- I mean a person is -
23 - like me. A person, you know, is going through life --

24 MR. WRIGHT: Right.

25 MR. TRUDEAU: And why today do people, I mean,

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EXHIBIT A

8

1 generally have less energy? I mean, you know, my parents say you
2 know, you people you're not feeling good, you know you don't wake
3 up bright, you're not feeling good, you just don't have the
4 energy.

5 MR. WRIGHT: Right.

6 MR. TRUDEAU: Why today is this different that it was
7 year's ago? What are people doing to themselves today that's
8 different that they need to be in some type of cleansing program?

9 MR. WRIGHT: Twentieth century man, right there. There
10 are new and stronger chemicals in the environment. Walk down a
11 health food -- I mean walk down a store. Walk down the aisles
12 and look what's on the food. Ninety percent of the food that
13 you're eating has impurities in it. It has been treated with
14 toxic -- it has been treated with pesticides, herbicides. The
15 meat that you're getting has been shot full of antibiotics.

16 MR. TRUDEAU: Un-huh.

17 MR. WRIGHT: The environment is polluted. Now there
18 are newer and stronger chemicals in your dry-cleaning. The air
19 is polluted, the water is polluted. So what happens? I mean it
20 simply has an affect on the microbiology of your system.

21 MR. TRUDEAU: So now where a person is today, they're
22 eating fried food, it an advent to the fast food industry --

23 MR. WRIGHT: Right, right.

24 MR. TRUDEAU: The food chemicals and the additives, the
25 stuff in the water. I know I've been reading all these articles

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EXHIBIT A

1 about how bad the water is.

2 MR. WRIGHT: Right:

3 MR. TRUDEAU: It's clogging up the system and that's
4 making them feel kind of miserable and crumby and as you
5 mentioned the symptoms that people can see readily are the lack
6 of energy, the skin, and the hair?

7 MR. WRIGHT: Right.

8 MR. TRUDEAU: And maybe the --

9 MR. WRIGHT: Weight.

10 MR. TRUDEAU: Oh, they gain weight.

11 MR. WRIGHT: Oh, my God. I mean people -- why do you
12 hold on to weight? Why do people hold on to weight?

13 MR. TRUDEAU: Now wait a minute. Stop here.

14 MR. WRIGHT: Why are you craving foods all the time?

15 MR. TRUDEAU: Now this is very important. Today I was
16 reading USA Today. They said that there are more people
17 overweight today than ever in history in our country. And people
18 are telling me, I meet them all over the country, they go no
19 matter what I do, and I honestly believe that people try, they
20 can't lose weight.

21 And it's really amazing because I have friends that I
22 see what they eat, and they try to exercise, they try to eat
23 right and they still can't lose the weight.

24 MR. WRIGHT: That's right.

25 MR. TRUDEAU: What's the problem here?

EXHIBIT A

1 MR. WRIGHT: Well step number one is if you don't
2 cleanse the system out, your body is constantly hungry. Why?
3 It's not getting nutrients. It's not getting fed. The colon
4 wall gets lined with some sort of a type of a, it's old fecal
5 matter. It's a old gluey plaque-like substance.

6 The wall of the colon gets compromised in such a matter
7 that a lot of the nutrients that you're eating, the foods that
8 you eat, don't transfer. It actually doesn't get into the blood
9 stream so you're not getting properly fed. So you're body's
10 hungry all the time.

11 Not only that, obviously you're eating -- people are
12 just eating way too much and the food they're eating is crumby.
13 But number one is if you don't clean the system out first off,
14 none of the food that you're eating gets into the system so
15 you're always hungry. You're always tired because you're not
16 getting fed. It's a vicious circle.

17 MR. TRUDEAU: Alright, now you're talking about this
18 colon problem with this fecal matter or something --

19 MR. WRIGHT: Right, right.

20 MR. TRUDEAU: That's clogging it up and people can't
21 absorb the food --

22 MR. WRIGHT: Right.

23 MR. TRUDEAU: And nutrients that they're taking?

24 MR. WRIGHT: Right.

25 MR. TRUDEAU: So people taking vitamins are really

EXHIBIT A

11

1 wasting their money?

2 MR. WRIGHT: Well you've heard -- you know that doctors
3 used to say that vitamins are expensive urine. They were right.
4 A lot of this stuff that we eat, the good food that you're trying
5 to eat, actually don't get into the body.

6 MR. TRUDEAU: Uh-huh.

7 MR. WRIGHT: It simply is passed out of you.

8 MR. TRUDEAU: Now are there -- your program consists of
9 herbs.

10 MR. WRIGHT: Right.

11 MR. TRUDEAU: And I have it here right in front of me.
12 How many herbs are in this stuff?

13 MR. WRIGHT: There's 28 herbs.

14 MR. TRUDEAU: There's 28 herbs --

15 MR. WRIGHT: Twenty-eight different herbs, yeah.

16 MR. TRUDEAU: This is a combination that you put
17 together? Invented?

18 MR. WRIGHT: Well, yeah. I did a lot of research. I
19 hired a biochemist. I hired a formulator. We went back and
20 forth with powders and mixes and tried this and tried that. And
21 then, in the health food store, I mean you can get a product that
22 has maybe five or six herbs in it, right.

23 MR. TRUDEAU: Right.

24 MR. WRIGHT: But it doesn't have the type of
25 synergistic affect, meaning that when you have a blend, like this

EXHIBIT A

12

1 is a very powerful blend, you can't get a blend like this. This
2 is -- we're the only company in America that makes this. The
3 affect of this broad, wide variety of herbs has a synergistic
4 affect on the body so that it cleanses deep and easy.

5 MR. TRUDEAU: Now, I've heard of cleansing before.

6 Before I had you on as a guest, I called a lot of the health food
7 stores in the area and I said, hey, is cleansing -- what's this
8 cleansing stuff? You know, cleaning out --

9 MR. WRIGHT: (Laughter)

10 MR. TRUDEAU: And they go, oh, yes, yes. You want a
11 colon cleanser, you want a colon cleanser. And I said, what do
12 you have? And they said, well we have this powder and this
13 powder and this powder. And every place I called, they gave me -
14 - they're showing me these powder stuff that you mix up and
15 supposedly cleans out the colon.

16 MR. WRIGHT: Right.

17 MR. TRUDEAU: Now this, I notice, is just a tablet.

18 MR. WRIGHT: Right.

19 MR. TRUDEAU: And it says -- one of them says, whole
20 body formula, and the other one says colon formula. So what is
21 the difference between like this type of program and what I was
22 being exposed to in a health food store?

23 MR. WRIGHT: Right. It's real simple. I mean if you
24 go to a health food store, they're going to give you some sort of
25 formula that's just aimed at the colon. But if the colon is

EXHIBIT A

1 compromised, if your colon is sluggish --

2 MR. TRUDEAU: Un-huh.

3 MR. WRIGHT: It is intestinal constipation leads to
4 cellular constipation. It means the whole body is slows down and
5 get sluggish because your intestines are slow.

6 So what we did is we coupled a we coupled a colon
7 cleanser and what comes under the category so to speak of blood
8 purifiers. I mean the large jar the you see there, the 300
9 tablets of the purifying formula, those come under the category
10 of blood purifiers.

11 So what we're doing is cleaning out the digestive
12 tract, the colon and aiming at cleaning and purifying the blood
13 all at the same time. So between the two of these, what we're
14 initiating, Kevin, is a complete biological interwashing. When
15 you assist the body's own eliminative channels, help open them up
16 --

17 MR. TRUDEAU: Right.

18 MR. WRIGHT: The body has an ability to restore itself.
19 The integrity of the cells themselves on a cellular level becomes
20 higher because there's not a bunch of junk in there. There's not
21 a lot of plaque in the way. They're opening up the transfer of
22 nutrients and oxygen so your cells can live again.

23 MR. TRUDEAU: Now I know that since you started being a
24 guest on radio shows that your office has been flooded with phone
25 calls.

EXHIBIT A

1 MR. WRIGHT: Incredible, absolutely unbelievable.

2 MR. TRUDEAU: I was talking to my dear friend, Fred Van
3 Liew. You were on his show a few weeks ago.

4 MR. WRIGHT: Right.

5 MR. TRUDEAU: And you got a couple hundred phone calls
6 or something

7 MR. WRIGHT: in about a half a hour or forty minutes.

8 MR. TRUDEAU: Right. People just responded. So I took
9 the liberty myself -- I know you sent me these people's letters -
10 - and I started calling people. I said, hey, I know you've been
11 using this stuff, what do you see? Everybody I talked to, unless
12 you just gave me the right people to call --

13 MR. WRIGHT: (Laughter)

14 MR. TRUDEAU: But everybody I talked to said the same
15 thing. They said let me tell you something, Kevin, I feel
16 better, I think clearer, my mind's more alert, I wake up in the
17 morning I don't need coffee. There's a lot of people who said
18 they don't even use alarm clocks anymore.

19 MR. WRIGHT: Right.

20 MR. TRUDEAU: And one of the things that everybody
21 said, I said what's your weight situation? And everyone said
22 they've lost weight.

23 MR. WRIGHT: Right.

24 MR. TRUDEAU: They're losing pounds.

25 MR. WRIGHT: Right.

EXHIBIT A

15

1 MR. TRUDEAU: Now this is obviously, we're not claiming
2 to lost weight with the product, but this is cleaning.
3 Something's happening here.

4 MR. WRIGHT: Right.

5 MR. TRUDEAU: Are you having any -- is there anyone
6 that takes this that doesn't like it?

7 MR. WRIGHT: We sell thousands -- I mean I've been on
8 radio shows, talk shows, interviewed in a variety of different
9 types of newspapers, guest appearances. I've been lecturing on
10 cleansing now, going to conventions and talking to people. We
11 just put it out there. And if you want to try it, try it. If
12 you don't like it, we'll give you your money back. Period. You
13 know what we have, Kevin?

14 MR. TRUDEAU: Tell me.

15 MR. WRIGHT: We haven't had anybody send anything back
16 ever.

17 MR. TRUDEAU: They just don't send it back.

18 MR. WRIGHT: They don't send it back. How can you send
19 it back when it works. They simply -- if you clean the junk out
20 of your system -- In a nutshell, I'm trying to keep this real
21 simple. Conceptually, if you just get all the old stuff out.--

22 MR. TRUDEAU: Right.

23 MR. WRIGHT: The old waste matter that's built up in
24 the body. How many times a day do you brush your teeth? Once in
25 the morning, once in the evening. Why? You get plaque built up

EXHIBIT A

1 on your teeth. You get a sludge on your teeth. You take a
2 shower everyday. What do you doing? Your washing off the
3 biggest, eliminative channel you have, your skin. How do feel
4 when you take a shower? You feel great, right?

5 MR. TRUDEAU: That's it.

6 MR. WRIGHT: You feel a lot better. You've got a lot
7 more energy.

8 MR. TRUDEAU: Right.

9 MR. WRIGHT: It's the same concept but you're doing it
10 internally.

11 MR. TRUDEAU: My engineer is screaming. People are
12 calling the station --

13 MR. WRIGHT: (Laughter)

14 MR. TRUDEAU: And they want to know how to get a hold
15 of you. If they can get your program. So let's take a short
16 break 'cause we can give our a toll free number where people do
17 want information on the purifying program they can call your
18 office directly and get information on how to order it.

19 So let's take a quick break so we can get that number.

20 MR. WRIGHT: Okay.

21 (BREAK TAKEN)

22 MR. TRUDEAU: And we're back. Kevin Trudeau. Let's
23 Talk America.

24 This is a fascinating show. Again, my guest is Mr. Ken
25 Wright, the founder of Eden's Secret and the inventor of

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EXHIBIT A

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1 formulator, if you will, of the Purifying Program, which is an
2 herbal concoction that a person takes --

3 MR. WRIGHT: (Laughter)

4 MR. TRUDEAU: To help the body purify themselves, the
5 blood and the colon. During the break, the engineer come running
6 in saying, this is unbelievable, this is great.

7 MR. WRIGHT: Yeah.

8 MR. TRUDEAU: And he said, wait a minute, wait a
9 minute.

10 MR. WRIGHT: He wants some of it. Do you see him go "I
11 want some of this." Let me have some.

12 MR. TRUDEAU: The question he asked Ken, he said how
13 come I just can't go out and like eat fresh fruits and vegetables
14 and drink a lot of water and cleanse my body that way?

15 MR. WRIGHT: Well let me tell you, there was just a, in
16 the January/February issue of Natural Health Magazine, which
17 there's a copy of here or anybody if you wanted to call Natural
18 Health and get a copy of it, they did an analysis of all of the
19 top cleansing products. They put a person on broccoli, brown
20 rice and water for a month. They had people on a variety of
21 different detox programs.

22 MR. TRUDEAU: Like the -- similar to the ones I'd seen
23 at the health food stores?

24 MR. WRIGHT: Oh yeah, right. You know they tested all
25 the top brands and through their analysis, they did stool

EXHIBIT A

18

1 analysis and urine analysis before and after, and according to
2 their lab tests, the lab data from Great Smokies and Doctors
3 Data, these are the two big clinics that test people's stools and
4 things for doctors, this product gave the best results.

5 And listen to this, the girl who was on our product, on
6 this formula --

7 MR. TRUDEAU: Right.

8 MR. WRIGHT: Didn't even change her diet. And it took
9 her level -- it took the levels of pathogens in her colon from
10 the level of microflouron in her colon from pathogenic, which
11 means to disease causing --

12 MR. TRUDEAU: Uh-huh.

13 MR. WRIGHT: To normal in 30 days.

14 MR. TRUDEAU: Without changing her diet?

15 MR. WRIGHT: Without changing her diet at all. The
16 best results compared to somebody who ate broccoli, brown rice
17 and water for a month. Somebody else was on a two week water,
18 lemon juice, cajun pepper and --

19 MR. TRUDEAU: Maple syrup.

20 MR. WRIGHT: Maple syrup, right. I told you about that
21 on the phone.

22 MR. TRUDEAU: Yeah, I remember reading the article you
23 sent me.

24 MR. WRIGHT: Right. Right.

25 MR. TRUDEAU: Now this is interesting because this is a

EXHIBIT A

1 claim you made. You didn't even know that they were doing this
2 test.

3 MR. WRIGHT: No, no, no.

4 MR. TRUDEAU: They just happened to buy the Purifying
5 Program from you.

6 MR. WRIGHT: Right, right.

7 MR. TRUDEAU: And they tested it on their own basis.

8 MR. WRIGHT: Oh, yeah. I mean I called up, when I
9 found out who they were and what they were doing, I called and
10 said hey, what's going on? How are you placing it? They would
11 not tell me anything.

12 MR. TRUDEAU: Yeah.

13 MR. WRIGHT: I mean it wasn't until -- I had to
14 actually call them and about a week before they released the
15 article, they finally faxed it to me. And I was going, well how
16 did we do.

17 MR. TRUDEAU: Yeah, you were probably sitting there
18 going, hey are we doing alright.

19 MR. WRIGHT: Did we do good? But I tell you, since
20 that article, our business has quadrupled. We can't keep -- we
21 have orders from all around the country. We have -- our booklet
22 that you see here has been translated into Spanish and Italian.
23 We're exporting -- we have a guy here, a guy in Beverly Hills now
24 who's here from South Africa who wants to import it into South
25 Africa.

EXHIBIT A

20

1 It's just great. When somebody cleanses their body and
2 purifies their system of waste matters, what happens? It's only
3 logic. There's no mystic -- there's nothing mystical about it.
4 It's very practical. It's very down to earth. You simply look
5 and feel better. You have a lot more energy and you revitalize
6 your system because it's not working so darn hard. It's simple.

7 MR. TRUDEAU: This is interesting here. I have
8 something here from the Citizens Commission on Human Rights --

9 MR. WRIGHT: Right.

10 MR. TRUDEAU: And this is a nice lady, she's the legal
11 director over there, and she writes and she says, "I work a lot
12 of hours, usually 60 to 80 hours a week. Sometimes I only get
13 five --

14 MR. WRIGHT: (Laughter)

15 MR. TRUDEAU: or less hours of sleep for a couple of
16 days at a time. Before I started on the Purifying Program, I
17 started cleansing my body, I needed eight hours of sleep or I
18 would become a real witch.

19 MR. WRIGHT: (Laughter)

20 MR. TRUDEAU: Irritable and unpredictable, with no
21 tolerance for stress.

22 MR. WRIGHT: (Laughter)

23 MR. TRUDEAU: I bet I know a lot of people that this
24 category fits.

25 MR. WRIGHT: Yeah. (Laughter) Including my wife

EXHIBIT A

21

1 MR. TRUDEAU: Since starting on the program and
2 detoxifying my system, I have much more -- I am much more stable
3 emotionally, regardless of the sleep irregularities or stress
4 that impinges upon me.

5 Now I want to mention about -- ask you a question about
6 his. There are people out there that, you know, are snappy and
7 irritable and have this emotional stress all the time. I have a
8 very dear friend that flies a lot and she's always like
9 complaining and she always has this stress problem.

10 MR. WRIGHT: Oh, yeah.

11 MR. TRUDEAU: I just need to relax. Is that also due
12 because of the buildup of the toxins in the body?

13 MR. WRIGHT: Well, how do you feel after you've had
14 four cups of coffee? How do you feel the next day after you've
15 gone out and had too many drinks? Or a drug addict who's
16 recovering from drugs and alcohol? They feel crumby.

17 Why? It's very simple. There's nothing dramatic about
18 it. Your blood stream is a wreck. Your blood stream's impure,
19 the PH balance is off, and it's exactly like a girl who has PMS.
20 The blood stream gets impure before her cycle, it's reabsorbed
21 back into the blood stream, she's experiencing she goes AHHH!!!
22 She goes crazy, just like my wife used to until we founded this
23 formula. This is the same kind of experience. Your stress level
24 gets nuts.

25 MR. TRUDEAU: So are you telling me that people that

EXHIBIT A

22

1 have -- women that have a bad PMS syndrome, if they started
2 cleansing their system, that could perhaps be relieved in some --
3 to some degree?

4 MR. WRIGHT: Let me tell you even a more dramatic
5 story.

6 MR. TRUDEAU: Okay.

7 MR. WRIGHT: Let me tell you a story.

8 MR. TRUDEAU: I can see you're about to -- I see you're
9 smiling like --

10 MR. WRIGHT: (Laughter)

11 MR. TRUDEAU: I've got something good here.

12 MR. WRIGHT: This is from a woman in Burger, Texas.

13 Now I'm not going to talk about PMS 'cause that's sort of a
14 pedestrian type thing that seems to be handled when the body
15 cleanses itself daily.

16 MR. TRUDEAU: Okay.

17 MR. WRIGHT: This is a woman who had been -- who is a
18 nurse, who was not attending work regularly. She was at home and
19 in bed more frequently. She was missing her paychecks.

20 She wrote us a letter, I won't read you the whole
21 thing. It's pretty long but she says, basically she's passed out
22 a lot of old, toxic stuff out of her body and she says here,
23 "Though I know my healing is not complete, I feel more energetic
24 and emotionally, emotionally well than I felt in almost a year.
25 I'm an RN, etc., etc., etc."

EXHIBIT A

21

1 So she called me up and told that now what's happening.
2 Now, she's back to work, she's regularly back to work. Her
3 patients are saying, my God, look at how great you look. What
4 have you been doing? What did you do, fall in love?

5 MR. TRUDEAU: (Laughter)

6 MR. WRIGHT: Were you on vacation? How come you look
7 so great?

8 MR. TRUDEAU: (Laughter)

9 MR. WRIGHT: What is it? So what am I trying to
10 communicate to you? I'm trying to tell the people out there, I'm
11 trying to tell the listeners, that by getting this old, old --
12 this is nothing new. This is getting this old waste matter out
13 of your system. You can look and feel better. You can have more
14 energy. You can be brighter. Your skin can look better. Your
15 hair -- you know what, look at my hair. You see that the haircut
16 that I got?

17 MR. TRUDEAU: Yeah.

18 MR. WRIGHT: Why do I get a haircut? I get a haircut -
19 - I get short, short haircuts because my grows so fast it is
20 ridiculous. My hairdresser, she was a real skeptic. Then she
21 saw my hair and said, what are you doing? Why is your hair like
22 this all the time? You come in here more frequently than anybody
23 I know. She now sells our product.

24 MR. TRUDEAU: Unbelievable.

25 MR. WRIGHT: (Laughter)

EXHIBIT A

24

1 MR. TRUDEAU: We've got to take another break, Ken,
2 because again our engineer is saying let's give out that toll
3 free number again if people do want information on the Purifying
4 Program. So let's take a quick break so we can get that number
5 out.

6 (BREAK TAKEN)

7 MR. TRUDEAU: And we're back. Kevin Trudeau. Let's
8 Talk America. My guest, Mr. Ken Wright, founder of the Eden
9 Secret and the inventor of the Purifying Program, which is an
10 herbal cleanser, detoxifier.

11 Now, I have to ask you a question. I'm look at all of
12 these herbs that are in here.

13 MR. WRIGHT: Right.

14 MR. TRUDEAU: And you mentioned earlier that it's never
15 been done before where they put this combination together in one
16 tablet.

17 MR. WRIGHT: Right, very unique.

18 MR. TRUDEAU: And I know that its simple a tablet form
19 that a person takes. So it's very easy.

20 MR. WRIGHT: Real simple.

21 MR. TRUDEAU: You just take it two times a day, is that
22 right?

23 MR. WRIGHT: That's right, take a twice a day. Half of
24 it for breakfast, half of it for dinner with a big glass of
25 water. They're tablets. They're not big horse pills. They're

EXHIBIT A

25

1 small so everyone can take them.

2 MR. TRUDEAU: It's easy.

3 MR. WRIGHT: Very, very easy.

4 MR. TRUDEAU: What's -- now I've got to say this.

5 MR. WRIGHT: No muck, no mess.

6 MR. TRUDEAU: When a person takes it, does this do
7 anything specific?

8 MR. WRIGHT: You know, Kevin, I've got to say this flat
9 out. These herbs are not going to do anything. I mean they are
10 not designed -- they're not going to heal anything, they're not
11 going to change anything in the body. What will happen is --

12 MR. TRUDEAU: So no medical claims?

13 MR. WRIGHT: There's no -- (laughter)

14 MR. TRUDEAU: There's no making the blind walk or
15 anything?

16 MR. WRIGHT: No, I mean the FDA would come down and
17 shut us down in a heartbeat. This simply, by cleansing your
18 system, when the body is cleansed of its waste matters, your body
19 can heal itself. It just makes common sense.

20 MR. TRUDEAU: So it simply helps the body cleanse and
21 detoxify?

22 MR. WRIGHT: Right. And when the body is cleansed and
23 detoxified, what happens? You have more oxygen circulating
24 through the body, you have more nutrient distribution, there's
25 less waste matter in the body. Obviously it gets out of the

EXHIBIT A

1 system faster. What happens? Your cells are alive. You're
2 living in a human organism and it has to be vibrant.

3 MR. TRUDEAU: Now some of these things I'm looking at
4 here, Echia. Is that my pronunciation?

5 MR. WRIGHT: Ecanatia.

6 MR. TRUDEAU: Ecanatia?

7 MR. WRIGHT: (Laughter)

8 MR. TRUDEAU: Is that what -- I can read, Ecanatia.

9 MR. WRIGHT: Ecanatia.

10 MR. TRUDEAU: What do some of these herbs do
11 specifically? I know some of them have a lot of historical
12 background that they historically do certain things or help the
13 body do certain things.

14 MR. WRIGHT: Right. I mean they call it folk medicine
15 historically they have been used for. But in our formula we've
16 got barberry buck thorn, capsicum, chickweed, dandelion root.
17 Dandelion root has been know to help, you know, it contains
18 natural salts which purify the blood. Ecanatia has been written
19 up as an infection fighter. You've heard a lot about ecanatia
20 and golden seal on the news a lot lately and CNN and the cover of
21 the Times, the LA Times Newspapers, a variety of different talk
22 shows.

23 They're finding that golden seal and ecanatia, when
24 people have colds they drink these as teas. Why? It seems to
25 help as a natural bionic. That's what the -- as a natural

EXHIBIT A

27

1 antibiotic that's what people are using these for.

2 MR. TRUDEAU: Well Ken, the time has flew and I'm
3 looking at the clock. We're about to end the show. But I just
4 want to thank you for coming on and sharing this with us. I know
5 that I'm going to jump on this thing and I will be the first
6 person to let you know how we do. Of course my engineer is going
7 yes, yes, yes.

8 MR. WRIGHT: (Laughter)

9 MR. TRUDEAU: He's shaking he head, give me some of
10 this stuff right now.

11 MR. WRIGHT: (Laughter)

12 MR. TRUDEAU: But folks, thanks for listening. Ken,
13 thanks again for being on the show.

14 MR. WRIGHT: Thanks, Kevin.

15 MR. TRUDEAU: Have a great day and folks, Let's Talk
16 America again soon.

17 (End of Tape)

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Complaint

EXHIBIT B



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-Bill Thompson, *Natural Health Magazine*

Dear Jeff Salberg,

Thank you for requesting information on my *Nature's Pure Body Program*. This 100% natural, herbal purifying program is designed to cleanse your body quickly and easily of accumulated, harmful toxins. I guarantee you'll feel energized and revitalized! And many experts now believe that detoxification may even help you avoid premature aging and ill health.

We're surrounded by toxins that age and destroy us

It's a fact: our generation is exposed to more pollution and toxins than any other in history. Water contaminated by lead, pesticides, bacteria and chlorine... air polluted with industrial waste and car emissions... dangerous food additives including pesticides, waxes, dyes, steroids and hormones... and nutritionally void "junk" foods loaded with preservatives and harmful chemicals and robbing us of our energy and vitality.

Worse yet, these man-made toxins eventually overwhelm our bodies' natural cleansing abilities and accumulate in our cells and tissues. As recent medical research indicates, the waste that remains is linked to declining appearance, premature aging and ill health.

Your body's cry for help

Although this news may come as a surprise to you, your body has probably been trying to tell you for years that it's "toxic." Just a few symptoms you may experience include fatigue, indigestion, headaches, being bloated or overweight, irritability, irregularity, depression, arthritis, insomnia and immune suppression. If you suffer from any or all of these conditions, it's time to listen to your body now... before your health suffers further.

The *Nature's Pure Body Program* helps your body purify itself, quickly and easily.

My exclusive purifying program gives your body the added help it needs to clear out the toxins that rob you of your energy and good health. And it's so easy to do because the program comes in convenient tablet form! Just take the tablets twice daily with water or juice to detoxify and cleanse your body of chemicals, air and water pollution, dead cells, mucus, acids, fatty deposits, other biochemical waste products and the effects of overeating and junk foods.

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TOTAL.....\$162.41 (U.S. Funds +)
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TRUDEAU COMPLAINT EXHIBIT B

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EXHIBIT B

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Although the *Nature's Pure Body Program* is incredibly powerful, it's also completely safe. There are no chemical or artificial stimulants used—just a unique blend of 28 natural herbs that gently cleanses and purifies your body. Even with sensitive systems can use the program with no bad reactions or side effects.

You can try my *Nature's Pure Body Program* risk free
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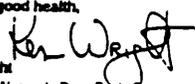
There's simply no easier and faster way to detoxify your body and improve your vitality than my *Nature's Pure Body Program*. But don't just take my word for it—try it yourself absolutely risk free. If for any reason you're not satisfied simply return the unused portion within 60 days for a full refund of the purchase price!

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Regularly priced at \$69.97, my 30-day purifying program can be yours for only \$59.97 if you order now. For even greater savings, order a three-month supply for only \$49.97 a month—a \$60 savings!

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EXHIBIT C

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: SABLE HAIR FARMING SYSTEM
RADIO INFOMERCIAL

PAGES: 1 THROUGH 25

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TRUDEAU COMPLAINT EXHIBIT C
SABAL COMPLAINT EXHIBIT A

Complaint

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EXHIBIT C

1

1 MR. TRUDEAU: My guest from beautiful Florida I have on
2 the telephone is Jacqueline Sable, the founder of Sable
3 Laboratories and the inventor of the hair farming formula we've
4 been talking about all morning.

5 You know, our topic today is going to be balding, hair,
6 the scalp, thinning hair, and how people get that, what they can
7 do about it, what the options are, and so forth.

8 Well, good morning, Jacqueline. How are you?

9 MS. SABLE: Good morning, Kevin. Thanks for having us
10 on the air today. And happy hair farming to everybody listening
11 in who has a hair loss problem.

12 MR. TRUDEAU: Yes. You know, it's funny. When I was
13 talking to you a few days ago, and I read all the material that I
14 was looking at, this is very fascinating.

15 MS. SABLE: Hard to believe, isn't it?

16 MR. TRUDEAU: You know, male pattern baldness is what
17 people think about a lot when they talk about hair. And I know
18 . . . I understand that you are really an expert in the field of
19 hair and the scalp and this type. And it's really interesting
20 cause I understand from your material you've been all over the
21 country, on virtually hundreds of shows talking to people about
22 it, the problem and the invention that you came up with. How did
23 you get involved? I mean, you think about baldness, you think of
24 men.

25 MS. SABLE: Well, I had what's called alopecia areata.

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Complaint

EXHIBIT C

1 Now, there's a lot of women, and some men listening in, that have
2 had that problem themselves, where hair falls out in patches due
3 to a nervous condition, or it just thins evenly due to nerves.

4 And what happens is the spinning mechanism at the base
5 of the follicle, the actual hole that hair grows inside of, is
6 affected by nerves. And it cannot spin the protein from the
7 blood from which hair grows evenly and smoothly into hair. The
8 hair breaks and stops growing, and your hair falls out and it's
9 not replaced.

10 And in order to help myself, because I had to wear
11 hairpieces. I'm a teacher of cosmetology here in Florida, and
12 I've been a hairdresser for 20 years, at least. I'm not that
13 old, but at least 20 years. And I didn't want to wear a wig for
14 the rest of my life. In fact, the more I wore one, the more hair
15 I lost. So it was a never-ending problem.

16 And in order to help myself, I went to the medicinal
17 powers of herbs. You know that herbal remedies, Kevin, were what
18 they used for thousands of years. In fact, even the medical
19 people today are turning back to herbs now for natural healing.

20 MR. TRUDEAU: Aren't most drugs derived from herbs? A
21 lot of them?

22 MS. SABLE: They were. But then in the beginning of
23 the 20th century they started deriving them from metals. And
24 that's where a lot of sickness has come from, in my belief, my
25 personal belief.

EXHIBIT C

3

1 MR. TRUDEAU: That's interesting.

2 MS. SABLE: Now they're turning back to natural
3 healing. So I found a combination of herbs that, when mixed with
4 cleansers like witch hazels and alcohols, can deep clean
5 underneath the surface of the scalp, and clean out all the debris
6 that prevents the hair or blocks the hair from reaching the
7 surface.

8 You see, hair only grows from blood, Kevin. There is
9 no magic potion that grows hair. And please, anyone listening in
10 with any kind of hair loss problem, don't buy these phony
11 products that you see on the market. They don't work. Anything
12 that claims to grow hair, it's a flat-out lie.

13 MR. TRUDEAU: But what about Minoxidil? Don't they
14 claim to grow hair?

15 MS. SABLE: It cannot grow hair. All it does it
16 elongate the peachfuzz, or glue in the hair that you would
17 normally lose. It's a glue. It's an Elmer's Glue for the scalp.
18 That's what I call it.

19 MR. TRUDEAU: No kidding.

20 MS. SABLE: You see, people who are totally bald cannot
21 be helped by Minoxidil, because they cannot grow their hair back.
22 If they grew hair, why couldn't they grow hair back on a man
23 who's totally bald? They can't do that.

24 MR. TRUDEAU: So does it work with people who are just,
25 you know, straight bald?

EXHIBIT C

4

1 MS. SABLE: No. It only works on those who are just
2 losing their hair. So here's a young man using this very
3 expensive drug, rubbing it into his head every day, which is
4 causing all kinds of other physical ailments, according to their
5 own literature, now.

6 MR. TRUDEAU: Right.

7 MS. SABLE: I'm not saying this. It's in their own
8 literature.

9 MR. TRUDEAU: Exactly.

10 MS. SABLE: According to the law of the United States
11 and the FDA, you have to put side effects. There's liver
12 problems, kidney problems, heart problems, rashes. There's a
13 list a mile long. But naturally, they make it so small that a
14 human eye can't read it.

15 MR. TRUDEAU: Right.

16 MS. SABLE: I had to blow it up 10 times at a photostat
17 machine in order to see what they were saying.

18 MR. TRUDEAU: Okay.

19 MS. SABLE: So the point that I'm making is, they can
20 only help those who are just starting to lose hair. And the only
21 way to help them is by gluing in the hair that would naturally
22 fall out. And that's why they say, if you stop using Minoxidil
23 or Rogaine, the hair falls out. The glue dissolves. It's very
24 simple.

25 MR. TRUDEAU: That's interesting.

EXHIBIT C

5

1 MS. SABLE: Now, what hair farming does it totally
2 different. We deep clean the debris under the scalp. It's just
3 a shampoo. Not a drug. Completely herbal, completely natural.
4 Safety tested. It's been used for many, many years. About 10,
5 15 years in this country and 4 or 5 other countries that we are
6 in. We are in about 150 cities in this country alone. And all
7 it does it clean. And so that the hair that's growing from the
8 blood has a free passageway to reach the surface.

9 MR. TRUDEAU: Now, why did you come up with the name
10 hair farming? When I first heard this, I --

11 MS. SABLE: Well, that's what we're doing.

12 MR. TRUDEAU: I thought you were involved with rabbits.

13 MS. SABLE: Well, that's true. The telephone company
14 put me in the bunny business. They spelled it
15 H-A-R-E. And we lost thousands of dollars on that mistake.

16 MR. TRUDEAU: Right.

17 MS. SABLE: And when I called the phone company and
18 asked them why they did that, they said, "Well, gee, we never
19 heard of hair farming, H-A-I-R." And they were right, because we
20 had made it up. So I couldn't really be too mad at them, could
21 I?

22 MR. TRUDEAU: That's right.

23 MS. SABLE: So what happened is I had to think of a
24 name to explain what we were actually doing. Now, we weren't
25 growing hair. We do not claim to grow hair.

EXHIBIT C

6

1 MR. TRUDEAU: Right.

2 MS. SABLE: There is no way anyone can grow hair,
3 except the blood. But we were cleaning, and you might say we
4 were cultivating. And the amazing thing that was happening is
5 that after we cleaned, as we looked at the scalp, hair sprouted
6 out. And right in front of our eyes. And when I saw that
7 happen, I said, "Gee, this is just like farming."

8 MR. TRUDEAU: Now, I understand that you've been on a
9 vast number of television shows where you actually take people
10 right out of the audience and clean the scalp right there. And
11 in virtually just a few minutes -- what is it, a half an hour or
12 something?

13 MS. SABLE: At least. That's all. Hair sprouted right
14 out.

15 MR. TRUDEAU: People get excited about the results.

16 MS. SABLE: Yes. Because the hair is there. Again,
17 we're not growing hair. And the hair that sprouts out measures
18 five years, for instance, that it's been growing under the scalp,
19 from the blood, from the protein in the blood. And we've
20 actually proved that even more so, because we had cadaver scalps
21 dissected, and there's the hair trapped in the follicles. And
22 then we went further than that, and we had live subjects tested
23 in a laboratory here in south Florida, and they counted the hairs
24 as they came in on every test subject every day that they used
25 the product.

EXHIBIT C

3

1 Again, we were not growing hair. We were just cleaning
2 debris, which is just simply a shampoo. But we're the only
3 shampoo in the world that can get down and clean under the scalp.

4 And fortunately for us, or we wouldn't be on this show
5 right now, it cannot be broken down and deciphered, because it's
6 herbal. And anything organic cannot be duplicated.

7 MR. TRUDEAU: Well, you can't duplicate Coca-Cola.

8 MS. SABLE: True. I don't know if that's organic or
9 not.

10 MR. TRUDEAU: No, no. But the ingredients are right on
11 the label, and of course it cannot be duplicated.

12 MS. SABLE: Exactly. So we have a wonderful product
13 that cleans the scalp. And if you learn to do that, first of
14 all, you'll never lose your hair. If you learn the correct use
15 of hair cosmetics and how to keep your glands under control.
16 Because, you see, that's my theory. And I have a right to this
17 theory, whether the medical community believes me right now or
18 not, although they soon will because I'll be written up in most
19 of the major medical journals around the world.

20 MR. TRUDEAU: You were mentioning that. There are
21 articles coming out now in medical journals?

22 MS. SABLE: Oh, yes. I should be in most of the major
23 medical journals in the world in the next few months, which will
24 finally end baldness in the human race. And I'm very proud of
25 that. A hundred percent on my testing. And that will be

EXHIBIT C

8

1 announced, I would say, before the end of the June. And that's
2 one of the reasons for this show today. Hopefully we're going to
3 reach all the people that have seen me on TV already and wondered
4 if this is really true.

5 MR. TRUDEAU: And by the way, for the people listening,
6 we are going to be giving out a toll-free number in just a little
7 while, if you want information on the hair farming product. So
8 we will be giving out a toll-free number.

9 Now, you were talking the other day, and I talked to a
10 station manager, you were on as a guest. After the show, where
11 you did actual live demonstration and people saw it. I
12 understand you got over 2,000 phone calls.

13 MS. SABLE: The phones are still ringing. That was
14 three weeks ago.

15 MR. TRUDEAU: Unbelievable.

16 MS. SABLE: And that was just a local show in Missouri.
17 Can you imagine what's going to happen from your show? I hope
18 you have the staff to answer the phone calls. I don't.

19 MR. TRUDEAU: Well, yeah. And like I say, we will be
20 giving out the number, so people don't have to call the station
21 and flood us with inquiries.

22 MS. SABLE: Well, for those who are listening in, let
23 me say this, very simply. It's guaranteed to work on every human
24 being. You're alive, the blood is flowing, your hair is growing
25 from blood.

Complaint

125 F.T.C.

EXHIBIT C

1 Number two, we don't grow hair. We're just cleaning
2 the debris that's preventing it from reaching the surface. It's
3 100-percent guaranteed, completely harmless, herbal, natural.
4 And everyone should have all their hair back in six months to a
5 year, permanently, painlessly, and never have to purchase
6 anything again. You're not tied to hair farming for the rest of
7 your life.

8 We teach you free of charge what to do to keep your
9 hair once you have it back.

10 MR. TRUDEAU: Now, I have a partner, and we talked
11 about this in the last few days. He's bald. And he asked me a
12 question. He said, "Why do some people go bald, and not others?
13 Why don't all of us have, you know, the debris get stuck in our
14 scalp?"

15 MS. SABLE: Because some people inherit -- in fact, 80
16 percent of the male population of the world inherit over-
17 producing scalp glands. They either sweat too much or have too
18 much oil on their scalp. And we've got about 2,000 glands every
19 square inch of our scalp. Perspiration and 2,000 oil glands.

20 If you've inherited the tendency to perspire too much,
21 when you reach 15 or 16 you're going to start having dry hair.
22 This glandular problem matures when you become an adult. That's
23 why everybody has hair as a preteen.

24 Now, once you become a teenager, your glands in your
25 body start working as they will the rest of your adult life. And

EXHIBIT C

10

1 if you have a perspiration problem, it will come out of the
2 scalp, this excess fluid, move along the surface of your scalp,
3 according to the inherited shape, taking debris with it,
4 pollutants in the air, any conditions you work under or play
5 under, and hair cosmetics that we use incorrectly. And it will
6 clog the openings in its path.

7 Now, fortunately you don't go bald in one day. You
8 lose about 30 hairs a day. And in that two-month period of time,
9 two- to three-month period of time, which they call the telogen
10 stage, before the second hair can replace the one that's fallen
11 out, if the passageway in the follicle above it becomes clogged,
12 too much so, too hard, too permanent that the hair can't push its
13 way through, a clogged area will eventually form over a period of
14 years that's called a bald spot. And it takes on the pattern of
15 the inherited shape of the head.

16 So if you've got a flat area in back, the fluid goes
17 there and causes a puddle back there. Clogs there, and you've
18 got monk's pattern. If you've got a high-pitched head, it goes
19 forward towards the front of your head, and you've got receding
20 hairline, and eventually all the hair on top of your head is
21 gone.

22 Now, what usually happens when you have dry hair and
23 scalp is that you use conditioners, because you want to condition
24 your hair. Now what do you do? You rub it into your scalp,
25 don't you?

Complaint

125 F.T.C.

EXHIBIT C

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1 MR. TRUDEAU: Sure.

2 MS. SABLE: Real good. You're clogging the scalp with
3 the conditioner.

4 MR. TRUDEAU: So it's even making the problem even more
5 severe.

6 MS. SABLE: Exactly. And then you use hairspray,
7 because you want to hold that flyaway hair in place. And
8 hairspray is one of the biggest problems to mankind today, never
9 mind the atmosphere, also to having hair loss. Because people
10 don't know how to use it correctly. I'm not saying don't use
11 these products, but learn to use them correctly.

12 MR. TRUDEAU: So not just men. We're talking about
13 women, too.

14 MS. SABLE: Exactly.

15 MR. TRUDEAU: As in yourself, that have the thinning
16 hair, the hair falling out.

17 MS. SABLE: Exactly. You see, in the case of a man,
18 when the blow-dryer look came out about 15 years ago, when they
19 invented blow dryers, and men started using hairspray for the
20 first time, young fellows. Because my father's generation didn't
21 use hairspray, it was a sissy thing to do.

22 MR. TRUDEAU: Right.

23 MS. SABLE: So today, now, the young fellows are blow
24 drying their hair. And what do they do? They want to hold their
25 hair in place, so they spray the hair on the side of their head

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Complaint

EXHIBIT C

92

1 to hold it in place. They don't realize how much hairspray is
2 hitting the temple area. The next thing, with the perspiration
3 and oil that's there, causing cement in the follicle, and
4 starting a receding hairline. Until eventually they have so much
5 of a receding hairline that what do they do? They comb their
6 hair over and spray down on the scalp to hold that hair in place,
7 to hide the receding hairline, and they clog the hair on top of
8 their head, and they go bald on top.

9 Now, I'm not saying don't use hairspray, those of you
10 who do this that are listening in. But simply cover with your
11 other hand the receding area as you're spraying that side of the
12 head. Same thing with the other side, cover that receding area.
13 And when you do the top of your hair, don't spray down on your
14 scalp. Comb the hair the way you want. Spray the hairspray on
15 your hand, comb, or brush, and put it on the hair that way.

16 MR. TRUDEAU: All right, now, let me ask you a
17 question. I don't have, I've never had any hair loss. I don't
18 have a receding hairline. And --

19 MS. SABLE: Then you can't sympathize, can you?

20 MR. TRUDEAU: And my partner's bald.

21 MS. SABLE: Okay. But you see, you're one of the rare
22 20 percent of the human race, which includes Indians -- anyone
23 with Indian blood will never lose hair. Any kind of Indian blood
24 will never lose hair.

25 MR. TRUDEAU: Why is that?

Complaint

125 F.T.C.

EXHIBIT C

13

1 MS. SABLE: We don't know.

2 MR. TRUDEAU: You don't know.

3 MS. SABLE: And why is it, also -- now, here's a very
4 interesting premise for any doctors or any scientists listening
5 in today. I have found that it is the Caucasian race that
6 affects the other races. No Indians, no black or Oriental race
7 has hair on their body like the Caucasian male.

8 MR. TRUDEAU: Right.

9 MS. SABLE: And they are not prone to hair loss unless
10 it's intermarriage. And in the Indian race -- with whites. In
11 the Indian race, there is no hair loss. And anyone that has even
12 one-quarter of Indian blood will not lose hair. If there's more
13 mixture in the blood than one-quarter, they will lose.

14 MR. TRUDEAU: So there are some things out there that
15 we still don't know about.

16 MS. SABLE: I think we've just touched the tip of an
17 iceberg here.

18 MR. TRUDEAU: But what you're saying is if somebody has
19 thinning hair, if somebody has a receding hairline, if someone is
20 bald --

21 MS. SABLE: They've inherited over-producing scalp
22 glands.

23 MR. TRUDEAU: And you're saying that if the follicles
24 were cleaned properly --

25 MS. SABLE: They would never lose their hair.

EXHIBIT C

14

1 MR. TRUDEAU: -- then the hair that is there will start
2 to --

3 MS. SABLE: Remain the rest of their life.

4 MR. TRUDEAU: That's amazing.

5 MS. SABLE: Now, if we could reach the teenagers
6 through wonderful shows like these -- and I'm very grateful for
7 you to be giving us this opportunity to tell people about hair
8 farming -- we could actually end hair loss in the human race. No
9 one would become bald any more.

10 MR. TRUDEAU: Well, I'm going to tell the audience
11 about it, because I've been talking about it all week. I said,
12 "You know, I'm talking to this woman who I think is crazy." And
13 I said, "We're going to try it out on my partner, who I mentioned
14 is bald." And the only reason that you're on this show with us
15 today is because yesterday we took my partner, and we put this
16 stuff on his head.

17 And I'm going to tell you what happened. But we are
18 going to take a break, because I know I'm already getting waves
19 from the studio that people are calling saying is there a toll-
20 free number that we can get information from the Hair Farming
21 Product. So, let's take a short break and give out that number
22 so if people do want information on the Hair Farming program they
23 can call you and get all their questions answered and so forth.
24 Let's take a break.

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EXHIBIT C

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1 MR. TRUDEAU: And we're back. This is Kevin Trudeau on
2 "Let's Talk, America." My guest again is Jacqueline Sable, the
3 founder of Sable Laboratories in Florida, and the inventor of the
4 hair farming product or program, or herbal formula invention.
5 We've been talking about hair loss and balding and thinning.

6 And you know, Jacqueline, this is a fascinating
7 subject. As I mentioned, I can't sympathize with people because
8 I've never had any hair come out of my comb, and I have a full
9 head of hair and no receding hairline.

10 MS. SABLE: The glands of your scalp are working
11 normally. I was mentioning about those that have a perspiration
12 problem, but there's a lot of those that have oil problems, also.
13 And the oil glands, if you have over-producing oil glands, you
14 have dandruff. Dandruff is caused by oil coming out of inside
15 the follicle, because it lubricates the inside of the follicle,
16 the oil gland. And it lubricates the outside of the hair shaft
17 that slides up the follicle to reach the surface of the scalp.

18 So when the oil comes out of the follicle, it mixes
19 with the dead skin that we shed on our scalp, and you have
20 dandruff flakes.

21 MR. TRUDEAU: Okay.

22 MS. SABLE: If you have excess oil, you have excess
23 dandruff. Now, a dandruff shampoo manufacturer cannot stop you
24 from oversecreting oil. That's a genetic inherited problem. And
25 it can't stop us from shedding skin, because that's nature.

EXHIBIT C

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1 There has to be a barrier to prevent the two from
2 blending and reaching each other. And that barrier's usually
3 petroleum-based, tar-based, medicated-based, whatever they use,
4 in a dandruff shampoo, you will be bald in no time. If you have
5 a dandruff shampoo, throw it out the window. Because you'll
6 never see a shiny-headed, bald old man with dandruff. Think
7 about it.

8 MR. TRUDEAU: That's amazing, yeah.

9 MS. SABLE: They have totally sealed that person's
10 head. That's what a dandruff shampoo does.

11 MR. TRUDEAU: Now, it's funny you said that. Because
12 yesterday when I called you on the phone and said, "I have my
13 partner in the chair." I says, "I'm looking at his bald head,
14 and what should I do?" And you said, "Look at the scalp and tell
15 me if it looks like leather and nice and smooth." And I go,
16 "Yes, it's shiny. It's very nice and --"

17 MS. SABLE: Every follicle is filled.

18 MR. TRUDEAU: And when you said that, I said, "Of
19 course." And you said, "Do you think any hair can grow out of
20 that?" I said, "No, there's no place for it to grow."

21 So when I put on the formula one, and I rubbed it in,
22 within a few minutes, just a few minutes, all of a sudden the
23 smoothness stopped and the scalp became rougher --

24 MS. SABLE: And holes started to appear.

25 MR. TRUDEAU: It looked like somebody took little, tiny

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1 needles --

2 MS. SABLE: Exactly.

3 MR. TRUDEAU: -- and poked it in the scalp, so that
4 there were now, instead of just a smooth, shiny top, it looked
5 like there were places that hair could actually begin to sprout
6 again.

7 MS. SABLE: Well, the doctors that have tested with us,
8 that amazed them. That was the very first thing that amazed
9 them. They said they saw more in five minutes with our product
10 than they did with any other product they've ever tested. And
11 that includes the Rogaine and Minoxidil products. Because the
12 follicles actually started dilating in those five minutes.

13 They were cleaning out, you see. The debris that was
14 right on top was being flushed out by formula one.

15 MR. TRUDEAU: Now, obviously we've been hearing about -
16 - I've heard about, oh, this cleanness to follicles, cleanness to
17 follicles, that's been something that the people who've been
18 talking about for a long time --

19 MS. SABLE: Do you know why? I invented that, and I
20 was develop -- my discoveries were copyrighted in 1976. I am the
21 one who invented the theory of the clogged follicle; that it was
22 not dead, that it was simply a hole and that it was clogged. I
23 naturally formed a company, sent literature out all over the
24 world. And lo and behold, other companies started saying what I
25 was saying. And now doctors are saying what I was saying.

EXHIBIT C

18

1 But you know, I never got the credit for it.

2 MR. TRUDEAU: Well, that happens so many times, doesn't
3 it?

4 MS. SABLE: I have about five copyright lawsuit
5 infringements, copyright infringement lawsuits pending.

6 MR. TRUDEAU: Incredible, incredible.

7 MS. SABLE: And which I will be announcing probably by
8 the end of the year.

9 MR. TRUDEAU: Now, you said that your program, the hair
10 farming formula that people put on cleans the follicles. I've
11 heard of other products that make that same claim.

12 MS. SABLE: I'll tell you the difference. Anyone that
13 hears any other product making that claim, which was stolen from
14 me, call them up and tell them you're totally bald, you want all
15 your hair back, and they'll say they can't help you. Because all
16 they do is -- in hair. They just have a glue for the scalp.

17 MR. TRUDEAU: right.

18 MS. SABLE: As you can see, the phones never stop
19 ringing here, so be prepared.

20 MR. TRUDEAU: That's okay, Jacqueline.

21 MS. SABLE: And what happens in our case is that we
22 will say yes. We will say, "Yes, we can take a totally bald old
23 man. And if we're right, if the hair is there, it'll come back
24 through the clean passageways." Again, we're not growing it.

25 MR. TRUDEAU: All you're doing is cleaning the --

EXHIBIT C

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1 MS. SABLE: You see, in the United States you have to
2 be very, very careful about the words you use. But it happens to
3 be true. We're not growing hair. We're just cleaning debris.
4 Nobody can grow hair, it only grows from blood.

5 But again, in any way, shape, or form, if you were to
6 take a bald man and show him with a full head of hair, they, the
7 FDA claims that you're growing hair.

8 MR. TRUDEAU: Right.

9 MS. SABLE: And it's really a problem. It's really a
10 play on words, because it's unfair. It's really unfair. And
11 this is why we're going to countries like Mexico and Europe and
12 -

13 MR. TRUDEAU: You know, I want to talk about that.
14 Because I was talking to you, and you were telling me all the
15 challenges you were having in this country, being able to have a
16 program that seems to have effective results.

17 And by the way, I've talked to people that have been
18 using this for several months. Because I said no, no, no, this
19 sounds too --

20 MS. SABLE: Too easy.

21 MR. TRUDEAU: Yes. Let me talk to them. And I
22 understand that virtually there are tens of thousands of people.
23 As I mentioned, 2,000 people called on the last show you were on.
24 The phones were flooded with people wanting this program.

25 MS. SABLE: I often think at night before I go to bed

EXHIBIT C

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1 of all the men that are rubbing their heads and saying, "This
2 woman better be right." I'm either being thanked or cursed all
3 across the country. And world. I'm in Russia already. Would
4 you believe it? I'm in Russia.

5 MR. TRUDEAU: Really?

6 MS. SABLE: In Russia. When the walls came down in
7 Russia, they called me. They heard about hair farming in Russia.
8 I couldn't believe it. I heard the news in the morning that the
9 walls came down. I get a phone call from a big professor in
10 Russia that wants to represent us.

11 MR. TRUDEAU: There you go.

12 MS. SABLE: I thought it was so funny.

13 MR. TRUDEAU: But I called people. And I said, "Look,
14 you've been using this stuff for how long?" "I've been using it
15 for three months." "And what are the results?" It's
16 unfortunate, but, you know, before we did this show, because we
17 were talking about this product, there are certain things I can't
18 even tell you, you can't even tell me on the air --

19 MS. SABLE: It's a shame, really.

20 MR. TRUDEAU: -- of what's occurring.

21 MS. SABLE: You have to remember that we're putting
22 dermatologists out of business. They don't make money on
23 pimples. They make money on hair transplants.

24 MR. TRUDEAU: Sure.

25 MS. SABLE: They make money selling Rogaine and

EXHIBIT C

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1 Minoxidil. They don't make money on pimples any more.

2 MR. TRUDEAU: And these hair transplants and all these
3 other --

4 MS. SABLE: And scalp reduction, which is a horror. Do
5 you know that scalp reduction, they cut the whole top of the head
6 open?

7 MR. TRUDEAU: Oh.

8 MS. SABLE: They take the hair from above your ears and
9 pull it up top of your head and sew it in place.

10 MR. TRUDEAU: The things that people do just to --

11 MS. SABLE: Ten thousand dollars for that one.

12 MR. TRUDEAU: Unbelievable. Jacqueline, we've got to
13 take a break, because again, we're getting calls at the studio to
14 give out the 800 number again.

15 MS. SABLE: It's happening all the time.

16 MR. TRUDEAU: So hold on. We're going to take a break,
17 and we'll give out the 800 number for people who want information
18 on the hair farming system. Let's take a break.

19 MR. TRUDEAU: And we're back. This is Kevin Trudeau,
20 "Let's Talk, America." Our subject today is hair, hair loss.
21 And I'm talking with the founder of the hair farming system, from
22 Florida. I have her on the phone, Jacqueline Sable.

23 MS. SABLE: I was talking to you about Mexico.

24 MR. TRUDEAU: Yes, I wanted to ask you about that,
25 because I know that you were going over there in the next few

EXHIBIT C

22

1 actually today or something, to do all this filming, because the
2 Mexican government, the banks or something over there, want to
3 promote this, because they see the results.

4 MS. SABLE: That's right. And the main thing is that
5 when we do a Spanish TV show, we don't have the restrictions that
6 we have in the United States. They are not so involved with drug
7 companies, and they don't have the restrictions. You're able to
8 show the hair. You're able to show people returning their hair.
9 You're able to do a demonstration as part of an infomercial.

10 MR. TRUDEAU: Right.

11 MS. SABLE: In this country, you're not allowed to
12 advertise that you can put hair back on a bald person.

13 MR. TRUDEAU: Sure.

14 MS. SABLE: You can do interviews, like I've done in
15 the past on all the major talk shows. By the way, you'll soon be
16 seeing me on Oprah and Regis and Kathy Live, and I'll be in all
17 the newspapers, in all the news. We'll be announcing this around
18 the world.

19 MR. TRUDEAU: Well, once that comes out in the medical
20 journals, all of a sudden, bam, now all these people will, again
21 -- you've already been on several hundred talk shows all around
22 the country.

23 MS. SABLE: But, you see, that wasn't enough
24 credibility. When they see it in the medical journals, that's
25 when the trouble really starts.

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1 MR. TRUDEAU: The trouble. It sounds like the good
2 news for the people who have this problem.

3 MS. SABLE: Well, how many products in this country are
4 prevented from coming into this country, that can help people?
5 Think about it. How many people have got to go to Mexico for
6 cancer cures? How many people have got to go to Europe for
7 looking young again, and for wrinkle removal? I can name you a
8 list a mile long.

9 MR. TRUDEAU: Well, I, myself, I went to Mexico to have
10 a heart problem taken care of.

11 MS. SABLE: Thank you.

12 MR. TRUDEAU: With a treatment that wasn't available in
13 this country. And I tell people all around, I can't even mention
14 it on the air. It's unfortunate, because it's not available and
15 not legalized in this country yet.

16 MS. SABLE: Well, you're putting people out of work. I
17 mean, people at doctor offices have to be paid, nurses have to be
18 paid. You know, houses have to be paid for.

19 Now, it's like the car and the horse. That's my
20 position. And they didn't like that car too much, the people who
21 made the horseshoes and the horse carriages and so forth.

22 MR. TRUDEAU: Sure, I remember the whips being put out
23 of the --

24 MS. SABLE: Exactly. And the wagon wheels and so
25 forth. So here I come. little old me, little old hair lady,

EXHIBIT C

1 that's what they call me.

2 MR. TRUDEAU: The hair lady.

3 MS. SABLE: The hair lady, from Pompano Beach, Florida,
4 is taking on the whole United States, you might say. And it's
5 not fun. It's hard.

6 MR. TRUDEAU: But I have to tell you. My partner was
7 the most skeptical guy. And I started to tell you the story. We
8 put this on. And I saw the results. Just last night I hopped in
9 my car, and I was talking to him on the car phone. I said, "I
10 can't believe --"

11 MS. SABLE: Some of the hairs were probably three or
12 four inches long.

13 MR. TRUDEAU: Well, I tell you what. I couldn't
14 believe what I saw. And he couldn't. His wife couldn't believe
15 it. His two sons said, they were laughing. We were having --

16 MS. SABLE: You want to see the doctors' expressions.
17 The condescending look when I walk into their office. And then
18 their expression and the jaw that drops when they 10-inch-long
19 hairs popping out of a totally old, bald man.

20 MR. TRUDEAU: Jacqueline --

21 MS. SABLE: The hairs measure five years per inch.

22 MR. TRUDEAU: Jacqueline, the time has flew, and we're
23 going to have to sign off here in just a couple seconds. But I
24 wanted to thank you for spending the time with us. And I'm sure
25 I'll be able to get you back on this show again.

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25

1 I know you're going to Mexico for all this filming, and
2 people will see on television again what's happening.

3 MS. SABLE: There's a lot more I can teach people. So
4 I really hope we've been of some help. There's hope now. You
5 don't ever have to be bald any more. You don't ever have to go
6 bald, if you're a young person who's just starting to lose their
7 hair. And there's a lot of help that we can give you. So I hope
8 you do give us a call.

9 MR. TRUDEAU: That sounds terrific. Jacqueline Sable
10 of Sable Laboratories, thanks for being our guest.

11 MS. SABLE: Okay. Happy hair farming, everyone.

12 MR. TRUDEAU: Have a great day.
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EXHIBIT D

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: KEVIN TRUDEAU'S MEGA MEMORY
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 25

MSI/SALBERG COMPLAINT EXHIBIT D
TRUDEAU COMPLAINT EXHIBIT I

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EXHIBIT D

1 ANNOUNCER AND GRAPHIC: The following is a paid commercial program
2 brought to you by Mega Systems.

3 [Setting - nighttime scene of city streets, band playing in background, newspaper
4 articles with Danny Bonaduce's picture on them pan across the screen as announcer announces
5 the opening of the show and introduces Danny Bonaduce].

6 ANNOUNCER: First he has the hottest talk show in the city on WO
7 [INAUDIBLE]P radio, the Loop, now with the hottest talk show on television, it's the Danny
8 Bonaduce Show. With Danny's house band, the Critics, and special guest, memory expert,
9 Kevin Trudeau. And now our favorite member of the Partridge Family - Heeere's Danny
10 Bonaduce.

11 [Setting - Introduction ends. Scene of a talk show set (like The Tonight Show,
12 Late Show, etc. - band playing, Bonaduce enters the studio from behind an Arsenio style moving
13 wall, flash to cheering audience].

14 AUDIENCE: We love you, Danny!

15 MR. BONADUCE: [laughing] I thank you; I love you, I, I do. Thank you very
16 much, thank you very much [motions for cheering audience to quiet]. Thank you very much,
17 Thank you very much, Thank you for showing up for the show - I'd like to give a special thank
8 you to Chevy for showing up tonight. [points to police style outline on the floor of a dead body].
9 Thank you. [Audience cheers]. You know, I'll tell you what the problem with Chevy was, he
0 didn't play with the big boys, it's television, it's all about cars. It's who has the best car. Leno,
1 he's got himself a new Viper; Letterman - he drives a Viper. So what did I do? I went out and
2 got myself a Viper and here it is ... [red toy motorized car runs across the stage into Bonaduce's
3 right foot].

4 [Audience cheers, laughs].

5 What can I tell ya I don't have their budget! Let's say hello to the house band. the

EXHIBIT D

2

1 Critics. [points to band, camera on four piece rock band playing theme song] [back to Danny
2 seated at desk with Letterman style window behind him with a city background and large
3 microphone on desk].

4 All right, Mr. Montegna (band director), how is your memory?

5 MR. MONTEGNA: Oh, [INAUDIBLE] Danny, I'm lucky I remembered how to
6 get here today.

7 MR. BONADUCE: I have the same problem myself. I'm really glad that
8 memory expert Kevin Trudeau is on the show tonight - because I, I as you might expect, I don't
9 have quite the memory I should, uh I always knew that I was on a TV show but until I met Kevin
10 I always thought I was a member of the Brady kids.

11 [Audience laughs, shot on band].

12 Well, I'd like to bring out my first guest, he's memory expert Kevin Trudeau, he's
13 the founder of the American Memory Institute, the world's largest memory training school and
14 author of the number one self-improvement program in history, the Mega Memory - you've seen
15 him on all the television shows - he is one of the most sought after speakers and talk show guests
16 in the country. Please help me make him feel welcome - Kevin Trudeau!

17 [Band plays, Bonaduce applauds, audience howls. Kevin Trudeau walks out,
18 shakes hands with Bonaduce and seats himself in guest chair].

19 MR. TRUDEAU: How ya doing?

20 MR. BONADUCE: Real good. It's good to see you. Thanks for being on the
21 show.

22 MR. TRUDEAU: It's a pleasure.

23 MR. BONADUCE: All right first thing tell us about the American Memory
24 Institute and Mega Memory.

25 MR. TRUDEAU: Well, as you know, as you mentioned, what we are is the

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EXHIBIT D

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1 largest memory, memory training school in the world today and we teach people all around the
2 world how to release the photographic memory that people have right now, or instant recall
3 memory. Now I call it Mega Memory so that people can do some pretty amazing things like go
4 into a room and meet thirty or forty people and remember everyone's name or a student can
5 study for an exam and remember everything for the test and get a straight A or you can
6 remember phone numbers, things to do, foreign languages, uh, playing cards, um, anything all
7 like that that helps people be more effective in their business and even stop some of the absent
8 minded things, like did you ever have this happen to you, did you ever walk into a room in your
9 home and say, "Why did I come in there?" [All laugh].

0 MR. BONADUCE: Almost every day.

1 MR. TRUDEAU: Happened to you, right? Or you go to the store to buy milk
2 and you come back with ten things but you didn't buy milk?

3 MR. BONADUCE: Right, exactly, OK.

4 MR. TRUDEAU: Or where are my keys or where did I park the car? All these
5 little absent minded things we help people when we develop and release the photographic
6 memory that they have.

7 MR. BONADUCE: And the Mega Memory will do all that?

MR. TRUDEAU: Oh, yeah, as a matter of fact, we gotta do a demonstration first.

MR. BONADUCE: I was gonna say how about a little demonstration. Now I've
seen some of these demonstrations from you before.

MR. TRUDEAU: Yeah, on all the other talk shows I've been on and since you
asked...

MR. BONADUCE: Well if it's on the other talk shows I want it here. [All
laugh].

MR. TRUDEAU: OK. So I had a chance to meet some of the audience before

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EXHIBIT D

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1 the show real quickly. If I had a, if I met you, stand up, if I met you just stand up real quick and I
2 what, I'm gonna do is I'm just gonna go around the room, real quick and call you off by name,
3 by memory if I get your name right have a seat and if by some reason I miss, you have to remain
4 standing for the rest of the show. So . . .

5 [Audience laughs].

6 OK, let's go over here. OK, we have Danelle have a seat, we have Neil, the
7 nickname Haje have a seat, back there we have Nick have a seat, York have a seat, Rob have a
8 seat, [shot on audience crowd of people standing up, each sits as he is called]: Elana have a seat,
9 Matt have a seat, Janice Nugemi have a seat, Jules Leave have a seat, Ordo have a seat, Anna I
10 believe have a seat, uh John have a seat, Donna have a seat, lets have Julie have a seat, uh Floyd
11 have a seat, Amy in the back have a seat, I think it's Charise have a seat, Debbie have a seat, And
12 then we have Gail have a seat, uh, let's see this is Pauly have a seat, Brenda have a seat, Jeff, we
13 have Ed, believe it's Anno, am I pronouncing it correctly?

14 MAN: Udo.

15 MR. TRUDEAU: Udo, OK, have a seat.

16 MR. BONADUCE: Unbelievable, unbelievable, unbelievable.

17 [Audience cheers, applauds etc.]

18 MR. TRUDEAU: That's, that's, that's, that's just to give you an idea, Danny just
19 to give you an idea of what can be done when you have a trained memory and it's something that
20 everybody can do right now.

21 MR. BONADUCE: That's what I was going to ask you. Are some people just
22 born lucky, with a better memory than others?

23 MR. TRUDEAU: Yeah, y'know that's probably one of the most common
24 misconceptions. Some people think, Oh, he y'know must have been lucky, and born with a good
25 and I just don't have a good memory. That's not the case. Every single person has a

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1 photographic memory right now lying dormant. It's an ability that everyone has. You see, you
2 remember everything that you see, hear and think about. If it comes through the senses it is
3 remembered. The problem though is recalling information. And let me give you an example.
4 And think about this and ask yourself this question. How many times, does it happen to you
5 where you walk into a bank or a grocery store and you see someone you know, I mean for
6 something like five years you know them a You know them and you go, oh "hi" and as soon as
7 you say "hi," the name goes completely blank in your mind, happen to anybody, here right?
8 [directed to audience, laughs] and the whole day doesn't it aggravate you? I know this guy,
9 what's his name? Can't remember. Three days later, at two o'clock in the morning, from
10 nowhere, the name just pops into your mind, oh it was Joe Smith. The question is did you really
11 forget in the first place? No! The information was in your memory. The problem was recalling
12 it when you needed it.

MR. BONADUCE: Yeah, when I remember it later, I'm so proud, I wake up my
wife. It was Bob! That's who it was at the bank! [All laugh].

MR. TRUDEAU: Yeah, yeah and it doesn't really help you then, you know.

MR. BONADUCE: No.

MR. TRUDEAU: Happens a lot of time. Three o'clock in the afternoon, you're
drinking coffee at your desk and you go, "oh I forgot to call Harry at noon." Well, you didn't
really forget, you did remember it at three, it you unfortunately just didn't remember it at noon
when you needed it.

MR. BONADUCE: Well, how does it work?

MR. TRUDEAU: Well, let me just give you an idea of how the memory actually
works and the mind works so people have an idea. If you can imagine a filing cabinet and in that
filing cabinet there is a thousand files all alphabetized, in alphabetical order. And I go, "Hey,
Danny, can you get me the Jones file?" Boom. Within seconds you can have that information at

EXHIBIT D

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1 your fingertips.

2 MR. BONADUCE: Sure, it's under the J's.

3 MR. TRUDEAU: Right. But what would happen if we took the same files and
4 threw them on the floor and mixed them all up? I say, "Hey, can you find me the Harris file?"
5 You'd say, "Yeah, can you call me next Tuesday, I have to, I gotta go through this big mess.
6 Your mind is exactly the same way. You meet people everyday in you business and forget their
7 names. A student may be studying for an exam, maybe thinking of things to do. You may try
8 reading things or watching television or a business professional attending meetings and all you're
9 really doing is throwing information in the Grand Canyon of your mind. It's like taking that file
10 folder and throwing it into the room arbitrarily then when you try to go back to recall it and you
11 and you think, what was that guy's name? What was that phone number? What did I have to do
12 today? What were the directions? You go blank and you think you forgot. You didn't forget.
13 The information is in your memory, the problem is, it's just misfiled. So what we actually
14 developed when I developed the Mega Memory system is a way to teach the brain how to
15 develop mental file folders. So when you see something, when you hear it, or even if you think
16 about it without doing anything, the information automatically goes into a mental file and can be
17 instantly recalled just like a person's name, or anything at all.

18 MR. BONADUCE: All right, well, I went a little bit out of my way and made a up
19 list, a list of fifteen things.

20 MR. TRUDEAU: OK.

21 MR. BONADUCE: Now, I wrote them down. You haven't seen it before, uh, if
22 you're at home or you in the audience want to try and remember these fifteen things give it a
23 shot.

24 MR. TRUDEAU: Yeah, as he calls them out try your own to at home. and here in
25 the audience to see how well you can remember. test your own memory.

EXHIBIT D

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1 MR. BONADUCE: All right, you ready?

2 MR. TRUDEAU: Yes.

3 MR. BONADUCE: Number one through fifteen. Number one "Larry Worth."

4 [All laugh].

5 MR. TRUDEAU: I'm sure there is something, I'm sure there's something, I'm
6 sure, behind that name.

7 MR. BONADUCE: Yes. It's my boos's name and I get one thousand bucks
8 every time I mention it.

9 [Laughs, applause]

10 MR. TRUDEAU: You did that on Arsenio too, didn't ya. . .

11 MR. BONADUCE: Now I'm doing it again! I know a good thing when I get a
12 hold of it.

13 MR. TRUDEAU: OK, number one is "Larry Worth," OK.

14 MR. BONADUCE: All right, number two is "table."

15 MR. TRUDEAU: Number two is "table," got it.

16 MR. BONADUCE: Three is "microphone."

17 MR. TRUDEAU: OK, three is "microphone," got it.

18 MR. BONADUCE: Four, "ashtray."

19 MR. TRUDEAU: Four is "ashtray," got it.

20 MR. BONADUCE: Five, the name "Art Eastland."

21 MR. TRUDEAU: OK, uh, "Art Eastland," got it.

22 MR. BONADUCE: OK, number six is a phone number. It's "541-2270."

23 MR. TRUDEAU: "541-2270," got it.

24 MR. BONADUCE: Seven. "passion fruit."

25 MR. TRUDEAU: Uh, "passion fruit," OK.

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1 MR. BONADUCE: Eight, "St. Lucia."
2 MR. TRUDEAU: OK, eight, "St. Lucia."
3 [Laughs]
4 MR. BONADUCE: Nine, "Chicago."
5 MR. TRUDEAU: Nine, "Chicago."
6 MR. BONADUCE: Ten is "paper."
7 MR. TRUDEAU: Ten's "paper," got it.
8 MR. BONADUCE: Eleven, "watch."
9 MR. TRUDEAU: OK, got it, "watch."
10 MR. BONADUCE: Twelve, "book."
11 MR. TRUDEAU: Got it, "book."
12 MR. BONADUCE: Thirteen, "constants."
13 MR. TRUDEAU: OK, thirteen, "constants."
14 MR. BONADUCE: Fourteen, "success."
15 MR. TRUDEAU: Fourteen, "success."
16 MR. BONADUCE: And fifteen, "money."
17 MR. TRUDEAU: OK fifteen "money." Now we kind of did this at a blistering
18 speed, but but check and see how well I can recall these by memory. I think they go something
19 like this. One was "Larry Worth." Two, of course was "table." Three was "microphone." Four
20 was "ashtray." Five was "Art Eastland." Six was the telephone number "541-2270." Seven was
21 "passion fruit." Eight was "St. Lucia." Nine was "Chicago." Ten, of course, was "paper."
22 Eleven was um, "watch." Twelve was "book." Thirteen was "constants." Fourteen was
23 "success." Fifteen was "money." And backwards, it goes, money - success then we have
24 constants, book, watch, paper, Chicago, St. Lucia, passion fruit, 541-2270, then we have. Art
25 Eastland, ashtray, microphone, table, and the first one was Larry Worth and that's forwards and

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1 backwards by memory.

2 MR. BONADUCE: That's spooky!

3 [Cheers, applause]

4 Oh.

5 [Cheers, applause]

6 MR. TRUDEAU: Now, I gotta, gotta say something. I gotta say, 'cause when
7 people see me do that demonstration and remembering the names demonstration, I think it, you
8 know people can be impressed by that and think, "oh, wow that's something, that's really
9 impressive!" and even though I think it is . . .

10 MR. BONADUCE: It is.

11 MR. TRUDEAU: . . . an impressive demonstration. What can be done with a
12 trained memory, I tell people, please don't be impressed because it's something that everyone
13 can do right now. It's virtually an ability that everyone has.

14 MR. BONADUCE: Well, and I know that to be true as a matter of fact.

15 MR. TRUDEAU: Yeah, because, as a matter of fact, I was on your radio show,
16 "The Loop" in Chicago, one of the things you did, because I know you're not into sports . . .

17 MR. BONADUCE: I'm completely sports illiterate. As a matter of fact [All
18 laugh].

19 MR. TRUDEAU: And you, he was being harassed a lot by people calling up, the
20 callers, and what you did to in order to kinda make yourself a little more acclimated to the city
21 was, you took the Mega Memory course and committed to memory in about thirty minutes all of
22 the Chicago Bears.

23 MR. BONADUCE: It's true.

24 MR. TRUDEAU: Names, numbers, and positions.

25 MR. BONADUCE: Now, [inaudible]

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1 MR. TRUDEAU: Now, yeah, right

2 MR. BONADUCE: Now this list.

3 MR. TRUDEAU: Yeah, I brought with me and this was months ago, right?

4 MR. BONADUCE: Because I thought there were eleven people on a football
5 team.

6 MR. TRUDEAU: Right, there's uh

7 [Laughs]

8 MR. BONADUCE: Apparently there's fourteen thousand peöples on the Bears.

9 [Looks at the list, Mr. Trudeau shows list]

10 Look at that list. It's really unbelievable.

11 MR. TRUDEAU: Yeah, now and this was months ago and that you committed
12 this to memory so I just want . . .

13 MR. BONADUCE: Right.

14 MR. TRUDEAU: to call a couple and test your own memory. Here see how
15 well . . .

16 MR. BONADUCE: OK, yeah, right, right, all right.

17 MR. TRUDEAU: OK, what number? We'll start with an easy one. What
18 number if Jim Harbaugh.

19 MR. BONADUCE: Easy, four. And he's the quarterback.

20 MR. TRUDEAU: OK, that was an easy one. Let's go to more obscure players.
21 How 'bout Ron Cox.

22 MR. BONADUCE: Ron Cox is number fifty-four and he is a lineman.

23 MR. TRUDEAU: Ex, excellent. OK, how about Keith Van Horn?

24 MR. BONADUCE: Keith Van Horn, is number seventy-eight and he is a tackle.

25 MR. TRUDEAU: Excellent. And, uh, we'll do another one. How about Perry

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1 Snow?

2 MR. BONADUCE: Perry Snow is number ninety-six and he is also a linebacker.

3 MR. TRUDEAU: Not bad, huh?

4 [Cheers, applause, etc.]

5 MR. BONADUCE: And I cannot tell you, I cannot tell you how easy it was. It
6 really wasn't difficult to do at all. It took about thirty minutes.

7 MR. TRUDEAU: Yeah, that's one of the things about Mega Memory that's very
8 unique is the fact that it only takes only a few hours to learn the technology and when you release
9 that photographic memory learn for anything, whether it be for business, for a business, if you
10 are in business, or if you're a student wanting to recall things for test time or if you just impress
11 people it's pretty easy to do. Yeah.

12 MR. BONADUCE: Now, since I've done it on my radio show a lot of people
13 have asked me, isn't it all just word association?

14 MR. TRUDEAU: Yeah, y'know if anyone's out there very read a book on how to
15 improve your memory and I'm sure many people have, that's what you're probably exposed to
16 basic word association and you'll probably find out what I did - it doesn't work. Basic
17 association is very difficult and very cumbersome to use. Now I saw that problem evident also
18 so the Mega Memory technology is very unique where it's the only memory improving system in
19 the world that doesn't use basic word association as the technique to help you remember. It
20 simply consists of a series of mental exercises which stimulate parts of the brain cell and the big
21 words are "dendrites" and "neurotransmitters."

22 MR. BONADUCE: Oh yeah, I got lots of them.

23 MR. TRUDEAU: Right. [Laughs]

24 [Audience laughs]

25 All it virtually does is it releases the photographic memory people have so your

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1 eye becomes like a wide angle camera virtually picking up and recording everything it sees
2 whether you're focused on it or not. Your ear becomes a powerful tape recorder virtually
3 recording everything it hears whether you're focused on it or not, and so you remember things
4 without applying a technique. I gotta tell you a quick story. I was on one of the other talk shows
5 and one of the demonstration I did was I met the audience like I did tonight and remembered
6 everybody's name. Now we had a short period of time but I did about one hundred people
7 because we had a lot of time before the show and I came off and everybody was impressed, and
8 Ed grabbed me and said, "Sure, you could do that, but nobody else could." I said, "No, Ed,
9 anybody can do that and I'll prove it out on tonight's audience. You give me a student, a
10 business professional; give me someone in their sixties. I'll have them go through Mega
11 Memory, the home study course this week on their own. Next week Invite the four of us back on
12 the show and I'll have my brand new graduates do the same demonstration.

13 MR. BONADUCE: The same demonstration, with all of the names with the
14 audience?

15 MR. TRUDEAU: With all of the names, yeah, right.

16 Right. And it was a great way to get back on the program.

17 MR. BONADUCE: Right. [Inaudible]

18 MR. TRUDEAU: But, it was so exciting next week to see a sixty-seven year old
19 woman, by memory, rattle off over fifty people's names that she met just before the show.
20 Everyone was so impressed that she got a standing ovation and they grabbed her and they said,
21 "Hey, how did you remember those people's names?" and her answer was, "uh, I don't know!"
22 [Laughs]. She said, "I just remembered." And we all laughed hysterically. She looked at me
23 and she said, "What did you do to my memory?" And I said, "Well, I didn't do anything, I just
24 released the photographic instant recall memory you've had your whole life and now it's with
25 you forever." She grinned ear to ear and I said, "What's so funny?" She said, "I can't wait for

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1 my bridge club!" [Laughs]. She's gonna be a terror now on the playing cards.

2 MR. BONADUCE: Well, I want to talk to you about playing cards and it's gotta
3 be great for business and school, but right away, how do people get this course if they want it or
4 information on it, anyway?

5 MR. TRUDEAU: Sure, Danny, if people do want information on the Mega
6 Memory home study course they can call our 800 number which is on the screen, and as a
7 courtesy to the viewers, we will give them an over fifty percent discount off the regular price of
8 the course.

9 MR. BONADUCE: All right, now what about playing cards? Can you, can you,
10 like, if can you, go to Vegas with this?

11 MR. TRUDEAU: Yeah, I knew you were going to ask me that. [Laughs]. If
12 anybody, uh, uh . . .

13 MR. BONADUCE: Of course.

14 MR. TRUDEAU: It was funny I did a seminar a couple of years ago in Las Vegas
15 and uh we sold this thing out in a matter of days, like two days. Five thousand people complete
16 sell out and I was like, "This is amazing!" It's a self sell. We get there and there's five hundred
17 people we have to turn away at the door. And it dawned on me that this was Las Vegas, memory
18 cards, so I asked the crowd how many people here came here because they wanna learn how to
19 remember playing cards. Every hand in the room went up. I said well, it's going to be very easy
20 to do, with a powerful memory, but please don't use this as an unfair advantage against your
21 friends to make money. A guy in the back of the room yelled out, "Why not?"

22 MR. BONADUCE: I'm with him.

23 MR. TRUDEAU: But it is very easy for bridge players or card players and it
24 changes the game from one of luck to one of skill once you have an advantage.

25 MR. BONADUCE: All right. There are two areas where this has got to be very

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1 important. One of them has to be business. Does it help in everyday business?

2 MR. TRUDEAU: Yeah, it really does. Y'know, Dale Carnegie wrote a book
3 called How to Win Friends and Influence People

4 MR. BONADUCE: Right.

5 MR. TRUDEAU: it's the number two bestseller of all time, second only behind
6 the Bible, so it's a pretty credible book, but in that book, Carnegie discovered that a person's
7 favorite subject is really themselves. . .

8 MR. BONADUCE: Right.

9 MR. TRUDEAU: And a person's name is the sweetest sound in the language to
10 each one of us. It commands attention every time it's used, but most people really don't use that
11 fact to their advantage every single day in a business. As a matter of fact, let me ask the
12 audience a question by a show of hands, and be honest. How many people here has this actually
13 happened to, you walk up to someone for the first time, you shake their hand, that person gives
14 you their name, and as soon as that handshake breaks, the name kinda just drops to the floor.
15 Has that happened to anyone here?

16 [Audience shot. Raised hands].

17 MR. BONADUCE: Oh yeah. All the time.

18 MR. TRUDEAU: OK, yeah, OK. If you didn't raise your hand perhaps you
19 didn't understand the question.

20 [All laugh].

21 Happens to everyone and it's very embarrassing in business not remembering
22 names. I will say this, you go into a group situation, uh, a cocktail party or a business meeting
23 and you meet ten, twenty, thirty people and you leave and say goodbye to every single person
24 with their name; I guarantee when you leave the room they'll all remember you and the business
25 you're in because it gives you such a big advantage. You know I was doing a show in New York

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1 not too long ago and it was a call in radio show a fellow called up on the air, he says "Kevin I
2 saw you on TV about eight months ago, I bought your Mega Memory course. It was the best
3 investment I ever made for my business." I said, "Why's that?" He said, "You see I was
4 applying for a job on Wall Street, a job I really wanted, the problem was five hundred other
5 people were applying for the same position so in order to set myself apart, what I did was I
6 committed to memory every single person's name in the firm." He says, "Kevin, over the five
7 day interview process I must have met over fifty people. So everyday when I would walk back in
8 I'd call people by name that I met -- like hey, Franklin Milatello good to see you, John Sincotti,
9 nice to see you again. They were blown away." He says, "But the second thing I did is I
10 committed to memory all fifteen hundred of the New York Stock Exchange companies and their
11 stock symbols."

12 MR. BONADUCE: No way, fifteen hundred, really?

13 MR. TRUDEAU: Yeah, fifteen hundred. As a matter of fact, gentleman has
14 written a book on that, who has committed those to memory. It very easy to do and he said, "Oh
15 man, I was like a freak show. They say 'hey Charlie you gotta check this guy out!'"

16 [All laugh].

17 He goes he obviously got the job, has gotten three promotions, since then. I go to
18 meetings now without paper and pencil, I make presentations without notes, they call me the
19 walking computer. He says, "and the best part about it is now because of my powerful memory,
20 everyone thinks I'm smart."

21 [All laugh].

22 And he was kidding me and he goes, "and I don't know if it's true!"

23 [All laugh].

24 MR. BONADUCE: Well, let, let me test you on how long things stay in your
25 mind, how many lists you've memorized. Number five.

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1 MR. TRUDEAU: Number five of course was Art Eastland, the name Art
2 Eastland.

3 MR. BONADUCE: OK, there we go.

4 MR. TRUDEAU: [laughs].

5 MR. BONADUCE: All right so uh, it'll help you make money in business. Now
6 how about school? It's gotta be really important for studies 'cause - now I remember talking
7 about being able to take notes faster than you can write by remembering it.

8 MR. TRUDEAU: Right, that's true.

9 MR. BONADUCE: Well, that's true.

10 MR. TRUDEAU: Yeah, 'cause you can remember faster than you can write
11 things down, and in, in school it's probably one of the most quantifiable ways you can determine
12 whether the powerful memory is helpful. We took an entire seventh grade class in the beginning
13 of last school year. They went through the Mega Memory system, just took a few days, a couple
14 of hours, very easy and at the end of the school year they had a big problem on their hands.
15 Eight months ahead of their school curriculum, lowest grade point average A minus, and they
16 tested the vocabulary levels of the seventh graders and they found to be those of sophomores in
17 college because they could remember all the words and definitions. I can't wait until they take
18 their SAT's. They were three years ahead in Spanish, because Foreign languages, if you ever
19 wanna learn foreign language it has a lot to do with memory, as you know.

20 MR. BONADUCE: Sure.

21 MR. TRUDEAU: Because I know you speak Japanese.

22 MR. BONADUCE: I speak Japanese, right. This has been very helpful with that.

23 MR. TRUDEAU: And, and has a lot to do with memory, learning foreign
24 languages.

25 But here's the most exciting statistic. Absentee rate virtually zero.

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1 MR. BONADUCE: Because school became what, more fun? More interesting?

2 MR. TRUDEAU: The kids loved to go to school. I can just imagine in class
3 going, "teacher, don't forget that test I studied for twenty minutes last night!"

4 MR. BONADUCE: So, your kids could definitely improve their grade point
5 average by, by taking memory course.

6 MR. TRUDEAU: Yeah, as a matter of fact, on my first television show we had
7 this fellow on there who was a law student who went from a 2.5 GPA to a 3.8 after going through
8 Mega Memory. But more importantly, he used to study as a law student three to five hours every
9 single day. After he went through the program, his study time went down to one hour a day and
10 his GPA went up from a 2.5 to 3.8. Matter of fact in the law firm he works in now, they call him
11 the walking genius because he has committed to memory virtually all of the case law he learned
12 in school. She he'll be sitting in contract meetings, and they'll mention something and he'll say,
13 "wait a minute, there was a case in 1975, it was a landmark case, in St. Louis, the judge was
14 Harrington, it was Shoemaker versus Augustine.

15 MR. BONADUCE: Oh, geez.

16 MR. TRUDEAU: And he'll recall the basic information. Then, they'll send a
17 gentleman to run to the law library to get the actual case. But having information at your mental
18 fingertips, fingertips like that really gives you a major advantage.

19 MR. BONADUCE: Make sure to give me his card. I've, I've been known to use
20 lawyers before.

21 [All laugh].

22 Um, um, one more time 'cause I mean people are going to be amazed by this.
23 How can we get a hold of it or at least get more information on the Mega Memory system.

24 MR. TRUDEAU: Sure, again, if people want to call us, they can call us at our
25 800 number which is on the screen and again as a courtesy to the viewers when they call in for

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1 information on the Mega Memory. our home study course, we'll give them an over fifty percent
2 discount off the regular price of the program.

3 MR. BONADUCE: Cool. Now what got you started in all this. How, what made
4 you wake up one day, and say, "I think I'll be in the memory business."

5 MR. TRUDEAU: Well . . .

6 MR. BONADUCE: "I think I'll teach people to memorize things."

7 MR. TRUDEAU: It was funny because a lot of people assume I had a good
8 memory my whole life and that really wasn't the case. I was told in high school that I had a
9 learning disability, a memory block. I virtually flunked out of high school and never went to
10 college and after I, I, I found that out, I said I figured I had to find a way to help myself to
11 improve my own memory and I read every book on memory and nothing worked because all
12 they taught you was basic word association.

13 MR. BONADUCE: Right.

14 MR. TRUDEAU: It didn't work. I then met a fellow who did a research report in
15 1975 at the Oklahoma School for the Blind in Muskogee, Oklahoma, V.R. Carter, was the
16 Superintendent back then, and he took thirty-five blind children and he improved their memory.
17 These kids were blind from birth, by the way, and he improved, in just five days, fifteen percent
18 recall ability to ninety percent in just the week.

19 MR. BONADUCE: Wow.

20 MR. TRUDEAU: They were so impressed that they tested the kids six and eight
21 months later to see if it stuck and most of the kids improved to ninety-five and ninety-eight
22 percent recall. So, it stuck. He duplicated the results with retarded kids with IQ's of only fifty
23 and sixty and the results were almost identical, lower memory in the beginning, dramatic
24 improvement in the nineties just a week later and a year later in testing almost hundred percent
25 recall ability with slow, retarded kids. Obviously we know at this point if we can teach blind and

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1 retarded kids it had to be an ability, a powerful memory, that everyone had. So I took that raw
2 data and put together, invested, if you will, over the next year the entire Mega Memory system
3 that we have today, founded the institute and just in the last couple of years over two million
4 people now, uh, Danny, have gone through the Mega Memory home study course to improve
5 their own memory.

6 MR. BONADUCE: Wow.

7 MR. TRUDEAU: It's the most utilized home study course utilized, as you
8 mentioned, in history. So we're seeing the results, we really are.

9 MR. BONADUCE: I'll tell you along these lines, we're hearing a lot about
10 Attention Deficit Disorder, do you know about that? Have you heard about that?

11 MR. TRUDEAU: ADD.

12 MR. BONADUCE: Right, ADD. Uh, will this help with that?

13 MR. TRUDEAU: It's a, it's a buzzword, ADD and we're getting letters and calls
14 more on this subject than any thing else and there are millions of people, children and adults who
15 are afflicted with this problem, and when I started looking at that because it has a lot to do with
16 memory, attention span, uh it didn't exist twenty-five years ago, thirty-five years ago it didn't
17 exist so I started to wonder if there is anything physically amiss. So I started doing the research
18 and we tested five thousand kids with ADD. One hundred percent of them hypoglycemic, they
19 eat too much sugar. Ninety-eight percent had food allergies, primarily monosodiumglutamate, the
20 casing in the milk, glutamate in wheat, red dyes. We had, uh, eighty-six percent had low grade
21 virus infections primarily in the Herpes family, Epstein Barr virus which is associated with
22 chronic fatigue syndrome.

23 MR. BONADUCE: Right.

24 MR. TRUDEAU: And then we had an eighty percentile candidiases which is a
25 yeast overgrowth. When you combine these things together you get the symptoms of

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1 hyperactivity or a short attention span and not just for children, for adults. So we see that there is
2 a big correlation, there's a lot of controversy 'bout this, by the way, because the drug Ritalin is
3 the drug of choice to give.

4 MR. BONADUCE: Sure.

5 MR. TRUDEAU: And we don't agree with that as an option, but uh we think
6 through dietary change and we discuss this in Mega Memory, some of the things and options that
7 people can take to dramatically improve. Tell you a story about ADD. I was doing a show in
8 Cleveland, a fellow called up on the air and he says, "I have ADD." He says, "I'm flunking
9 Calculus, I have a straight "F" because I can't remember the calculus equations," he goes, " but
10 Kevin I got your course." And in lesson seven I teach everyone how to commit an equation to
11 memory in thirty seconds, a calculus equation. He says, "I can't believe it, I have a test
12 tomorrow. If I can remember twenty equations I'm gonna get an "A." I'm gonna give a
13 hundred." I says, great then you study for a half hour tonight and you call me tomorrow after
14 your test. Tell me how you did.

15 MR. BONADUCE: Half an hour?

16 MR. TRUDEAU: Sure. It takes thirty seconds each. So the next day he called
17 me at my home. So I says, "How'd you do?" He says, "Well I got good news and bad news," he
18 goes, "the good news is that I got a hundred percent on my calculus equations exam." I go,
19 "Man, that's great." He goes, "Yeah I was the first person done." I go, "What's the bad news?"
20 "What's the bad news is that the teacher won't accept the test because she figures I must have
21 cheated to get this "A."

22 MR. BONADUCE: Sure.

23 MR. TRUDEAU: I said, "Oh what do you have to do now?" He says, "I gotta
24 take it Friday in the principals office." I said, "Now how you gonna do on Friday?" Now here's
25 the best part. He says, "Kevin, I can't forget these equations even if I tried." You see, when you

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1 learn information properly the first time it's locked into the knowledge bank and you can recall it
2 and have access to it anytime in the future. Just like that list we did earlier. To be able to go
3 back and say, "yeah, number six was 541-2270."

4 MR. BONADUCE: That's right, all right how about number thirteen, then?

5 MR. TRUDEAU: Number thirteen of course, was "constants."

6 MR. BONADUCE: And, uh, lets go for the money, what was number one?

7 MR. TRUDEAU: Number one, of course, was "Larry Worth!"

8 MR. BONADUCE: All right.

9 [Laughs, cheers, etc.]

10 Now you were talking about allergies and things like that is nutrition, well, I
11 happen to know this from the course, and I find this very interesting. What is the correlation
12 between nutrition and memory.

13 MR. TRUDEAU: There is a big connection between nutrition and memory, and
14 Mega Memory is one of the only courses that talks about the foods you can eat, that can improve
15 memory, some of the supplements that people can take; herbs and so forth that'll improve the
16 memory function the way the brain operates. So, uh there's a lot to do with nutrition and
17 memory not only for children but for adults. I mean I'll just give you a prime example. Turkey
18 which is a wonderful food. we eat a lot of it today because it's low in fat and it's very high in
19 something called Tryptophane.

20 MR. BONADUCE: Right.

21 MR. TRUDEAU: Which is a natural sedative. The problem is after
22 Thanksgiving what do everyone want to do? Take a nap.

23 MR. BONADUCE: Go to sleep.

24 MR. TRUDEAU: Take. exactly. They think. "Oh it's because we ate a lot of
25 food." No, you eat a lot of food at other holidays but you don't fall asleep. We eat a lot of

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1 turkey, you're putting into your body a high dose of tryptophane and it makes you tired
2 physically as well as mentally. Makes you lethargic so that's an example of something to avoid
3 if you want to be mentally alert and mentally sharp.

4 MR. BONADUCE: I always thought turkeys were really boring.

5 [Laughs].

6 MR. TRUDEAU: Yeah, Yeah [laughs] 'cause

7 MR. BONADUCE: That must be what that's about,

8 MR. TRUDEAU: [inaudible] Yeah, let me tell you something else about this,
9 about nutrition. I was walking in New York City, Manhattan with the President of the NFL, he's
10 a good friend of mine. He has children. We were talking about nutrition, I was talking about
11 how Mega Memory virtually takes that eye, as you mentioned, and turns it into a wide angle
12 camera and your ear into a powerful tape recorder so you record this without trying. He says,
13 "Kevin, that's amazing! Let's put it to the test." So we were walking down Fifth Avenue,
14 "describe to me one of these storefronts." I said, "OK" and I thought for a second, he put me off
15 guard. I said, "One of these storefronts, there was a wicker chair, as a matter of fact, the bottom
16 rung was frayed. There was two uh, brown shoes with argyle socks. There was a black Chinese
17 cabinet with one, two, three, four, five drawers. The two in the top had a dragon, looked like a
18 tiger on the right," and I was describing in detail the wicker basket, the fruit, the type of fruit and
19 so forth and he . . .

20 MR. BONADUCE: Sounds like Elvis's room.

21 [Laughs]

22 MR. TRUDEAU: [Laughs]. So we, so we walked back about fifteen blocks and
23 we found this exact storefront with everything as I described it was exactly there. Let me tell ya
24 something, this guy was impressed.

25 MR. BONADUCE: I bet.

EXHIBIT D

23

1 MR. TRUDEAU: Well I looked in I was impressed. I go, I go, "Wow. This
2 really works." But that's the ability that everyone has right now and it can be released.

3 MR. BONADUCE: How about remembering the past? You know, I know you
4 can teach to remember things you're learning now but how about things you knew back then but
5 that you've since forgotten?

6 MR. TRUDEAU: Yeah, uh I got a call on a talk show years ago and this woman
7 calls up and says, "I'm so glad I'm talking to a memory expert. I went on vacation two years ago
8 with my husband and we hid our jewelry box where no one would ever find it," and she said,
9 "and no one has every found it including me." I said, "No, I can't help," and I thought about and
10 there's a lot of things if it did come in through the senses or even if you thought about it is
11 permanently recorded in the memory so I do have a technology now called "How to Remember
12 Things in Your Past" and it's excellent for if you lost a ring, a piece of jewelry, if you met
13 someone in the first grade that you think, "I know that person but I can't remember his name." It
14 is in the memory and it can be accessed very easily.

15 MR. BONADUCE: This is amazing, once again, how do people get more
16 information on Mega Memory?

17 MR. TRUDEAU: Sure, again if people wanna call us, they can call us at our 800
18 number which is on the screen. And again as a courtesy to the viewers when they call for
19 information on Mega Memory our home study course, we'll give them an over fifty percent
20 discount off the regular price of the program.

21 MR. BONADUCE: All right. What was number three?

22 MR. TRUDEAU: Uh, number three was "microphone."

23 MR. BONADUCE: What was number twelve?

24 MR. TRUDEAU: Twelve, of course, was "book."

25 MR. BONADUCE: And eight?

EXHIBIT D

24

1 MR. TRUDEAU: Eight was oh, "St. Lucia," which us, there's something behind
2 St. Lucia, right?

3 MR. BONADUCE: I, I, happen to be going there next week on vacation, and I
4 can't wait.

5 MR. TRUDEAU: I knew that. [Laugh].

6 MR. BONADUCE: That's amazing, now, and a lot of people are going to ask if
7 that takes an enormous amount of practice.

8 MR. TRUDEAU: Yeah, a lot of people think that you have to work at it and
9 practice. And Mega Memory's unique in that regard. Since we're not teaching basic word
10 association it's not something that you have to practice like a skill to keep up or requires a lot of
11 hard work to learn. It's more like an ability that's being released. And I'll give you a good
12 analogy, learning how to ride a bicycle. Learning how to swim, learning how to drive a manual
13 speed transmission on a car. Once you learn how, the ability is now released, it's with you
14 forever there's no constant practice. I mean if you didn't go swimming in twenty years and I
15 throw you into the deep end of the pool, you're really not gonna drown, you're gonna swim like
16 a fish. It's an ability that's been released. Or if I put you on a bicycle tomorrow which you may
17 not have ridden in five or ten years, boom, you still ride the bike. Same with the memory once
18 it's released it's with you forever.

19 MR. BONADUCE: Thank you very much. We've been talking with Kevin
20 Trudeau, author of Mega Memory. Thank you very much for coming. Thanks to the Critics.
21 Thank you and thank you, Kev.

22 [Shake hands].

23 MR. TRUDEAU: Thank you very much, Danny.

24 [Cheers. Camera shot of behind the audience. Band is playing].

25 [Graphic appears on the screen as follows: For more information on the Mega

Complaint

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EXHIBIT D

25

1 Memory Home Study Course call. Copyright MCMXLIII Mega Systems, Inc., 5211 86th Ave.,
2 Suite G, Mernville, IN 46410 (219) 736-6172. Mr. Bonaduce speaks over graphic].

3 MR. BONADUCE: Hi, this is Danny Bonaduce. Thanks for watching the show.
4 I just want you to know that I have personally gone through Kevin's Mega Memory home study
5 courses and I highly recommend and endorse the program. It's great if you wanna make more
6 money in your career, get straight "A"s in school with less study time or just develop a
7 photographic memory, call the 800 hundred number and get yourself the Mega Memory course.
8 It's fun, it's easy and it works! This is Danny Bonaduce and remember, I love you!

9 [Camera shot on playing band, audience applauding].

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EXHIBIT E

MEGA MEMORY

12/14/94

Hello, thank you for calling the American Memory Institute, this is _____ and I'm glad you called, how can I help you today?

Customer: What's the price?

- Great I'd be happy to help you with that. Now, did you hear about us on the television or radio?
- Were you considering this for yourself, or for someone else?

-If someone else ask, "Is this for your children?" Pitch the bene's...ad lib like crazy!

-If for the caller...

Will you be using this for work or study? (do this regardless of how old they sound)

Student... What are you studying?

Would you find it helpful to cut your study time in half and improve your grades at the same time?

Working... What kind of work do you do?

Do you find it difficult to keep track of daily details in your work?

BENEFITS

(this is a foundation, benefits change depending on what caller does...you must call)

Students-earn straight A's, cut study time in half, improve confidence and self image.

Business-remember important client information, names, faces, schedules, important details.

Generic-shopping lists, names, birthdays, speeches, poetry, scripture, playing cards.

Essentially what Kevin teaches you is a mental filing system. It's an organizational system for your memory that is being used by over 2 million people! (#1 self improvement system in history!) He shows you how to put things away in your memory in a sequential order, so that when you go looking for them you know right where there are. We all have a photographic memory, it's just that we haven't been shown how to use it.

The course itself is primarily an audiocassette tape program, there is also a video tape and two workbooks. The lessons are about 25 minutes each, nice and short for kids or commuting back and forth to work and it's very simple to go through.

You'll start to see results after the first couple of lessons and we guarantee you'll have a minimum improvement of at least 500% in your memory, and that is measurable because you're tested on the lessons.

Now if you were to attend Kevin's live training the cost would be \$300, but since you heard the special promotion, you can get the home study program for a 50% discount from that. The program would be \$149.95 and it comes with a 1 year trial period. That's a one year unconditional money back guarantee, if you're not satisfied for any reason, just return it and we'll give you a full refund of the purchase price, no questions asked and we can do that with a Visa or Mastercard today, which would be best for you?

MSI/SALBERG COMPLAINT EXHIBIT E
TRUDEAU COMPLAINT EXHIBIT J

EXHIBIT E

Mega Memory Pricing Information

	DISPLAY:	Complete Package	Basic Package	Advanced Only
Price Info	Product Price:	\$149.95	\$69.95	\$79.95
	S & H	\$17.50	\$9.55	\$9.50
	Subtotal:	\$167.45	\$79.50	\$89.45
		(\$149.95 in Indiana)	(\$83.00 in Indiana)	(\$93.95 in Indiana)
		(\$174.45 in Illinois)	(\$85.10 in Illinois)	(\$95.85 in Illinois)
Upsell Info	Upsell Price:	\$19.95 - Get Smart, Get Healthy	\$19.95	\$19.95
		\$29.95 - Spell Magic	\$29.95	\$29.95
	Add'l S & H	\$0.00		
	Total Price:	\$187.40 w/ Get Smart	\$99.45 w/ Get Smart	\$109.40 w/ Get Smart
		\$197.40 w/ Spell	\$109.45 w/ Spell	\$119.40 w/ Spell
		(\$187.40 in Indiana)	(\$114.45 in Indiana)	(\$124.90 in Indiana)
		(\$206.40 in Illinois)	(\$117.44 in Illinois)	(\$127.19 in Illinois)

Canadian Shipping - shipped via Fed Ex (NO PO Boxes!)

		Complete Package	Basic Package	Advanced Only
Price	Product	\$149.95	\$69.95	\$79.95
	S & H	\$17.50	\$17.50	\$17.50
	Subtotal	\$167.45	\$87.45	\$97.45
	Total w/ Upsell	\$187.40 w/ Get Smart \$197.40 w/ Spell	\$107.40 w/ Get Smart \$117.40 w/ Spell	\$117.40w/GetSmart \$127.40 w/ spell

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EXHIBIT E

Mega Memory Addtl Information

Delivered in US by: US Mail Delivery time: credit card - 3 weeks or 4-6 weeks for checks

Delivered in Canada by: Fed Ex (No P.O. boxes) 3 week delivery

(Rush Orders: addtl \$15 for 5 business day Fed Ex delivery on 3XXX and 7XXX)

Charge will appear on their statement as: Mega Systems

Make checks or money orders payable to: Mega Memory

Send checks or money orders to: Mega Memory, PO Box 888

Dept. T for 77XX or Dept A for 3XXX and 76XX

Morton Grove, IL 60053

NOTE: Only 05, 259X, and 4411 come to Portland, ME.

All others go to Morton Grove. No exceptions.

UPSELL # 2 INFORMATION

I wanted to tell you about a book that will go great with your Mega Memory program. It's by Dr. Alex Duarte and it's called *Get Smart, Eat Healthy*. It has a special section on memory and it gets into the details about vitamins and other food supplements that can help really enhance your memory. There's a chapter on foods that *reduce* memory abilities. It usually sells for \$69.95, but with your order today, it's only \$19.95. It still has the same guarantee, would you like to add this to your order?

UPSELL # 2 INFORMATION

Oh, by the way, Kevin has just released his brand new tape series called, "5 Minutes a Day to Perfect Spelling." You'll be able to write letters, business correspondence, reports, anything -- and you'll use the right words and spell them correctly every time! There are no tricky spelling rules to learn, and you'll learn to spell automatically - with no effort! It's like having a permanent "spell check" in your head! Like the title says, it only takes 5 minutes a day and you'll be a perfect speller. It sells for \$59.95, but since you've ordered Mega Memory today, it's only \$29.95 with no extra shipping and handling. Since this is a brand new program, everyone who orders will receive Kevin's two lesson course, "How to Remember Everything in your Past" FREE! It's a \$19.95 value that has sold over a million copies! This complete package is also still covered by the same one year unconditional money back guarantee. Shall I add this to your order?

Customer Service - 1-800-323-3938. To cancel hold orders, give 800-695-8374.

To Reach Kevin Trudeau: Corporate Phone Number - Mega Systems, Merrillville, IN
219-736-6172

Address: Kevin Trudeau
PO Box 11031
Merrillville, IN 46410

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EXHIBIT E

MEGA BASIC

Names

Dates

Facts

Figures

Faces

MEGA ADVANCED

Large Amounts of Info

(textbooks, scripture, technical product info)

Large Series of #'s

Calculus Equations

Playing Cards

Statistics

Attention Deficit Disorder (A.D.D.)

Diet & Nutrition

+ The Video Never Forget Another Name

*...And it will take you to the full
potential of your memory!*

EXHIBIT E

Basic Package

8 audio cassette tapes

1 workbook

1 pocket guide

The basic package of Mega Memory sold over 1 million copies before the advanced package was ever produced. Due to extreme positive response from the basic course, Kevin went on to produce Advanced Mega Memory. The basic course takes about 8 hours to complete and still guarantees a 500% improvement in memory retention. It covers how to remember names, dates, facts, figures, etc. and is an excellent "start-up" course to unleashing a perfect photographic memory. You want to be careful that you don't "downgrade" the basic package to make it seem like it won't be worth their time.

Complete Mega Memory Package

14 audio cassette tapes

1 video entitled, "Never Forget Another Name"

2 workbooks

1 pocket guide

The advanced package is for anyone who is serious about reaching their full memory potential. It takes a 12-14 hour time commitment to complete. This package will go into greater detail about how to remember names with the help of the hour long video. It also goes into specifics on remembering enormous amounts of information, large series of numbers, math formulas and calculus equations, playing cards, statistics, and much more.

Upsells:

Our upsell rate on Mega Memory has been very low. You always need to try to sell the past tape. Some things to always mention when selling the past tape are:

1. Oh, I almost *forgot* to mention (ha, ha) the latest tape that Kevin has just produced. (this needs to be said sincerely and as sort of a joke, too)
2. This tape is usually \$19.95 but since you placed an order today, you can get it for only \$9.95 with NO extra shipping!
3. This tape is also covered under the 60 day money back guarantee and you could return just that one tape if you choose to for your \$9.95 back.
4. If you change you mind and call to order it later, we'll have to charge \$19.95 plus shipping. Now is the time to buy.
5. This technology allows you to selectively choose things you want to remember. It's not as if all your memories will come flooding back to you.
6. We had a guy call us to tell us that he lost his glasses many years ago and when he got this tape he remembered where they had fallen off. Incredible!

EXHIBIT E

Help Sheet - Overcoming Common Objections

1.) I have to talk it over with my spouse.

- Well, I completely understand that. There are a lot of people who make those kinds of decisions together. Let me ask you this, could he/she use a better memory, too? Does your wife/husband like to save money? Do you think your wife/husband would be pleased if you saved her/him \$160? Since you have the money back guarantee, you have nothing to lose, right? Which is better for you, Visa or Mastercard?

2.) First request for literature.

- Of the two million people who've done Mega Memory, most of them tell us that it makes more sense to evaluate course by *using* it - rather than by trying to make a decision from a brochure. We can send you the Mega Memory program with an unconditional 60-day money back guarantee which means if you're not completely satisfied after using it for 2 full months, we'll refund the purchase price —no questions asked! Two months would be enough time for you to evaluate the program, wouldn't it? You'd like to take advantage of the 50% savings, right? Which is better for you, Visa or Mastercard?

3.) Second request for literature.

- Are there other questions you have that I haven't answered for you? (Answer each question, then go for the close.)
- I'd hate to see you miss out on this substantial savings today. This is a special price, and since we've started this promotion, there's been an unbelievable response! You've already taken the first step to improving your memory by calling! With a . . . unconditional money-back guarantee you have nothing to lose, right? Based on that, let's get you started with Mega Memory, fair enough?

4.) Can this work for people with learning disabilities, ADD, dyslexia, or head injuries?

- These techniques were perfected with blind and retarded children back in the early 70's. Through research, we've found that everyone can improve their memory with this program (except Alzheimer's patients). We guarantee a minimum 500% improvement in memory, but the average person has a 1500-2000% increase in memory retention! I think you'll agree that any degree of improvement in memory is worth it, isn't it? We want you to try the program, for 60 days, with an unconditional guarantee. You be the judge of the results - I know you'll be satisfied because I've heard from people just like you who have had tremendous success. Would you prefer Visa or Mastercard?

EXHIBIT E

5.) I'd like to think it over before I order.

- Is it the money, or is it something else?

If money:

If I could break it up into two easy payments would you buy the program today? (If yes..)
Well, then what I can offer you is the basic course first - which covers how to remember names, dates, facts, and figures - and it's an excellent way to start to unleash a perfect photographic memory! The basic course contains 8 audio cassettes instead of 14, one workbook instead of 2, and although you don't get the video, you still get the handy pocket guide. And remember, this technology was developed with blind and retarded children - so it's easy to learn - and once you know it, you don't have to practice. By ordering today, the basic course is only \$69.95 plus \$9.55 shipping and handling - and we still honor Kevin's 60 day money back guarantee. When you're finished the basic course, you can call back and order the remaining tapes. That would be better for your budget, right?

If it's something else:

(Find out their real objection) Let me ask you a question, a \$139 investment is reasonable for something that's going to help you (and your family) for the rest of your life, isn't it? You'd like to have a powerful memory like Kevin does, wouldn't you? Well, you'll start seeing the results by lesson 3! You've already got the ability to never forget! You can't forget how to swim or tie your shoes, can you? Of course not! This course allows you to use the ability you already have - you just haven't been shown how to use it! Would you like to get started with a Visa or Mastercard today?

Some common "tie-downs" you can use throughout your pitch:

- You can see how you'd benefit from a 500% improvement, can't you?
- A 60 day money back guarantee is pretty fair, isn't it?
- Having a better memory would certainly benefit you, wouldn't it?
- You can see how this program would help you, right?
- Spending a half hour at a time on a lesson is reasonable, isn't it?
- If you could take a pill for \$140 dollars that would improve your memory, you'd swallow it, wouldn't you? Hal Hal Then what are you waiting for?
- You probably know other people this program could help, don't you?
- You probably know people who have good memories, right? Well, how would you like to have a great memory?
- \$139 is a reasonable investment for something that will help you (and your family) for the rest of your life, right?

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EXHIBIT E

STUDENTS

- they'll know the answers to test questions easily
- spend less time studying
- raise their grades and the possibility of scholarship money for college
- increase their overall efficiency
- improve their self-image, more confidence in themselves
- less stressful because they have more confidence in remembering things
- easily impress teachers and others - making school visits enjoyable
- learn foreign languages faster and with ease
- math formulas

BUSINESS/PROFESSIONAL USE

- remember people's names easily
- remembering appointments and things to do
- instantly recall details about important clients, prospects, associates
- remember facts, figures, statistics
- do presentations without notes
- impress people with your ability to remember (Wall Street story)
- directions to important meetings

HOME/PERSONAL USE

- remember shopping lists
- memorize playing cards
- study Bible scripture
- study foreign languages
- remember telephone numbers
- remember directions
- birthdays and anniversaries

SUCCESS STORIES

- chemist - memorizing the periodic table of elements
- doctors - memorizing all bones and muscles in the body
- lawyers - all the information about their clients and facts to win their cases
- accountants - memorizing all the tax
- teachers/educators - giving their students the advantage over the others, putting them way above grade

EXHIBIT E

Notes*Children*

The course is effective for anyone age 10 to the very elderly, however, children below age 10 can use the program with supervision. Now the program isn't too complicated for them, but their attention span at that age is limited. So, we recommend that you do the program with them and when they've lost concentration, turn it off, and go back to it when they're ready.

Students

Stress is a major factor in why students do poorly on tests. Mega Memory will teach them how to be relaxed and confident before taking their tests. Students will get better grades in less study time because they'll actually learn how to recall information when they need it.

Professionals

People who can walk into a room and meet 30 new people and remember their names, both first and last when leaving really leave an impression. They appear to be smarter than their coworkers and often times it's the little things that get you that promotion, close that sale or get you the new job you've been trying for. Dale Carnegie said it in his best selling book, *How to Make Friends and Influence People*. The sweetest sound in the language to a person is his name. If you want to make a favorable impression, call people by their name and watch them respond.

Seniors

The human brain is like any muscle in the body. The more you use, and exercise it, the better it will respond. Senior citizens are one of our largest markets. They assume because they're getting older, their memories are going to fade. It isn't necessarily so. The Mega Memory system allows people to stimulate their neuro transmitters and begin to dust off some of the cobwebs and see dramatic improvement in their recall ability.

Generic

The Mega Memory System teaches people how to file and retrieve information when they need it. At the Institute, Kevin Trudeau and his staff were able to prove that we are all born with perfect, virtually photographic memories. We remember everything we see, hear, feel and touch. The problem is recalling that information when we need. We like to explain the system as a mental filing system. For example, picture a room and in that room there were 500 file folders thrown all over the place, on the floor, on shelves, everywhere. I ask you to get me the Jones file and your response would be, yeah right, come see me in a couple of days. However, if you had filed the folders alphabetically in a cabinet, you would walk over and open the drawer, look under J and pull out the folder, simply and easily. That's what the Mega Memory System will do for you. Teach you how to organize and retrieve information simply and easily.

Complaint

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EXHIBIT F

Today! The Amazing Memory Secrets From A Man Who Virtually Flunked Out Of High School



Imagine meeting 50 people and remembering all of their names. Imagine giving a presentation and having facts, figures and details at your fingertips without having to "check your notes." Imagine having a 500% increase in your memory. Imagine recalling telephone numbers, playing cards, things to do, conversations, directions, appointments, addresses, everything you see, hear, read or even think about, all effortlessly. Imagine remembering everything for tests or increasing your intelligence, self-confidence, plus impressing everyone you meet. Imagine having a perfect **PHOTOGRAPHIC MEMORY!** With the American Memory Institute's revolutionary exclusive techniques taught in the "MEGA MEMORY" home study course—**NOW YOU CAN!**



Kevin Trudeau, Founder
American Memory Institute

"A lot of people think I've always had a photographic memory, but that's not true. As a matter of fact, I virtually flunked out of high school before I decided that I needed some help, and that's when I began developing the memory techniques that have made the American Memory Institute the world's most popular memory training school.

"There's a proverb I learned long ago that had a big impact on my life: 'It's not what you eat, but what you digest, that makes you strong. It's not what you earn, but what you save that brings you wealth. And it's not what you learn, but what you remember that makes you wise.' Best of luck with my program."

**You've Seen It On TV
Now Put It To Work For You**
UNBELIEVABLE? Not if you've seen or heard Kevin Trudeau in one of his thousands of television or radio appearances. Not if you have seen these amazing techniques

demonstrated on "The Tonight Show," "That's Incredible," or "20/20." Not if you have read about them in newspapers and magazines coast to coast. Not if you have seen him live with Zig Ziglar, Brian Tracy, or Charles "Tremendous" Jones.

days! Because these methods have been proven under the most difficult circumstances, they're guaranteed to work for you! Kevin's breakthrough techniques that you'll learn in this course allow you to release your own perfect photographic memory...effortlessly!

Over 1 Million People Can't Be Wrong!

- ✓ "A bargain at two, three, four times the price." *Manager, Honda Sales*
- ✓ "I have not only improved my recall of names and faces, but I can memorize a group at cocktail parties!"
V.P. Sales, A.G. Edwards
- ✓ "Of the 40 of our associates who took the program, a substantial number have reported increased earnings as a direct result of these improved skills."
Vernon A. Merin, Realtor
- ✓ "I have tried every memory course available. Kevin Trudeau's program MEGA MEMORY is light years ahead of them all. I would pay \$1,000.00 for this one."
Dr. Alex Duarte
- ✓ "Kevin Trudeau is a genius...the best teacher I have ever listened to. Priceless information!"
Prudential Insurance
- ✓ "My GPA went from a 2.5 to a 3.8! It is the best thing I have ever done!"
Kevin Bruen, College Student

Kevin Trudeau is the founder of the American Memory Institute, the world's largest memory training school, whose techniques have revolutionized and simplified memory development. And now you can experience, simplified memory techniques for yourself.

Memory Means More Money

In sales and business, a great memory means money! Why? Because, no matter what business you are in, you're really in the people business. Having instant and long-term recall of names makes you likable and helps people remember you! After all, a person's name is the sweetest sound to his or her ears. Plus, when you have instant recall of facts, details, and people, you appear more intelligent. **IN JUST 3 HOURS** you will begin to unleash the powers you already have! You will finish this course feeling powerful, in control and self-confident, and people will envy your new super memory ability.

Not Basic Association, Mega Memory Works While Others Fail

Maybe you've tried other memory courses and failed or found them hard to learn or difficult to use. **NOT** this time! Kevin Trudeau's breakthrough techniques were developed while working with blind and mentally handicapped students. Their recall ability increased from 15% to 90% in just 3

Knowledge Is Power, But Only If You Can Remember It

There is no such thing as a good or bad memory, only a trained or untrained memory. The easy-to-follow systematic method Kevin will teach you actually stimulates neurotransmitters in the brain to increase your memory and mental capacity. You'll remember everything you see, hear, read or even think about! What an advantage in your personal and business life!

Share It With The Whole Family Everyone Will Benefit From Their New Abilities

MEGA MEMORY is fun for the whole family to do together. Your children's self-confidence will soar. They'll find learning fun and exciting with their new super power instant recall memory. And they'll actually enjoy school. You will see their grades skyrocket with MEGA MEMORY. You'll be giving your children a gift that will last a lifetime!

One Year Money Back Guarantee

If you are not completely satisfied for any reason, simply return the program within one year for a full refund. You get to see for yourself...**RISK FREE!**

EXHIBIT F

What Is Your MQ? Take This Test And See For Yourself:

- | | |
|---|--|
| 1 Have you ever been embarrassed by forgetting someone's name ten seconds after shaking his or her hand? | 5 Have you ever forgotten to call someone or mail a letter? |
| 2 Do you need to remember product knowledge, facts or statistics in your profession? | 6 Have you ever been unable to call someone because you had forgotten his or her telephone number? |
| 3 When you make a presentation, do you feel more comfortable with notes or do you forget facts and details only to remember them later when it is too late? | 7 Have you ever had to apologize for forgetting an important meeting, appointment, birthday or anniversary? |
| 4 Do you read books and magazines or attend seminars and wish you could remember more of the information? | 8 Have you ever misplaced something (such as keys, important paper, etc.)? |
| | 9 Have you ever forgotten directions, or an address, or forgotten to stop at the bank, cleaners or a store on your way home? |

**Scoring - If You Answered Yes To 4 Or More Of These Questions,
You Need *The Mega Memory System* To Succeed!**

The Mega Memory System

The Mega Memory System contains 14 audio cassettes, 2 easy-to-use workbooks, and a handy pocket guide. Your personal instructor on all the cassettes is Kevin Trudeau, President and Founder of the American Memory Institute, the world's most popular memory training school.

We're also including, as a special gift, Kevin's popular TV video "Never Forget Another Name," yours **FREE!**

As Kevin teaches you his revolutionary memory techniques, you'll begin to see a difference almost immediately. You'll learn the secrets of organizing your thoughts. Amazing as it may seem, you already have the capability to remember more things—and recall them instantly—when you learn how to release the power of the subconscious mind. Not only will you see increased memory abilities, you'll also experience increased mind power as well.

Your increased mental powers will allow you to get more from life, and people will actually think you're smarter. That's because, as Kevin says, "It's not what you *learn*, but what you *remember* that makes you wise."

- | | |
|------------------------------------|---|
| ✓ Never Forget Another Name | ✓ Not Basic Word Association |
| ✓ Memory Means More Money | ✓ Revolutionary And Exciting New Techniques |
| ✓ Better Grades In Less Study Time | ✓ World's Largest Memory Training School |
| ✓ Easy-To-Learn Home Study Course | ✓ Used By Over 1 Million People |

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EXHIBIT G

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: DR. CALLAHAN'S ADDICTION BREAKING
TECHNIQUE TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 28

MSI/SALBERG COMPLAINT EXHIBIT G
TRUDEAD COMPLAINT EXHIBIT F
CALLAHAN COMPLAINT EXHIBIT A

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EXHIBIT G

PROCEEDINGS

1
2 ANNOUNCER: The following is a paid commercial program
3 brought to you by Mega Systems.

4 MR. TRUDEAU: Thanks again for joining me. I'm Kevin
5 Trudeau, and this is another edition of "A Closer Look."

6 Millions of people are addicted to food and are
7 overweight, constantly struggling with diet after diet, exercise
8 program after exercise program, yet more people are fat today
9 than ever before. Millions, too, are addicted to cigarettes and
10 can't quit, and probably millions more suffer from some kind of
11 addiction, compulsion, or phobia.

12 My guest today is Dr. Roger Callahan, an expert in the
13 field of addictions, phobias, stress, and traumas. He has been
14 featured on virtually every major TV and radio talk show,
15 including "Donahue" and CNN. He has been a best-selling author
16 whose revolutionary treatment for losing weight and quitting
17 smoking takes less than three minutes with 95 percent success.
18 If you smoke and want to quit, or if you want to lose weight once
19 and for all, today's show could be an answer to your prayers.

20 Dr. Callahan, thanks for being my guest today.

21 DR. CALLAHAN: Kevin, a pleasure to be with you.

22 MR. TRUDEAU: You know, I have to tell the viewing
23 audience how I met you because it was a fascinating story. As
24 you know, we do a series of infomercials like this where we
25 market different products, and I saw your ad in an airline

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1 magazine for the five-minute phobia cure. And I thought, you
2 know, that would be a great product for us to market if it works,
3 and I called you on the phone to discuss it with you, find out
4 your background; and I learned all about your, you know,
5 expertise and the books you've authored with the major book
6 publishers and your experience on CNN and "Donahue" and so forth.

7 And you said, Kevin, not only will we get rid of
8 phobias, but the treatments that you discovered, that you
9 invented get rid of addictions like food addictions so people can
10 lose weight easily without trying to diet. They can just lose
11 the weight because they reduce the urge to overeat.

12 You can reduce smoking, alcoholism, any type of
13 compulsion, depression, jealousy. And I was fascinated. I said
14 really, can you get rid of smoking? He said, Oh, yeah. I said
15 well, doctor, I smoke cigars, about six cigars a day, if you
16 remember this conversation -- I was calling you on the phone.

17 DR. CALLAHAN: Yes, I do, yeah.

18 MR. TRUDEAU: And I said I had gone to, for the last
19 six years, the top people in various fields trying to get rid of
20 --

21 DR. CALLAHAN: You mentioned some names to me, and they
22 were, indeed, the top people.

23 MR. TRUDEAU: The top people in hypnotists. I bought
24 subliminal tapes. I bought other types of tapes. I'd been to,
25 you know, different types of therapies -- biofeedback. I got

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1 accupressure, acupuncture. I, I got the patch. I got an ear
2 clip that uses some type of Chinese thing. I got magnets --
3 everything to try to quit. I bought little devices to try to cut
4 down, and nothing worked. And worse, I was just more stressful
5 trying to quit.

6 And you said, "Well, Kevin, the next time you have an
7 urge to smoke a cigar, you call me." So I called you on the
8 phone a few days later because for the first two days I didn't
9 want to call you. I was afraid you were going to take the cigar
10 away from me.

11 So I called you on the phone and said, Doctor, I really
12 have to smoke a cigar right now. And I remember this because it
13 wasn't that I wanted to; I had to.

14 DR. CALLAHAN: Yes.

15 MR. TRUDEAU: And a lot of people that are watching, if
16 you have an addiction to cigarettes or food, you know it's true.
17 If you want Haagen Daz Ice Cream, if you want pizza, if you want
18 hamburgers or French fries, or if you want a cigarette, you get
19 to that point, as you know, it's a have to: you have to smoke.

20 DR. CALLAHAN: Yeah. That's the keynote of addiction.

21 MR. TRUDEAU: Right.

22 DR. CALLAHAN: It's an irresistible, uncontrollable
23 urge --

24 MR. TRUDEAU: -- to do it.

25 DR. CALLAHAN: -- which is destructive in some way.

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1 MR. TRUDEAU: Oh, sure.

2 DR. CALLAHAN: And hurtful.

3 MR. TRUDEAU: And I said-- you said on a scale of one
4 to ten, where is it? And I says it's about a nine and a half.
5 You said fine. You gave me and walked me through the treatments
6 --

7 DR. CALLAHAN: Right.

8 MR. TRUDEAU: -- on the phone. It took less than five
9 minutes. It's a simple treatment you just do. Very simple, very
10 easy. And the urge reduced from a nine and a half to a one or
11 zero. It was gone.

12 DR. CALLAHAN: Yeah. That's right.

13 MR. TRUDEAU: I said, Doctor, I swear to you, I'm not
14 going to smoke this cigar, but I'm convinced it will come back,
15 the urge, if not tonight, tomorrow. And you said fine, if it
16 comes back, call me.

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: I said that's a deal. Six months passed,
19 and I never had the urge to smoke a cigar. I never smoked a
20 cigar.

21 DR. CALLAHAN: Right.

22 MR. TRUDEAU: It was incredible. Now, this is not
23 uncommon. You see this all the time in your practice.

24 DR. CALLAHAN: Yeah. We see that all the time. More
25 frequently, a person will have to repeat the simple treatment.

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1 Once they learn how to do the treatment, --

2 MR. TRUDEAU: Right.

3 DR. CALLAHAN: -- it only takes a minute or less.

4 MR. TRUDEAU: Yeah. It seems, it seems --

5 DR. CALLAHAN: Because once you know it and once the
6 person learns how to do it, they can do it without thinking about
7 it, and it takes less than a minute.

8 MR. TRUDEAU: Now, this is a revolutionary approach to
9 addictions.

10 DR. CALLAHAN: Oh, yes, yes. It's revolutionary in the
11 sense that nothing in psychology could have explained or
12 predicted this. It's revolutionary because it works with a high
13 success rate that's never before been possible.

14 And what we're doing, Kevin, is we're actually --when
15 we do the treatment, we're actually getting to the fundamental
16 causal level of the problem. It's not like just distraction or
17 reducing the symptom. We're actually getting at the core base of
18 the problem. I had to study quantum physics to really understand
19 that in more detail.

20 MR. TRUDEAU: Now, I remember you were on CNN --

21 DR. CALLAHAN: Yes.

22 MR. TRUDEAU: -- because with people who are
23 overweight, they have this uncontrollable urge to eat, whether it
24 be chocolate or candy bars or, you know, hamburgers, french
25 fries. People watching know they have addictions to Haagen Daz

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1 ice cream. You know, we eat too much food.

2 DR. CALLAHAN: Right.

3 MR. TRUDEAU: And, again, they eat when they are not
4 hungry.

5 DR. CALLAHAN: Yes.

6 MR. TRUDEAU: I mean, you authored the book, "Why Do I
7 Eat When I'm Not Hungry?" Right?

8 DR. CALLAHAN: That's right.

9 MR. TRUDEAU: But you were on CNN, and you had a very
10 interesting experience you were sharing with me.

11 DR. CALLAHAN: Yes. It was my third time on CNN. The
12 previous two times I helped some people with anxiety problems,
13 very quickly, who called in for help. This time the anchor said,
14 I hear you've been developing something with addiction. Well,
15 see if you can help me right now. I'm dying for some chocolate.
16 And the anchor who was with her joked and says, Yes.
17 She's going to eat her pencil. And she really looked desperate,
18 and it was serious. At first, I didn't know if she was joking
19 because they were laughing. And she says, no, it's very serious.
20 So I took her through the treatment. She was in Georgia, and I
21 was in a studio in L.A. And in about two minutes, because she
22 didn't know what they were all about -- two or three minutes --
23 her urge was not only gone, but you've seen a clip of that, you
24 know --

25 MR. TRUDEAU: Yes.

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1 DR. CALLAHAN: She does something like this, which is
2 very interesting. She says -- and we're telling her all the
3 while to think how good the chocolate would be. We're not trying
4 to turn her off.

5 MR. TRUDEAU: That's right.

6 DR. CALLAHAN: She said at the end of the treatment.
7 "Ooh, I don't even want any." Remember that?

8 MR. TRUDEAU: That's right.

9 DR. CALLAHAN: Isn't that interesting? We get that
10 every once in a while. Also, she became very relaxed. Her whole
11 being changed. Her manner changed because that, that power that
12 was driving that urge coming from a very deep level of being, was
13 simply dissipated. It was gone, not there anymore.

14 MR. TRUDEAU: And now you also find that when people
15 give themselves the treatment, because it just takes less than
16 five minutes, that their face sometimes changes, the stress
17 reduction goes down so much.

18 DR. CALLAHAN: That's right. Their face changes. I
19 had one patient who was addicted to pain pills, and it was very
20 serious because she was getting pain pills from a number of
21 different doctors, -- you know, one doctor would never give her
22 that many -- and she found that it made her relax, the only thing
23 that made her relax, but it was a terribly dangerous thing she
24 was doing. And I treated her. After the second meeting, by
25 telephone -- we treated her by telephone -- after second session.

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1 she didn't want, she didn't want any anymore, and about a week
2 later she called up and she said, you know, this is really
3 interesting. My friends are coming up to me and asking if I had
4 plastic surgery, I look so much better. She looked younger. All
5 the strain and stress and everything was gone out of her face.

6 We have people, too, who are very pale and they are low
7 on energy. After treatment, color comes into their face. They
8 feel so much better. So we know that a lot of physiologic and
9 chemical changes result as a function of this simple treatment.
10 It's a very deep, basic thing.

11 MR. TRUDEAU: Now, we were talking about smoking, and I
12 had a friend of mine, Jack Freeman, who is -- he's from
13 Charlotte, North Carolina. We had went to Las Vegas, and he, for
14 15 years, this guy smoked two and a half packs of cigarettes a
15 day.

16 Now, imagine, he's on the plane from Charlotte to
17 Chicago for about two hours without a cigarette. He gets off the
18 plane, and the plane was a little delayed because we were running
19 late. He says, Kevin, I have to smoke a cigarette. I said,
20 well, you can't. We have to just get right on this plane.
21 They're going to leave.

22 We hop on. Now we get another three hours to Las
23 Vegas. This guy is in the plane climbing the walls. Now, when
24 someone doesn't have a cigarette, what's going on there? Let's
25 talk about that phenomenon just for a moment.

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1 DR. CALLAHAN: I wrote a book called -- it's published
2 in Germany -- called "The Anxiety Addiction Connection" because I
3 found there is an addiction between anxiety and addictions. And
4 all addictions, Kevin, whether it's to nail biting, hair pulling,
5 heroine, cocaine, pain pills, cigarettes, chocolate, -- you name
6 it -- all addictions are a result of anxiety, and they are an
7 attempt to -- a wrong attempt, a tragic attempt to mask or
8 tranquilize the anxiety. And it just doesn't work. It doesn't
9 take care of the problem.

10 MR. TRUDEAU: So that's what people go on diets for?
11 If they try to stop cold smoking they are climbing the walls and
12 they are irritable?

13 DR. CALLAHAN: Yes, that's right. That's what it is.
14 They are having an anxiety attack. Even heroin withdrawal, I
15 found, is actually an anxiety attack.

16 MR. TRUDEAU: Really? Not physiological?

17 DR. CALLAHAN: No. Well, there are physiological
18 elements, but they are very minor, very minor. What I was
19 trained, and most professionals still believe, that in the heroin
20 addiction the problem is mainly physiologic. It's not at all.
21 There is a lot of evidence now to show that. It's not at all.

22 MR. TRUDEAU: Well, this fellow, Jack, when he was, you
23 know, climbing the walls on the plane, I walked him through the
24 treatments. We're sitting right next to him on the plane.

25 DR. CALLAHAN: Yeah.

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1 MR. TRUDEAU: And within two to three minutes, the urge
2 went from a ten -- actually, he said it was an 11 -- went from an
3 11 down to a zero, and he said I don't want the cigarette. I
4 have no urge. Then he goes, I can't believe it.

5 DR. CALLAHAN: Yeah.

6 MR. TRUDEAU: The meal came, and we started talking,
7 and he was eating. They were cleaning up all the plates, and he
8 had not finished his meal yet; he was still eating. He noticed
9 he was the last guy done eating, and he didn't even eat his
10 entire meal. And he grabbed me, and he says, Kevin that's the
11 slowest I've ever eaten in my life.

12 DR. CALLAHAN: Oh, yeah.

13 MR. TRUDEAU: Now, isn't that interesting? It seemed
14 to change everything.

15 DR. CALLAHAN: Yes. What happened is -- and they all
16 report this after the addiction treatment. They unanimously
17 almost will say, you know, I feel very relaxed.

18 MR. TRUDEAU: Right.

19 DR. CALLAHAN: I feel very calm inside. And that's
20 what it was. He didn't have that frantic kind of a need to push
21 and shove the meal down. So it's better for his digestion also.

22 MR. TRUDEAU: Oh, sure.

23 DR. CALLAHAN: But, you know, there is something very
24 important for people -- you said at the opening, if they want to
25 quit smoking.

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1 MR. TRUDEAU: Right.

2 DR. CALLAHAN: Let me tell you something: Some of them
3 don't want to quit smoking. I recommend those who don't want to
4 quit smoking but have to fly across country or attend meetings
5 where they are not allowed to smoke, do this treatment and watch
6 what it can do for them. And they find that it's not going to
7 drive them crazy to be without their cigarettes, they may change
8 their mind about it.

9 MR. TRUDEAU: They may want to.

10 DR. CALLAHAN: But even if they never want to, at least
11 they are going to have more control over it. It's not going to
12 be running them, not controlling them. They can regain control.

13 MR. TRUDEAU: That's funny, because we both know a
14 major celebrity, who will be nameless, who just yesterday just
15 did the treatment because "I don't want to quit; I like smoking."
16 I said, well, do this treatment anyways, and then smoke the
17 cigarette. We did the treatment. He didn't want to smoke it.
18 He says you know something? Maybe I do want to really quit.

19 DR. CALLAHAN: Sure.

20 MR. TRUDEAU: Because he was afraid, as you mentioned,
21 to try to quit because he thought it was going to be very
22 difficult and stressful and so forth.

23 DR. CALLAHAN: Oh, yeah. I know how difficult it is
24 when I quit 30-some years ago. It was terrible. I went through
25 hell. And there are people who -- most smokers have tried it.

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1 and they find that, Jesus, I'd rather die of lung cancer or heart
2 disease than end up in a mental hospital. That's the way it
3 stands for them.

4 MR. TRUDEAU: Right, right. For those of you watching
5 who do want information on Dr. Callahan's techniques, it's a
6 videotape where you, in just about 15 minutes, explain and show
7 the treatment, how to apply it.

8 I highly recommend it. I've seen this in-action. It's
9 probably the most revolutionary thing you can do, if you have any
10 addiction, whether it be for food, if you're overweight, if you
11 have a smoking addiction, if your children are addicted to drugs
12 -- any compulsion, anything whatsoever, we recommend you call the
13 800 number and get information on the video because it really
14 could change your life. And it's something that I feel very
15 passionate about because I've seen the results for myself and in
16 my own life.

17 Now, let's talk about weight loss. We've talked about
18 smoking, but people out there -- and I'm one of them -- we like
19 to eat food. You know, I --

20 DR. CALLAHAN: Almost all of us are.

21 MR. TRUDEAU: It's a very pleasurable experience.

22 DR. CALLAHAN: Yeah. And it really is, yeah.

23 MR. TRUDEAU: And sometimes you eat to the point -- and
24 I think people can relate to this -- you eat when you're not
25 hungry. You just go past that point.

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1 DR. CALLAHAN: Or it's so good, and you can't resist
2 it. See, that's the key element. If you could resist it, then
3 you don't have any problem.

4 MR. TRUDEAU: Right.

5 DR. CALLAHAN: And there are very few people like that,
6 they can just resist it. "Oh, I'll lose a few pounds. I'll just
7 leave this out and leave that out," and they don't have any
8 trouble, but most of us have trouble; and that's what we mean by
9 addiction.

10 MR. TRUDEAU: It seems that a lot of these diets that
11 people try would work if you followed through on them, --

12 DR. CALLAHAN: Yeah.

13 MR. TRUDEAU: -- but people, quote, cheat, or they
14 can't -- because they are just being driven -- at ten o'clock at
15 night they open up the refrigerator and out comes the Haagen Daz.

16 DR. CALLAHAN: The editor who bought my book, "Why Do I
17 Eat When I'm Not Hungry?" -- she was at Doubleday at the time --
18 she and her husband are very nice people, and they love good
19 food. In fact, they go over to Italy -- they go to Bologna and
20 study the special gourmet cooking that they have there and so
21 forth, and she always has been over 30-some pounds, and she'd
22 always go crazy when she was there because it was so good and she
23 could not resist it.

24 Well, she read the book, of course, that she bought.
25 She later left Doubleday, so that's relevant for the rest of this

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1 story because at the International Book Fair, my agent was there,
2 -- I think it was at Brussels -- and he said that she was telling
3 everybody that for the first time she could go to Bologna and
4 only eat smaller amounts. She didn't have to eat so much. The
5 drive was gone, that extra urge. That addictive urge was gone,
6 so she was raving about it to everybody.

7 MR. TRUDEAU: She could really enjoy the food --

8 DR. CALLAHAN: But she could still enjoy good food --

9 MR. TRUDEAU: -- without feeling guilty --

10 DR. CALLAHAN: -- without feeling guilty.

11 MR. TRUDEAU: -- and actually reduce weight because she
12 could eat normally without having that urge.

13 DR. CALLAHAN: Exactly. Isn't that wonderful?

14 MR. TRUDEAU: It's fascinating. Now, you had mentioned
15 about some of the talk shows you've been on radio, because you've
16 been on many --

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: -- and you treat people right over the
19 phone in a few minutes.

20 DR. CALLAHAN: They call -- we tell them to call -- you
21 know, I'll tell you why I do this. It's very simple. When I
22 wrote my first book, it was a Book-of-the-Month Club selection on
23 romantic love, and like every other author, I just went on show
24 after show and just discussed the concepts in the book.

25 But when I wrote the "Five-minute Phobia Cure," I knew

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1 nobody in their right mind would believe me or even should
2 believe me because it's so outrageous, it's so revolutionary. So
3 I told all the producers, get people who have these problems, and
4 let me show you.

5 So when I was appearing on the radio shows and I had
6 just discovered the addiction treatment, I told the listening
7 audience because I wanted to show people what we could do, so
8 they didn't just have to take my word for it. You know, in the
9 privacy of your office, you can make any claim you want. Nobody
10 knows the difference.

11 MR. TRUDEAU: Sure, you can. Right, right, right.

12 DR. CALLAHAN: So I wanted to show the world that we
13 really had something quite real and powerful. And so we had -- I
14 urged anyone calling in who had any addictive urge for anything
15 -- we've had people call in for -- who needed to shoot up with
16 heroin, they needed to take the extra alcoholic drank, they were
17 -- the first one who called was on the way to the refrigerator,
18 she said, and she heard me say that. She stopped, picked up the
19 phone, and called.

20 She says, I'm on my way to the refrigerator right now.
21 I'm in there to get my favorite desert, that ice cream with
22 chocolate on it. She said, I can't resist that stuff. Is there
23 anything you can do for me?

24 In a matter of about a minute and a half, in her case.
25 she didn't want it, didn't need it. Now, listen to this: 104

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1 people in a row -- I kept the records on this -- called before we
2 ran into the first person that we couldn't help within the time
3 constraints of the show.

4 MR. TRUDEAU: Now --

5 DR. CALLAHAN: That was over a lot of shows. That
6 wasn't one show. That was about 30 or 40 shows.

7 MR. TRUDEAU: Right. Well, that brings me to the next
8 question: Does this treatment work for everyone 100 percent of
9 the time?

10 DR. CALLAHAN: No, no; of course, not. There are some
11 people that it won't work for at all: their problems are too
12 complicated. Also, let's make it clear --

13 MR. TRUDEAU: But that's a very small percentage.

14 DR. CALLAHAN: It's a small percentage, and they can
15 usually be helped with individual treatment --

16 MR. TRUDEAU: Right.

17 DR. CALLAHAN: -- which we do by telephone.

18 MR. TRUDEAU: Which you still do over the phone, right?

19 DR. CALLAHAN: Yeah. We and our staff can check them
20 through their voice, and we can treat them by phone.

21 MR. TRUDEAU: But it helps most of them, and what we
22 mean by "help" is we don't mean we cure their addiction in a
23 couple of minutes.

24 MR. TRUDEAU: Right.

25 DR. CALLAHAN: What we mean is that their addictive

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1 urge, that uncontrollable urge is gone, completely gone, and they
2 feel fine.

3 MR. TRUDEAU: Right.

4 DR. CALLAHAN: And there is no resistance. They don't
5 have to fight it. Now, they may have to repeat that treatment
6 over and over until -- the beautiful thing is for the first time
7 in their life, the cause, the deep cause of the problem is being
8 addressed during this treatment, believe it or not.

9 MR. TRUDEAU: Right.

10 DR. CALLAHAN: The real cause.

11 MR. TRUDEAU: Which brings me to the next point: What
12 is the root cause that we're dealing with? I mean, you talked
13 about energy patterns running through the body, you know, with
14 meridians from the ancient arts.

15 DR. CALLAHAN: It's very, very difficult to explain
16 this, Kevin, because it does relate to quantum physics. There is
17 information -- God, how do I, how do I briefly tell you this?

18 The quickest thing I can tell you is that they are
19 anxious. When we do the treatment, they are not anxious. And
20 when we eliminate the anxiety, they don't need the heroin, they
21 don't need the alcohol. The withdrawal is gone.

22 MR. TRUDEAU: Is that why when someone tries to quit
23 one addiction, another one replaces it?

24 DR. CALLAHAN: Sure. Without treating the addiction --
25 Alcoholics Anonymous, which has been up until recently the best

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1 form of treatment for alcoholism, what do they do? They go there
2 and they get addicted to sugar, coffee, all kind of things, which
3 are better addictions, by the way, because the alcohol was
4 probably ruining their life, --

5 MR. TRUDEAU: Right.

6 DR. CALLAHAN: -- but, nevertheless, they still remain
7 highly addicted to these other things.

8 MR. TRUDEAU: Well, let's talk about the alcohol. You
9 had mentioned a story where you live in Palm Springs, someone
10 came into the grocery store that recognized you from TV.

11 DR. CALLAHAN: Yeah. I live in Indian Wells, which is
12 right near Palm Springs, and I was going to the supermarket one
13 day, and somebody slapped me on the shoulder. I looked around,
14 and I see this smiling face.

15 And he says, Dr. Callahan. I says, yeah. Hi, how are
16 you? He says, I saw you on television. He says, I saw you a
17 year and a half ago, and you were doing something about
18 addictions on there. I says, yeah, yeah, I remember that. And
19 he says, you know, I've tried that. I've been an alcoholic for,
20 like, 20 years, tried a lot of different programs. Nothing
21 helped me.

22 He says, I just followed the directions that you did on
23 that program, and I feel so great, I want you to know I haven't
24 had a drink in a year and a half. He said, I'm so grateful to
25 you. Now, that's the kind of thing that makes somebody feel

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1 good.

2 MR. TRUDEAU: It's amazing because I read some books
3 for different addictions and overweight.

4 DR. CALLAHAN: Yeah.

5 MR. TRUDEAU: And it seems that it's always about some
6 type of psychological problem, some type of stress, something
7 they are trying to cover up or hide.

8 DR. CALLAHAN: Yeah.

9 MR. TRUDEAU: And I know the feeling. I mean, I've
10 been there like a lot of people where you just want to eat, and
11 you're not hungry; and you say, you know, I just have to eat this
12 food.

13 DR. CALLAHAN: In November, the American Psychological
14 Association -- that's my professional organization -- came out
15 with a newspaper article reporting that the science director --
16 that's the group -- the head of the research and so forth
17 representing the organization -- found that really the people
18 trying to help other people with problems aren't doing very well.

19 They are not really helping much. So the problems
20 usually always come back, and so you see, but that's not applying
21 to this work. They are not aware of this yet. This gets to the
22 heart of their problem, eliminates in most cases, very quickly.

23 MR. TRUDEAU: For those of you watching, again, who do
24 want information on Dr. Callahan's technique, it's a video which
25 can eliminate or help reduce the urge of any addiction that you

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1 may have. If you are overweight and you've been trying to lose
2 weight, this could be -- and I believe it may be the answer that
3 you've been looking for. If you've been trying to quit smoking
4 and really want to, try this.

5 You have nothing to lose by trying it. I've used the
6 techniques myself. I've tried them on my friends. The results
7 have been nothing more than miraculous or spectacular. You have
8 the video, "Hope without Reason."

9 DR. CALLAHAN: "hope with Reason," yeah.

10 MR. TRUDEAU: "Hope with Reason."

11 DR. CALLAHAN: And, you know, how about the story about
12 the makeup lady?

13 MR. TRUDEAU: Oh, yeah. Every time that we would run
14 into someone we would use the technique --

15 DR. CALLAHAN: She was curious about what we did, and
16 so I said, do you want to experience it? She said, Yeah. This
17 happened about 20 minutes ago.

18 MR. TRUDEAU: Right.

19 DR. CALLAHAN: And she said -- I asked her, Is there
20 anything in your past that -- you know, most of us have things in
21 our past, some kind of pain or trauma.

22 MR. TRUDEAU: Everyone does. Sure. Yeah.

23 DR. CALLAHAN: Right. And I said I don't want to know
24 what it is, but think about it, and how high do you go? She went
25 all the way to the top of the scale for ten. How long have you

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1 had this? Seven years.

2 Well, she's only 29 years old, so she's had this almost
3 a third of her life. Every time she would think of this during
4 the last seven-year period, she'd be in great pain and misery.
5 In a matter of maybe a minute and a half, we got her to a one,
6 which I use as the lowest end of the scale, no trace of it.

7 MR. TRUDEAU: Right.

8 DR. CALLAHAN: And she walked around later, saying, I
9 feel so good. I feel like a load or burden. But, you see, until
10 my discoveries, nothing like that was possible.

11 MR. TRUDEAU: Right.

12 DR. CALLAHAN: And so, check back with her and see how
13 long it endures. We expect that to last forever.

14 MR. TRUDEAU: What other doctors right now -- I know a
15 lot of doctors, therapists from -- whether they be psychiatrists,
16 psychologists --

17 DR. CALLAHAN: Yeah.

18 MR. TRUDEAU: -- are coming to you to learn these so
19 they can treat their own patients.

20 DR. CALLAHAN: Oh, yes.

21 MR. TRUDEAU: What are other people, therapists saying?

22 DR. CALLAHAN: Oh, gosh. We have all kinds of -- for
23 example, at our last training session in June, this last June,
24 Dr. -- what's his name? -- from Massachusetts -- well, put his
25 quote up and let them see it because he said something really

EXHIBIT G

22

1 spectacular, and I want his name on there.

2 MR. TRUDEAU: Yeah.

3 DR. CALLAHAN: He said he's been a psychiatrist for 30
4 years, but since he's been doing my procedure, -- this is really
5 terrific -- he said for the first time in 30 years, he has the
6 satisfaction of actually helping his patients. Now, we get
7 things like that from all over.

8 We had people from Europe, from Canada, and doctors all
9 over the country who -- Dr. Fred Gallo, for example, from
10 Pennsylvania, is very, very excited because he's been able to
11 eliminate depression with these techniques which we developed
12 some time ago. And he's just thrilled about it because he had
13 always thought that depression was a chemical problem.

14 MR. TRUDEAU: Right.

15 DR. CALLAHAN: You have to do something with the
16 chemistry. When we do the treatments, Kevin, the chemistry
17 changes.

18 MR. TRUDEAU: The actual ---

19 DR. CALLAHAN: Sure, because we're working on a more
20 fundamental level than the chemistry. We're working at the
21 input-of-information level into the body. The chemistry and the
22 thoughts come later. I used to work just with thoughts.

23 MR. TRUDEAU: Right.

24 DR. CALLAHAN: They are almost irrelevant.

25 MR. TRUDEAU: It's amazing. Now, people can learn the

EXHIBIT G

23

1 treatments within less than ten or fifteen minutes.

2 DR. CALLAHAN: Well, on the video we take them through
3 the step-by-step recipes that we've developed that will help most
4 people.

5 MR. TRUDEAU: Now, when you see these physiological
6 changes, -- we talked about the stress reduction, we talked about
7 the urges going away - is there any other physiological or health
8 benefits that you know are associated with the treatments?

9 DR. CALLAHAN: Oh, yeah, because there is a lot of --

10 MR. TRUDEAU: Does energy levels increase, for example?

11 DR. CALLAHAN: Oh, yes. Well, there is a lot of
12 physiologic health benefits simply from eliminating psychological
13 problems. It's been known for many, many years that most
14 patients that go to their general practitioners or doctors
15 actually -- at least half of them mainly have something
16 psychological behind their problem.

17 MR. TRUDEAU: You know, I was reading in a trade
18 journal that the 900 lines, the psychic lines, --

19 DR. CALLAHAN: Yeah.

20 MR. TRUDEAU: -- the number-one reason people call is
21 because they are feeling bad, some type of depression --

22 DR. CALLAHAN: Yeah.

23 MR. TRUDEAU: -- which usually leads them to overeat,
24 and they are looking for relationships, they are looking for
25 love, and they have some type of love pain. And they continue to

EXHIBIT G

24

1 call over and over again to try to get some type of relief from
2 this bad feeling. And these treatments that you give that you
3 teach people how to administer to themselves in just a matter of
4 minutes can alleviate that problem --

5 DR. CALLAHAN: Yes, in most people.

6 MR. TRUDEAU: -- and not just -- maybe they have to
7 apply it a few more times, --

8 DR. CALLAHAN: Yeah.

9 MR. TRUDEAU: -- but how long does it last?

10 DR. CALLAHAN: Well, it will vary from one person to
11 the next. It's really shocking that in a small number of them,
12 one treatment is all they need. My first case, you know, was
13 with a Snicker bar addiction. This patient came to me because
14 her doctor told she was developing a heart problem. She needed
15 to lose about 40 pounds.

16 She went back six months later. She hadn't lost a
17 pound. And she explained to her doctor it's because of the
18 Snicker bar. I got to have Snicker bars all the time. She
19 carried a bunch of them in her purse for emergencies. And so she
20 came to me and said -- I had already helped her with a serious
21 anxiety problem -- and she said, do you think you could help me
22 with this? I said, let's find out. So we had her think about
23 Snicker bars, treated her. It took about two or three minutes,
24 at most. That was 14 years ago, and I keep checking with her.
25 She hasn't wanted another Snicker bar since.

EXHIBIT G

25

1 MR. TRUDEAU: It's amazing --

2 DR. CALLAHAN: That's what happens.

3 MR. TRUDEAU: -- because when you do the treatment,
4 like when you mentioned about the CNN, you don't try to hide what
5 the person -- you say, here, look at it, --

6 DR. CALLAHAN: Yeah.

7 MR. TRUDEAU: -- smell it.

8 DR. CALLAHAN: Think about how good it is:

9 MR. TRUDEAU: Think how wonderful it is. And I've seen
10 people like with Haagen Daz Ice Cream who are about to just jump
11 right in -- and the ice cream is great, as we know, but say, I
12 don't want it. Now, the other thing that you had mentioned which
13 was fascinating is that people can still eat chocolate, they can
14 still eat Haagen Daz, but now they are in control. They can eat
15 it, or they can still smoke the cigarette, --

16 DR. CALLAHAN: Yeah.

17 MR. TRUDEAU: -- but they are now in control.

18 DR. CALLAHAN: Yeah. People can eat and smoke and do
19 all kinds of things without being addicted. What we are after is
20 eliminating the addiction.

21 MR. TRUDEAU: Do you find that when people use the
22 treatments for being overweight that there is -- that they lose
23 weight very quickly without any stress whatsoever?

24 DR. CALLAHAN: Well, it's much easier for them,
25 obviously. For example, this first patient I was telling you

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1 with the Snicker bars, all she had to do was leave out the
2 Snicker bars, and she started keeping everything else the same
3 and started dropping a pound, two pounds a week.

4 MR. TRUDEAU: So now people don't have -- for the first
5 time don't have to, quote, go on a diet.

6 DR. CALLAHAN: Yeah.

7 MR. TRUDEAU: They can just eliminate the addiction to
8 food that they know they shouldn't be eating?

9 DR. CALLAHAN: That's right, yes.

10 MR. TRUDEAU: And they can eat normally, be
11 happy --

12 DR. CALLAHAN: Exactly.

13 MR. TRUDEAU: -- and have no deprivation.

14 DR. CALLAHAN: Right.

15 MR. TRUDEAU: Which is a key. When people try to go on
16 diets, I know, they always feel like they are being deprived of
17 something that they really want.

18 DR. CALLAHAN: Oh, yeah.

19 MR. TRUDEAU: But you're saying --

20 DR. CALLAHAN: And they can't wait to get off the diet.

21 MR. TRUDEAU: You're saying you eliminate the want.

22 DR. CALLAHAN: We eliminate that excessive addictive
23 urge, yes. That's right.

24 MR. TRUDEAU: And if you are overweight -- I think
25 every person who has had this type of addiction to food feels

EXHIBIT G

1 that -- they know that they've been overweight. Let's talk about
2 sports. You mentioned an Olympic swimmer.

3 DR. CALLAHAN: Uh-huh.

4 MR. TRUDEAU: What type of result --

5 DR. CALLAHAN: Oh, yeah. We had -- an Olympic swimmer
6 was sent to me by a psychologist who he was working with because
7 he knew I had developed a phenomenon. It's a very interesting
8 thing I call "psychological reversal." It's sort of a
9 self-sabotaging thing that can happen to any of us.

10 MR. TRUDEAU: I think a lot of us can relate to that.

11 DR. CALLAHAN: That's right. And he's an excellent
12 athlete. He's just superb, and he was on the -- one of the major
13 teams. And -- but he had trouble just getting over the edge:
14 every time that he was observed and so forth, he couldn't perform
15 up to his maximum ability. We fixed his reversal. Boom, he
16 suddenly did well and played in the Olympics.

17 MR. TRUDEAU: So this can reduce stress if people are
18 in real-life situations, maybe businessmen are going into
19 meetings and their stress is going up?

20 DR. CALLAHAN: We help a lot of golfers. You know, in
21 the Palm Springs area there's more golf courses per capita than
22 anywhere in the world, so we get a lot of golfers who are
23 interested, and they have the yips. You know, they do well when
24 nobody is looking, but putting, you know, the short game really
25 suffers from anxiety, and it's a phobia. I treated, I treated a

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1 hall-of-fame athlete and two golf champions who had some of that
2 problem, and as soon as we treated them, wham, they took off.

3 MR. TRUDEAU: Yeah. We call it "choking under
4 pressure." Right?

5 DR. CALLAHAN: That's right. Yeah. I just was talking
6 to a person I know who owns archery -- manufactures archery
7 equipment, and he was telling me that it's a big problem there,
8 too, that a lot of people drop out because they get the yips when
9 they are shooting at a target. They get nervous, apprehensive,
10 phobic.

11 MR. TRUDEAU: Sure. Dr. Callahan, time is running out
12 and I really appreciate you being my guest. It's a fascinating
13 subject. Hopefully, we'll have time to have you on again to talk
14 more about it.

15 DR. CALLAHAN: Good.

16 MR. TRUDEAU: If you are overweight, if you've been
17 trying to quit smoking and you can't, please call the 800 number.
18 This is something that I personally can endorse and recommend.
19 I've used it myself. I've seen my friends use it. We both have.
20 And the results have been nothing but spectacular. Call the 800
21 number.

22 Thanks again for being with me and watching. I'm Kevin
23 Trudeau, and this has been another edition of "A Closer Look."

24 ANNOUNCER: The preceding has been a paid commercial
25 program brought to you by Mega Systems.

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EXHIBIT H

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FTC MATTER NO.: 942-3278

TITLE: DR. CALLAHAN ADDICTION BREAKING
TECHNIQUE TELEVISION INFOMERCIAL
(TRUDEAU ONLY)

PAGES: 1 THROUGH 25

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TRUDEAU COMPLAINT EXHIBIT G

EXHIBIT H

P R O C E E D I N G S

1
2 The following is a paid, commercial program brought to you
3 by Mega Systems.

4 Thanks for joining me. I'm Kevin Trudeau, and this is a
5 very special edition of A Closer Look.

6 If you are one of the 65 million Americans who are
7 overweight, please stay tuned. We're going to be sharing the
8 most revolutionary breakthrough that can allow you to lose all
9 the weight you want.

10 If you have any addiction, if you're addicted to food, if
11 you're addicted to cigarettes and want to quit smoking, please
12 stay with me. If you have any stress and anxiety in your body,
13 please stay tuned for this show.

14 We're going to be sharing Dr. Callahan's revolutionary
15 breakthrough that he had discovered while studying quantum
16 physics. Dr. Callahan came up with a breakthrough that in 60
17 seconds can eliminate your addictive urge to overeat, to smoke
18 cigarettes, to do any compulsion, any type of addicted behavior,
19 whether it be alcohol, drugs, cigarettes, food, maybe picking
20 your thumb, any type of compulsive behavior, and eliminate all
21 the stress and anxiety in your body.

22 Now this technique will take 60 seconds to apply and works
23 in virtually 100 percent of the time.

24 Let me explain who Dr. Callahan is. Many of you know me,
25 I'm Kevin Trudeau, founder of the American Memory Institute and

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1 the host of A Closer Look. I bring and find some of the most
2 important people and breakthroughs that are out there in the self
3 improvement area. Things that can have a positive change in your
4 life.

5 I found Dr. Roger Callahan, who is a clinical psychologist
6 and one of the world's foremost authorities on addictions,
7 compulsives, compulsive behavior, phobias, and stress and
8 anxiety. He's written several books including "Why Do I Eat When
9 I'm Not Hungry," "Love, Pain, Stress and Anxiety: The Anxiety-
10 Addiction Connection."

11 And what he found as a practicing clinical psychologist for
12 35 years, while studying quantum physics, is that the root cause
13 of all addictions is the same thing. Whether you're addicted to
14 food -- now let me ask you a question.

15 If you are overweight, if you right now watching have an
16 overweight, fat problem, isn't it true that it's because you eat
17 when you're not hungry? Isn't it because that you have an
18 overwhelming compulsion to eat food when you don't want to.

19 Maybe you're addicted to pizza. Maybe you're addicted to
20 Hagen Daas ice cream. Maybe your's is potato chips. Maybe
21 you're addicted to -- maybe you just eat large, massive
22 quantities of food. Maybe you eat late at night. Whatever your
23 addiction is, maybe it's chocolate. You have this overwhelming,
24 uncontrollable desire to eat food when you're not hungry.

25 That's the reason you're overweight. That's the number one

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3

1 cause of people being overweight.

2 You've tried diets, you've listened to hypnotic tapes,
3 you've listened to subliminal tapes, you've tried exercise
4 programs, but nothing works. Why? Because you can't stick with
5 the program. Heck, if you go on a diet for three weeks and stick
6 to it, you'll lost weight.

7 The problem is, you can't stick to it. Why? Because you're
8 struggling the entire time. You have an uncontrollable urge to
9 eat when you're not hungry.

10 I've known people that, maybe you're watching a show right
11 now, who are saying as you're eating your pint of Hagen Daas ice
12 cream, yeah, that's exactly me. Maybe you eat pizza, piece after
13 piece after piece, and just stuff your face.

14 Do you ever just go to a buffet and just fill your plate,
15 and fill it again, and fill it again, and ask yourself as you're
16 stuffing your mouth and say, I'm full. I don't feel good. Why
17 am I doing this?

18 I want you to know, it's not your fault. Up until now,
19 folks, not one program has ever gotten to what we believe to be
20 the root cause of all addictions, whether it be cigarettes,
21 whether it be food, whether it be alcohol, whether it be any type
22 of addiction or compulsive behavior.

23 The root cause, Dr. Callahan discovered, is a stress and
24 anxiety energy field that flows through the body. You see, when
25 -- right before we have to smoke that cigarette or eat that food

EXHIBIT H

4
1 or eat that chocolate or eat that -- those cookies or cakes or
2 ice cream or pizza, whatever it is, right before we do that,
3 there is a field of energy, Dr. Callahan calls it prutravations
4 in the thought field. That's the big word.

5 There's a field running through the meridians in your body,
6 it's energy. It's stress and anxiety. As that energy field
7 begins to flow up, we attempt to mask it. We mask it by smoking
8 a cigarette, by eating some chocolate, by eating cookie after
9 cookie after cookies, by eating the ice cream, by having another
10 helping of food when we're full. That's how we mask the stress
11 and anxiety.

12 Nothing has gotten to the root cause. Well, Dr. Callahan,
13 in research in quantum physics, figured out a way that in 60
14 seconds you can do a simple technique to yourself that will knock
15 out and eliminate the stress and anxiety pattern. The stress
16 actually dissipates out of the cells. When that happens, you
17 begin to breathe different, you begin to feel different, you feel
18 lighter. All the stress just left your body, you feel totally
19 relaxed. And the urge to overeat or the urge to smoke is gone.
20 It's eliminated. It's 100 percent gone.

21 Right on CNN, Dr. Callahan took one of the anchor gals, he
22 was talking about phobias and how he gets rid of and cures
23 phobias in 60 seconds, and he was talking about addictions. This
24 gal was addicted to chocolate. She was a chocoholic. This is
25 the anchor woman right on CNN.

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5

1 She said, "Dr. Callahan, I'm addicted to chocolate. I have
2 this chocolate compulsion. I eat it all the time. I have to eat
3 it. It's an uncontrollable urge. I don't have any control over
4 it."

5 Many of you right now, if you smoke cigarettes, if you eat,
6 you know, it's an uncontrollable urge. It has nothing to do with
7 will power. You're a good person. It has nothing to do with --
8 people say oh, you just don't have enough will power. No, it's
9 uncontrollable. You can't control this. It's not your fault.
10 It's this field of energy running through the body.

11 Well this uncontrollable urge, she said, "I have an
12 uncontrollable urge to eat chocolate." He said, "Well, on a
13 scale of one to ten, where's your urge right now?" She said,
14 "Well, it's about a five or a six." He said, "Do you have any
15 chocolate on you?" She said, "Well of course I have chocolate on
16 me. I eat it all the time." He said, "Can you take it out of
17 your purse." "Oh no, I can't do that. Because then I'll have to
18 eat it, and I won't have any control over it. Doctor, I'll just
19 have to eat it."

20 He said, "Take it out anyway. She takes it out and he says,
21 "Open up the package and smell it. I want you to imagine how
22 wonderful and how delicious this chocolate's going to taste. I
23 mean, it's chocolate. It tastes great."

24 So she begins to smell it. "Oh Doctor, I have to eat this
25 now." He said, "On a scale of one to ten, where is your urge?"

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1 She said, "It's over a ten. I have to have it." He said, "Fine."

2 He walked her through a 60 second procedure, a simple
3 technique right there. Right at CNN studios. This is the anchor
4 woman. And he said, "Where's your urge now?"

5 She looked at that chocolate and she said, "I don't want
6 it." He said, "No, don't tell me that." He said, "Pick up that
7 chocolate. You love chocolate. Chocolate tastes great. You
8 couldn't -- you had to eat it a minute ago. Smell it. Imagine
9 how wonderful it's going to taste if you eat it."

10 She smelled it and here's exactly what she did. "Ugh, I'm
11 repulsed by it, Doctor. I don't want it. I do not want it."

12 What happened? The stress and anxiety energy field that was
13 running through the body, he broke it up with that simple
14 technique. And when he broke it up, she began to breathe
15 different, all the stress left her body, she felt great. She was
16 like, wow. Her facial muscles relaxed. She looked beautiful and
17 radiant and she had no desire to eat that chocolate. The
18 uncontrollable urge was gone.

19 Now let me ask you a question. If you're fat, if you're
20 overweight, and most people out there are. I read a report in
21 some magazine that said over 65 percent of all Americans are
22 either on a diet, just got off a diet, about to start a diet.
23 That's a lot of people that have a weight problem.

24 I'm sure hundreds of millions of dollars are spent every
25 year on pills and powders and shakes and diet packaged food and

EXHIBIT H

7

1 diet programs and tapes and hypnosis tapes and all these
2 ridiculous things. They don't work.

3 Why? Because nothing gets to the root cause of the
4 addiction. The food addiction. Nothing.

5 Dr. Callahan, while studying quantum physics, figured out
6 that he has this technique that in 60 seconds you can break up
7 the stress and anxiety in your body and eliminate totally the
8 addictive urge.

9 Now what will that mean to you? That means you can lose
10 weight easily, effortlessly, because you don't have any urge to
11 overeat when you're not hungry. The urge is gone.

12 I was on Value Vision, one of the home shopping clubs, a
13 wonderful organization. We were on here selling the videotape,
14 Dr. Callahan's videotape, that people can learn the techniques.
15 It takes 15 minutes to learn the technique and only a minute to
16 apply.

17 We broke all the records. People were buying this thing
18 like crazy. We just broke record after record after record.
19 They got more response on this than anything else, they had told
20 me.

21 While I was on another time, a gal called up on the phone.
22 She said, "Kevin, I saw you about a month ago and I bought your
23 program." This is right on tape. We have this on film. Right
24 on national TV.

25 She said, "I want you to know. I got it a month ago and

EXHIBIT H

8

1 here's what happened. I was addicted because of food. I would
2 overeat when I wasn't hungry. So late at night when I wanted to
3 eat food, I used the technique. It took only 60 seconds. I just
4 used it one time. I relaxed, I felt fantastic. I slept better
5 than I have in years because all the stress was gone."

6 She goes, "I was just feeling great and the urge was gone.
7 I didn't eat the food. I didn't want it." She goes, "Since
8 that, I've lost over 10 pounds, but I'm not trying to lose
9 weight."

10 She said, "I eat ice cream, I eat cookies, I eat cake, I eat
11 everything I want. But I'm just losing weight." And I said,
12 "Well are you trying to lose weight." And she says, "No." I go,
13 "Do you need to lose weight." She goes, "Well, of course I need
14 to lose weight."

15 What's happening is she broke up the cause. She got to the
16 root cause of the addiction, the overeating compulsion and
17 addiction and now she doesn't have to eat it. She feels
18 wonderful. There's no struggle.

19 Imagine going into a buffet and looking at all this
20 luscious, wonderful food and say, this looks wonderful. But you
21 still don't have to eat it if you don't want to. That's what
22 we're talking about.

23 Folks, if you're watching right now, I want you to know you
24 can purchase what we have available. It's Dr. Callahan's, "The
25 Callahan Technique." It's a videotape. That's all it is.

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1 Up until this point, Dr. Callahan's Technique was only
2 available one-on-one with Dr. Callahan. The fee was \$3,000.
3 Three thousand. I paid that. I'm going to tell you that story.

4 Now you can get the video. In just 15 minutes you can learn
5 the simple, one minute procedure that you can apply to yourself
6 that eliminates all the stress and anxiety in your body,
7 eliminates any addictive urge, whether it be for smoking, whether
8 it be for weight loss, whether it be any type of compulsion or
9 addition, and eliminate it.

10 The video we sell right now, this is a limited time offer.
11 I'm not sure how long we're going to make this available. We
12 were selling it for \$90.00 on our Infomercial. We are making it
13 available now at a special price of \$29.95. Twenty-nine ninety-
14 five for the video.

15 Now we are so convinced, and I'm so passionate about this
16 because I've seen it happen with friends of mine, I've gotten
17 letters, I've seen the phone calls, I hear the people telling me
18 the results and the response, that we're offering a one-year,
19 unconditional money back guarantee.

20 Folks, you're not going to have to wait a year. When you
21 get this videotape, when you get this videotape for twenty-nine
22 bucks and you take it home and you watch it, it just takes 15
23 minutes to watch, and you apply the technique just one time,
24 you'll know whether it works. And it does work.

25 So pick up the phone and call now. If the phone is busy,

Complaint

EXHIBIT H

1 continue to call back. Write the number down. We don't know how
2 long we're going to make this available at this price, but it's
3 something that could change your life.

4 We have a caller on the line. Thanks for calling. I'm
5 Kevin Trudeau.

6 FEMALE CALLER: Hi, Kevin. I'm trying to quit smoking and
7 I'm having a terrible time. I've tried everything.

8 MR. Trudeau: Have you tried the patch and --

9 FEMALE CALLER: Yes.

10 MR. Trudeau: Different things like that?

11 FEMALE CALLER: Yes. I've had hypnosis. I've tried
12 everything.

13 MR. Trudeau: Subliminal tapes and -- You know, smoking is
14 something that's so common out there because people try all types
15 of things, and people always say the same thing. I've tried
16 everything. I'm trying to quit but I can't quit.

17 I've tried the patch. I've tried the subliminal tapes.
18 I've tried the -- this system that slows, you know slows the
19 process down. I've tried will power. Nothing gets to the root
20 cause of smoking.

21 And by the way, if you ever quit smoking, if anyone out
22 there watching has tried to quit and did quit using will power,
23 you may have gained a lot of weight. Why? Because you didn't
24 get to the root cause of the smoking. The root cause is the
25 stress and anxiety energy field that's flowing through the body.

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11

1 That's the cause.

2 Nothing, up until this point, The Callahan Technique is the
3 only thing that gets to the root cause. It breaks up the energy
4 field, the stress and anxiety, at the cellular energy field
5 level. It's the deepest root level that it gets rid of. I'll
6 tell you a story about this.

7 When I first met Dr. Callahan, the way I came about meeting
8 him, was I was flying on an airplane. I was reading one of the
9 airline magazines, and it had this full-page ad. It said the
10 five minute phobia cure. I said, "The five minute phobia cure?
11 That sounds pretty interesting for, you know, for people that are
12 afraid of snakes, or maybe going over bridges or tunnels. It
13 cures phobias."

14 So I called them up and I sent for some of the material. He
15 sent it to me, and he charged \$3,000 to get rid of a phobia with
16 personal treatment. So I talked to him on the phone and said,
17 "You know, Dr. Callahan, I have an Infomercial. I bring products
18 to market where I share these things which I think are pretty
19 revolutionary and helpful to market. Is this really work?"

20 He said, "Of course, it has. You know, I've been on Oprah.
21 I've been on Donohue. I've been on all the major talk shows.
22 I've been on hundreds of radio shows and things." He's a very
23 credible guy. A 35-year, clinical psychologist, one of the
24 foremost authorities on addictions and compulsions and stress and
25 anxiety and phobias. Very, very well know.

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1 So I said, "Well, does it work for addictions?" He said,
2 "Yeah." I said, "How about smoking?" He says, "Oh, yeah." At
3 the time, I'm smoking a cigar. I was smoking six to eight cigars
4 a day. Six to eight a day. And when I say I was smoking them,
5 it was an uncontrollable urge to smoke. I didn't have any
6 control over it.

7 Many of you right now watching, if you smoke cigarettes you
8 know what I'm talking about. You can't control it. You've tried
9 to quit and you can't. It's an uncontrollable urge.

10 So I said, "Hey, can you get rid of this smoking addiction.
11 I've tried everything. I've spent tens of thousands of dollars
12 myself, going to the top people in the country. Hypnotists,
13 neuro-linguistic programming people, the patch, the subliminal
14 tapes. Nothing works.

15 He said, "Because nothing gets at the root level cause." He
16 says, "What I want you to do is call me the next time you want to
17 smoke the cigar. We'll knock it out in 60 seconds." That's a
18 pretty tall order.

19 So I called him back. Now here's what happened, by the way.
20 When I called him the next day, I wanted to smoke a cigar. I
21 didn't take any cigars with me to the office. I told my friend
22 Jules, "Hey Jules, on the way home, make sure I call Callahan
23 because I dying for a cigar. I know I will by the end of the
24 day."

25 End of the day, I'm climbing the walls. I mean, I have to

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1 have the cigar. I told my friend Jules, "When I get home, I'm
2 going to smoke this cigar." He said, "No, you're not. You're
3 going to call Callahan." I almost got into a fight with him. I
4 says, "I'm not calling Callahan. I want to smoke this cigar."
5 Jules said, "Listen, just call him first and then smoke the
6 cigar."

7 I got in my house and if he wasn't there to pick up the
8 phone and dial it for me, I don't know what I would have done.
9 Got him on the phone and Callahan says, "On a scale of one to
10 ten, where's your urge to smoke the cigar?" I said, "A hundred.
11 I mean, I'm going to smoke this and no one's going to take it
12 away from me." That's how addicted I was.

13 Many of you right now, if Hagen Daas ice cream is your
14 thing, if it's pizza, if you're fat because it's some type of
15 potato chips or things, or if it's cigarettes, you know what I'm
16 talking about. It's an uncontrollable urge.

17 So he walked me through the technique on the phone. It took
18 less than a minute. I'm holding the cigar in my hand and he
19 says, "On a scale of one to ten, where's your urge now?" And I
20 looked at that cigar and I thought, "It's gone." He says, "No,
21 imagine how wonderful it will taste to smoke it." I said,
22 "Doctor, I don't want this. I'm not going to smoke this."

23 I just feel totally relaxed. I can't believe how relaxed I
24 feel. How -- man, I feel better than I have in years. He said,
25 "That's great." I said, "But I'm convinced that the urge is

EXHIBIT H

14

1 going to come back, if not tonight, tomorrow." He said, "If the
2 urge comes back, you call me."

3 Six months passed, folks. Six months, before I ever had
4 another urge. That one single treatment lasted six months. And
5 I used to keep this box of cigars. I had 150 cigars in my
6 humidor in my house. And I'd look at them when I'd go home and
7 go, I don't have any urge to smoke.

8 The great thing about it is this, when you knock out your
9 urge -- by the way, thank you very much for calling. So if you
10 do smoke, you need to call right now and order this program.
11 It's only \$29.95 for the videotape and this will knock out --
12 this will give you a technique.

13 It only takes 15 minutes to learn. When you learn this
14 technique, you can apply it anytime, anyplace, anywhere. It's
15 simple, it's easy, and in one minute you can knock out any
16 addictive urge you have while at the same time totally reducing
17 the stress at the cellular level in the body.

18 You're going to feel so wonderful when you reduce the stress
19 in the body and the urge is gone. But not only for cigars, not
20 only for cigarettes. I'll tell you a story.

21 My friend Jack Freeman from Charlotte, North Carolina, he
22 came into Chicago and visited me. I hadn't seen this guy in ten
23 years. I went to high school with him. Came off the plane, we
24 were going to the West Coast.

25 The first thing he said was, "Hi Kevin, nice to see you."

Complaint

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EXHIBIT H

15

1 I hadn't seen him in ten years. And he said, "I need to have a
2 cigarette." Now here's a guy who's about 40 pounds overweight,
3 smokes three packs a day for about 20 years. And he said, "I
4 need to have a cigarette."

5 I said, "Well, you can't. We're running late for our plane.
6 This is a non-smoking terminal. We have to get on it. We only
7 have six minutes to get there. But don't worry, Jack. When we
8 get on the plane, I'll give you a technique that will knock out
9 the urge."

10 He grabbed me with both hands and goes, "No, I have to smoke
11 this cigarette." I said, "Just trust me, Jack." We ran down,
12 got on the plane and sat down. He goes, "Kevin, you have to do
13 this to me. I've got to smoke a cigarette. I'm going crazy."

14 If any of you right now smoke cigarettes, you know what I'm
15 talking about. You don't -- you go without a cigarette for a
16 short period of time, you're climbing the walls.

17 So I walked him through this 60 second technique. The first
18 thing I said was, "Jack, on a scale of one to ten, where is your
19 urge?" He said, "A twenty." So I walked him through the
20 technique. In 60 seconds he looked at me and I said, "Jack,
21 where is your urge now?" He said, "I don't want it."

22 I said, "No, Jack. Take out a cigarette. Smell it.
23 Imagine how luscious and wonderful it's going to taste. You love
24 smoking." He looked at the cigarette and goes, "I don't want
25 it." I said, "Fine."

EXHIBIT H

1 Now, here's the kicker. The food came, and we were talking
2 and eating. He was eating really slow. He said, "I feel so
3 relaxed. Man, that thing you did to me, I just feel so great."

4 It's easy. It takes less than 60 seconds to apply.

5 The flight attendant came over. He hadn't finished his
6 food. She came back again. He'd finally not really finished it,
7 but he was done. He was the last person to finish his food, and
8 he didn't even eat it all. He grabbed me and he says, "Kevin,
9 that was the slowest I've ever eaten my food. The slowest." I
10 said, "Of course, isn't the best cigarette the one after a meal?"
11 He said, "Yeah."

12 And isn't that true. I said, "Jack, you don't need to smoke
13 a cigarette so now you can enjoy your food. But notice
14 something, you didn't clean your plate, did you?" He said, "No."
15 I said, "You were using food as a method also to reduce and hide
16 that stress and anxiety field. You use cigarettes and food."

17 Since that time, he just called me up this week and he told
18 me he's lost over 15 pounds. He's approaching 20 pounds weight
19 loss. He feels great. There's no effort on his part. He just
20 doesn't have any desire to eat when he's not hungry.

21 The best thing about this technique if you're overweight,
22 you can eat everything you want. You can eat pizza, you can eat
23 ice cream, you can eat anything and everything you want. You're
24 just not going to want it. The urge is going to be gone. The
25 uncontrollable urge is gone.

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EXHIBIT H

17

1 The reason you're overweight is you eat when you're not
2 hungry. You know it. It's an eating disorder and you can knock
3 it out.

4 We have another caller on the line. Thanks for calling.
5 I'm Kevin Trudeau.

6 MALE CALLER: Hi, Kevin. I just have a question about -- I
7 do some work at a drug and alcohol treatment center. Would this
8 be helpful for alcoholics when they have that compulsion to
9 drink?

10 MR. Trudeau: That's an excellent question. When I was on
11 Value Vision, the home shopping club, a gal called up and said
12 she does work in an alcohol and drug treatment center with
13 alcoholics, heroin addicts, cocaine addicts. That's how Dr.
14 Callahan actually started this work. He worked with some of
15 these major additions.

16 Here's the interesting thing. Whether your addiction is
17 cocaine, heroin, alcohol or pizza or chocolate or cigarettes,
18 it's all caused by the exact same thing. The stress and anxiety
19 energy field.

20 She told me that she's getting this program and for the
21 first time in her life she can actually help people, because in
22 60 seconds she knocks out the urge, the uncontrollable urge.

23 A lot of people ask me, how long does that last? When you -
24 - if you have an urge to smoke a cigarette or take a drink -- let
25 me just finish the story, by the way.

EXHIBIT H

18

1 Another gal called up on the same day on Value Vision and
2 said this. She brought the program 30 days ago. She had lost
3 weight -- and after she used it once, she lost weight. But her
4 husband was an alcoholic. He used the program. He hadn't had a
5 drink in 30 days. Why? Because it knocked out the addictive
6 urge.

7 Dr. Callahan was in a grocery store in California where he
8 lives. A guy ran up to him and said, "Dr. Callahan?" He said,
9 "Yes." He said, "I saw you on TV three years ago when you were
10 talking about this technique, and I got your book where it
11 describes it."

12 He said, "I was an alcoholic my whole life, over 28 years.
13 I used your technique and I haven't had a drink. Doctor, in three
14 years, and I feel so wonderful."

15 So in answer to your question, yes, any type of addiction or
16 compulsion.

17 I took a fellow who had -- who picked his thumb all the
18 time. That was a compulsion. Another person washed his hands 28
19 times a day. When you have the uncontrollable urge to do
20 anything which is primarily destructive, the technique knocks it
21 out.

22 I had a gal call up and she said she was addicted to
23 vacuuming, which I didn't see that big of a problem with that,
24 but she did. So we knocked that out and she doesn't have to
25 vacuum now. It's a uncontrollable urge.

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EXHIBIT H

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1 So you can absolutely knock it out, and if you get this
2 program, you need to call me back or write me and let me know the
3 results in your clinical practice. We're seeing this all around
4 the country.

5 Thank you very much for calling.

6 You know, there's another story I want to talk about with
7 cigarettes. When I was at -- I was at this company up in
8 Minneapolis. One of the things I was doing is I was describing
9 this technique. Somebody grabbed me and said, well, this seems
10 really too good to be true. I said, "No, it is true."

11 If you're watching right now, I want you to think about it.
12 Up until this point three thousand dollars is what you would be
13 charged to work with Dr. Callahan. Three thousand dollars, and
14 it worked. And it's worth every penny.

15 I mean, how much would you pay? If someone said to you, I
16 guarantee you that you can eat anything you ever wanted and lose
17 all the weight you want easily and effortlessly, how much would
18 you pay? Is three thousand a good price? Guaranteed or your
19 money back.

20 If someone said, I guarantee you, you can quit smoking
21 without any problem whatsoever. Three thousand. Would it be --
22 it's guaranteed. Guaranteed, for a year, where you get your
23 money back if it didn't work. That'd be a good price. You don't
24 have to pay three thousand.

25 This product that we're bringing now, we were selling it up

EXHIBIT H

20

1 to \$90.00. Eighty-nine ninety-five is what we're selling it for.
2 It's available now, limited time, \$29.95. That's it, with a one-
3 year, money back guarantee.

4 Folks, you'll know. It takes 15 minutes to learn the
5 technique, one minute to apply it. You can eliminate any
6 addictive urge and you'll know from the day you get it whether it
7 works or not.

8 And it works. In my view, it works 100 percent of the cases
9 that people apply it.

10 Smokers. While I was at this company, and we were talking
11 about this, and they said, well, I'm not too sure. Three people
12 were walking out the door, all with cigarette and lighter in
13 hand. And I said, "Well, let's try this."

14 So I asked them all, "On a scale of one to ten, where's your
15 urge?" They said, "About five or six." I said, "Smell that
16 cigarette. You know, get the urge up." "Oh man, it's a nine or
17 a ten." We used the technique. In 60 seconds, knocked out the
18 addictive urge.

19 They all looked at me and said, "I don't have the urge. I
20 don't want the cigarette." One person actually grew about two
21 inches because all the stress left her body. She said she felt
22 wonderful. Another person said her back pain went away. Another
23 guy said his arm pain went away.

24 Many sicknesses and illnesses are caused by stress, as we
25 know. I mean, this is written up in AMA literature. And when we

EXHIBIT H

21

1 release stress from the body, the body maybe it works better, but
2 you feel better for certain. You see and feel the reduction in
3 the stress in your body.

4 We have another caller. You're on the line. I'm Kevin
5 Trudeau.

6 MALE CALLER: Yeah, hi Kevin. Listen, I have this
7 uncontrollable urge to eat snacks and probably the worse thing
8 that I feel is with popcorn --

9 MR. Trudeau: Right.

10 MALE CALLER: Specifically. And I don't go out to the
11 movies anymore.

12 MR. Trudeau: (Laughter)

13 MALE CALLER: It's like -- it's my lifestyle.

14 MR. Trudeau: Yeah, I've heard people that call me up and
15 say they eat potato chips, potato chips is one. Popcorn was
16 another one. Chocolate is a common one. I had one gal call up
17 and said honey roasted peanuts was another one.

18 The uncontrollable urge to do anything that's destructive is
19 what we're talking about.

20 I had a gal grab me up when I was in Utah, Green Valley
21 Health Spa. Beautiful Spa. She was about maybe 60 to 80 pounds
22 overweight. She may say a hundred, but she was overweight.

23 She said, "My problem is Hagen Daas ice cream and Milano
24 Petritram cookies." Hagen Daas -- macadamian nut brittle was her
25 favorite.

EXHIBIT H

22

1 So I went and bought some, and I brought it back and put it
2 right in front of her and said, "Do you want this?" And she had
3 just eaten lunch. And she looked at that bowl of ice cream, she
4 grabbed the table, her whole face had changed, "Yeah." I mean,
5 she was a panic. It was a panic attack.

6 And I walked her through the treatment. I said, "Do you
7 want it now?" She says, "No. I don't want it. I'm in control
8 of my life for the first time." I brought out the Petritram
9 cookies. I said, "Do you want these?" She says, "No. I don't
10 want it."

11 So if you have a popcorn addiction, chocolate, cigarettes,
12 any addiction, in 60 seconds it'll knock out the addictive urge.
13 Totally, just knock it out. And all the stress leaves your body.

14 It also eliminates stress and anxiety. I was in California.
15 There was a seminar going on, and this guy was this big inventor
16 of the stress and anxiety program. It had like ten tapes or
17 something. It was a big tape program. He said it teaches
18 people how to manage their stress. I want you to market it.

19 I said, "I don't believe in managing something you can
20 eliminate." He looked at me and I said, "I believe you can
21 eliminate stress." I said, "I don't think you should manage it."
22 I said, "By the way, how'd you get involved in this?" He said,
23 "Well, I've had stress and anxiety attacks my whole life." I
24 looked at him and said, "Are you under stress right now?" He
25 said, "Well, yeah." "On a scale of one to ten, where's your

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EXHIBIT H

23 • 6

1 stress level?" He said, "About a seven."

2 I walked him through this technique, took less than a
3 minute. I said, "Where's your stress level now?" He looked
4 around, he was like, as if he was trying to find it, he said,
5 "It's gone." I said, "Do you have to manage it now? It's gone."

6 Folks, I want you to know something. If you want to lose
7 weight, if you want to quit smoking, if you want to eliminate
8 stress and anxiety in your body, you need to pick up the phone
9 and call.

10 This program, The Callahan Technique, the addiction breaking
11 system, will take -- it's a videotape. In 15 minutes, you'll
12 learn the simple-to-apply technique. You just watch the
13 videotape once. You'll learn the technique. You can apply it to
14 yourself in 60 seconds, anytime, anyplace, anywhere and you'll
15 eliminate any addictive urge. Any addictive urge, whether it be
16 for food, you can lose all the weight you want, effortlessly,
17 because now it's not a struggle.

18 You can quit smoking, effortlessly, because now it's not a
19 struggle. You can reduce stress and anxiety in your body.

20 Again, Dr. Callahan has been featured on most of the major
21 talk shows, including Donohue, CNN. The results we've seen are
22 powerful and they work.

3 I want you to think right now, if this works, what is it
4 worth to you and the people that you know and you love. I want
5 you to call now and order this. It has a one-year.

EXHIBIT H

24

1 unconditional, money-back guarantee. Nothing ever -- we've never
2 been so confident in anything to offer this type of guarantee.

3 You'll know whether it works in the first minute after you
4 get the program. And it does work.

5 Pick up the phone and call. If the line is busy, write the
6 phone number down quick and keep calling back if you can't get
7 through. Everytime I've ever been on television with this
8 program, we have blown out all the phone lines and we have sold
9 this thing like crazy.

10 It was selling for \$90.00. Dr. Callahan charges \$3,000.
11 For a limited time, it's \$29.95. You can lose all the weight you
12 want.

13 For the first time in history, it gets to the root cause of
14 addictions, which is the stress. People who use this program go
15 to work and people say, wow, you look so relaxed. One gal said
16 that she was told that she looked ten years younger. She wanted
17 to know if they got plastic surgery because while using the
18 technique, all the facial muscles just relaxed.

19 I wish I had more time to talk. Pick up the phone and call
20 now.

21 This has been Kevin Trudeau on this very special edition of
22 A Closer Look. Join me next time for another edition of A Closer
23 Look.

24 The preceding has been a paid, commercial program brought to
25 you by Mega System.

25

1 END OF TAPE

2

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EXHIBIT I

DR. CALLAHAN'S ADDICTION BREAKING SYSTEM

Dr. Callahan's Addiction Breaking Hotline, this is (your name) and can I have your name please?

Thanks for calling (customer's name)... what do you hope to gain by ordering Dr. Callahan's addiction breaking video?

Great (customer's name)... by placing your order today you're taking the most important step to eliminate your addiction (s) for the rest of your life.

TAKE THE ORDER NOW...**Customer Question:**

"Can you tell me a little bit more about it?"

Answer:

"I'll be glad to"

Dr. Callahan's addiction breaking system is a video taped program that will instantly teach you how to break any addictive urge you want to eliminate by using a simple and easy to use 15 minute technique. This breakthrough technique is not available anywhere else in the country and is only being offered through this special television promotion. Dr. Callahan's clients have paid up to \$500 to learn the very same techniques that you will learn in your video program for only \$27.95 plus shipping & handling. (\$7.95)

SECURE THE ORDER NOW!!!

By the way (customer's name), you can also include with your order today one of Dr. Callahan's most highly sought after programs...the 5 minute phobia cure, which can totally eliminate any fear that you may have. This program is normally offered for \$89.95, but Dr. Callahan will allow you to include it in your order today for only \$19.95. And you can get the benefit of eliminating your fears for the rest of your life.

BENEFITS TO YOUR CUSTOMER:

QUIT SMOKING

BREAK ADDICTIVE URGES

LOSE WEIGHT

GAIN CONTROL OF YOUR LIFE AGAIN

Complaint

EXHIBIT J

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: JEANIE ELLER'S ACTION READING
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 34

MIS/SALBERG COMPLAINT EXHIBIT J
TRUDEAU COMPLAINT EXHIBIT D
ELLER COMPLAINT EXHIBIT A

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EXHIBIT J

P R O C E E D I N G S

1
2 ANNOUNCER: The following is a paid commercial program
3 brought to you by Mega Systems.

4 MR. TRUDEAU: Thanks again for watching. I'm Kevin
5 Trudeau and this another edition of "A Closer Look". Over one
6 million children graduate from high school each year functionally
7 illiterate. That's what the U.S. Government says. They simply
8 can't read. Millions of adults, many of whom are watching
9 this show right now, can't read.

10 According to my guest, Jeanie Eller, every single
11 person -- if they can see, hear and talk -- can learn to read,
12 guaranteed. She also claims that her revolutionary approach to
13 teaching reading is easy, quick, and works 100 percent of the
14 time.

15 Jeanie, thanks for being my guest today.

16 MS. ELLER: Thank you, Kevin. It's a real honor.

17 MR. TRUDEAU: Yes, we were having some fun before this
18 show and I said, they can't read in a matter of hours, right?

19 MS. ELLER: That's right. You sound like my father.
20 One time he said, if you're so smart, why don't you just teach
21 them to read in 24 hours.

22 MR. TRUDEAU: That's right.

23 MS. ELLER: I said, well, if I could do it straight
24 through, I could. But most people wouldn't be able to go through
25 for 24 hours. But they can do it in as little as a month to six

EXHIBIT J

2

1 weeks.

2 MR. TRUDEAU: But, now, I have to ask you a question.
3 Before we talk about your program, I know that you're the, ah,
4 the spokesperson or the founder of this home study course, called
5 "Action Reading", which teaches kids and adults how to read at
6 their home. But is there a real problem today with illiteracy,
7 with kids and adults?

8 MS. ELLER: Oh, absolutely. In fact, a year ago, in
9 1993, they came out with research that showed that 90 million
10 adults are functionally illiterate.

11 MR. TRUDEAU: Ninety million.

12 MS. ELLER: That is half our population.

13 MR. TRUDEAU: I was going to say, how many people are
14 there in America?

15 MS. ELLER: Yeah, that's half of our adult population.
16 And what they define as functionally illiterate --

17 MR. TRUDEAU: Right.

18 MS. ELLER: -- is, they cannot read a newspaper.

19 MR. TRUDEAU: Uh-huh (yes).

20 MS. ELLER: They cannot go to the grocery store and
21 shop by the names of products. They have to look at the picture
22 to see what's in the container. They can't read a bus schedule
23 or figure out a job application or, you know, fill out a form.

24 They certainly cannot read the Constitution, the Bill
25 of Rights, or the issues in an election. They really cannot

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EXHIBIT J

3

1 function in this society.

2 MR. TRUDEAU: Wait a minute. Who says half of our
3 people -- ah, half of the people in America can't read?

4 MS. ELLER: This was a study that was -- that came out.
5 It was on all the major television news. It was in "USA Today".

6 MR. TRUDEAU: Uh-huh (yes).

7 MS. ELLER: It was actually September of '93.

8 MR. TRUDEAU: Uh-huh (yes).

9 MS. ELLER: And it was published by the United States
10 Department of Education.

11 And, for example, you know, we don't realize that
12 people are out there who can't read and what -- what a handicap
13 that is.

14 I was doing a radio show and a man called in. And he
15 said, I want to tell you what it's like. I went to the grocery
16 store and I bought this container that had a picture of fried
17 chicken. Took it home, you know, the mouth was watering, all
18 ready to pop it in the microwave and eat the fried chicken. And
19 I opened it up and it was this white stuff that you cook the
20 chicken in, called shortening.

21 MR. TRUDEAU: Ahhh.

22 MS. ELLER: You see, that's how they have to live.
23 They have to rely on picture cues. They may be in a restaurant.
24 You know, you're sitting right there with someone --

25 MR. TRUDEAU: Right.

EXHIBIT J

4

1 MS. ELLER: -- and they say, well, what are you going
2 to have? What looks good to you? That's the way people have to
3 function, they hide it. They --

4 MR. TRUDEAU: It's like a secret.

5 MS. ELLER: -- they are embarrassed. Absolutely. And
6 they think it's their fault. They're embarrassed. They think
7 they've done something wrong or they think they have a learning
8 disability. It's really a tragic situation. Half of our adult
9 population.

10 MR. TRUDEAU: Well -- well, how do they go through
11 school and graduate and get a diplo- -- now, half of these people
12 have diplomas, right? I mean, a lot of these people --

13 MS. ELLER: Oh, yes --

14 MR. TRUDEAU: -- have diplomas.

15 MS. ELLER: -- many of them. And they've all --

16 MR. TRUDEAU: How do they --

17 MS. ELLER: -- attended school.

18 MR. TRUDEAU: -- how -- how -- how do they graduate
19 high school without learning how to read? I don't understand.

20 MS. ELLER: Well, see --

21 MR. TRUDEAU: How do they do homework? How do they --?

22 MS. ELLER: -- okay, here's what happened, Kevin.

23 We've changed the way we teach reading in the schools.

24 MR. TRUDEAU: Okay.

25 MS. ELLER: So, now, the methodology that we use it --

Complaint

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EXHIBIT J

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5

1 that we use in the schools does not teach the children to read in
2 first grade, as it did when I was a child.

3 MR. TRUDEAU: Oh, 'cause I went to -- to school, I
4 remember in the first grade, we had the phonics, ah --

5 MS. ELLER: Okay.

6 MR. TRUDEAU: -- book.

7 MS. ELLER: Exactly. That's what you have to have to
8 learn an alphabetic language. And English is an alphabetic
9 language.

10 MR. TRUDEAU: Right.

11 MS. ELLER: You cannot memorize it, by sight, as if it
12 were Chinese.

13 MR. TRUDEAU: Well, aren't we learning -- aren't --
14 aren't they being taught phonics now?

15 MS. ELLER: Nooo. No, no, no.

16 MR. TRUDEAU: They're not being taught --

17 MS. ELLER: No.

18 MR. TRUDEAU: -- phonics in school?

19 MS. ELLER: No. Fifteen percent of the schools in
20 America are using intensive, systematic direct instruction of
21 phonics in first grade, as the research from the United States
22 Department of Education tells them they should. Eight-five
23 percent of the schools in America are not doing that. They are
24 having the children memorize words by sight, what we would know
25 recognize as the "Dick and Jane" type readers.

EXHIBIT J

6

1 MR. TRUDEAU: Right, the look -- isn't that the "look-
2 see" method?

3 MS. ELLER: "Look-say," yes.

4 MR. TRUDEAU: Okay, "look-say."

5 MS. ELLER: I call it "look and guess."

6 MR. TRUDEAU: Right. (Laughs.)

7 MS. ELLER: They call it "look and say." Well, the
8 reason I call -- do that is because --

9 MR. TRUDEAU: Yeah.

10 MS. ELLER: -- after teaching school for 30 years and
11 watching these children look at the picture and then just guess
12 at the words, I call it "look and guess."

13 MR. TRUDEAU: Sure.

14 MS. ELLER: Okay. Then, there's also something in the
15 schools now called "whole language."

16 MR. TRUDEAU: Uh-huh (yes).

17 MS. ELLER: And in that method, the teachers are told
18 to surround the children with written information and read
19 stories to the children that are repetitious and predictable.
20 The children will memorize them. That's -- that's up your alley.

21 MR. TRUDEAU: Right, right.

22 MS. ELLER: And they will figure the system out on
23 their own. And if they don't figure it out in first grade, don't
24 worry about it. Pass them on to second grade. If they don't
25 figure it out by fourth grade, pass them on to high school.

Complaint

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EXHIBIT J

7

1 You see, what happens is, the children don't figure it
2 out. I train teachers all over the country. I get calls to come
3 into high schools where 90 percent of the kids in the high school
4 cannot read their textbooks. They have not figured the system
5 out on their own. And it's very simple to show them how the
6 system works.

7 So, what will happen is, I will train the teachers. I
8 will show the teachers how to teach reading. They will stop
9 teaching subjects for six weeks, teach all the kids to read, then
10 go back to their subjects, to their textbooks. It's that easy to
11 correct.

12 But the problem is, the teachers are not being given
13 the right information in their training. They don't have the
14 right tools. It wouldn't matter how hard they worked; with the
15 wrong information, they are not going to be able to teach the
16 children to read.

17 So, to answer your question, how do they get all the
18 way through, graduate --

19 MR. TRUDEAU: Yeah, right.

20 MS. ELLER: -- they get socially promoted right out the
21 door.

22 MR. TRUDEAU: And they never learn how to read.

23 MS. ELLER: Last year, we graduated two-and-a-half
24 million kids from high school, nationwide. One million of them,
25 according to the United States Department of Education, cannot

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1 even read their own diplomas.

2 MR. TRUDEAU: I -- that -- that -- it's incredible to
3 me, because this must, obviously, dramatically, adversely impact
4 these kids' self-esteem, self-confidence and income-earning
5 ability, right?

6 MS. ELLER: It's also impacting all the rest of us.
7 Because, you see, here's what happens. They're predicting -- the
8 United States Department of Education -- they're predicting that,
9 if we don't correct this problem --

10 MR. TRUDEAU: Uh-huh (yes).

11 MS. ELLER: -- by the Year 2000, we will have
12 two-thirds of our nation that will be functionally illiterate.
13 Now, how can the one-third of us who work and support all these,
14 ah, subsidized programs --

15 MR. TRUDEAU: Right.

16 MS. ELLER: -- support the two-thirds who don't? We're
17 heading for a big collapse.

18 Also, what you've got to realize is that illiteracy is
19 the best form of censorship there is. You don't have to ban the
20 books, you don't have to burn the books, if nobody can read the
21 books.

22 You cannot be a participating member of this society
23 unless you are literate.

24 MR. TRUDEAU: Now, that -- that -- that's a very
25 interesting, ah, way to look at it, from a political standpoint.

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1 MS. ELLER: Absolutely.

2 MR. TRUDEAU: Now, let me ask you a question. You --
3 you actually put together or -- or you have the teacher, on these
4 audio tapes, called "Action Reading".

5 MS. ELLER: That's me.

6 MR. TRUDEAU: Okay, that's you. And tell me a little
7 bit about that. How did you get involved? How did you start
8 this?

9 MS. ELLER: Well, I actually have --

10 MR. TRUDEAU: I mean, you -- you seem very passionate
11 about this whole program of reading.

12 MS. ELLER: Well, I absolutely am, because I have two
13 little baby granddaughters that I do not want to grow up in the
14 kind of society that I'm seeing today.

15 And what we're discovering is that a lot of the
16 problems in society are caused by illiteracy. Eighty-five
17 percent of the kids who go through juvenile court are illiterate.
18 So, if you can't read, what are you going to do?

19 MR. TRUDEAU: Right.

20 MS. ELLER: What kind of a job are you going to get?

21 MR. TRUDEAU: Right.

22 MS. ELLER: You see -- and especially in this
23 technological world. So, we have a real serious problem. And
24 that's why I'm very passionate about it.

25 But I actually have two stories.

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1 MR. TRUDEAU: Right.

2 MS. ELLER: My first story is a personal story.

3 MR. TRUDEAU: Uh-huh (yes).

4 MS. ELLER: Um, my first son, when he was five years
5 old, started first grade. He was one of those December babies.

6 MR. TRUDEAU: Right.

7 MS. ELLER: Okay, he did not learn to read in school.

8 This was my firstborn. My most precious thing in the world. I
9 trusted him to the public school.

10 MR. TRUDEAU: The public school system, okay.

11 MS. ELLER: And I was actually doing my student
12 teaching that year. So, my little Patrick didn't learn to read.
13 But they passed him to second grade. Couldn't read a word. So,
14 I said --

15 MR. TRUDEAU: What -- what were they teaching?

16 MS. ELLER: They were teaching "Dick and Jane."

17 MR. TRUDEAU: "Dick and Jane."

18 MS. ELLER: Sight reading.

19 MR. TRUDEAU: Sight reading, okay.

20 MS. ELLER: Trying to get him to memorize --

21 MR. TRUDEAU: "Look-guess-say," right, okay.

22 MS. ELLER: -- memorize half a million words in English
23 by sight.

24 MR. TRUDEAU: Right.

25 MS. ELLER: Absolutely impossible task.

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1 MR. TRUDEAU: Right.

2 MS. ELLER: Okay, he cried, he was very upset, he
3 didn't like school. Of course; he couldn't do anything.

4 MR. TRUDEAU: Right.

5 MS. ELLER: So, I said to him, as mothers do, you know,
6 well, Patrick, we can work really hard all summer and Mommy will
7 teach you to read. Or, next year, you can go back and start
8 again in first grade.

9 So, he chose, of course, as Mommy intended, to start
10 again. And that year, I put him in a classroom with a teacher
11 that I knew was using intensive, systematic phonics. At the end
12 of that year in first grade, he tested twelfth grade in reading
13 level. There was nothing --

14 MR. TRUDEAU: Twelfth grade?

15 MS. ELLER: -- wrong my child. It was the method that
16 the first teacher had used. She didn't have the right
17 information.

18 But that's not the end of the story.

19 MR. TRUDEAU: Okay.

20 MS. ELLER: Okay. I have another son who's 15 months
21 younger.

22 MR. TRUDEAU: Uh-huh (yes).

23 MS. ELLER: Okay. The next year, that son started
24 first grade. And Patrick was now in second grade. So, first
25 week of school, I get a call to come in to the school for a

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1 conference. And I'm thinking, what in the devil could he have
2 done the first week of school? I mean, you know --

3 MR. TRUDEAU: He's already in trouble, right?

4 MS. ELLER: -- you know, what can this kid have done?

5 So, I go in and the teacher says to me, "Has Mitch been
6 retained?" And I said, "No, why?" And she said --

7 MR. TRUDEAU: You mean, held back?

8 MS. ELLER: Yeah.

9 MR. TRUDEAU: Okay.

10 MS. ELLER: Why? And she said, "Well, he's so big and
11 he reads so well." I said, "Oh, really?" She said, "Didn't you
12 know he could read?" I said, "No." And I thought, yeah, right.
13 You probably handed him "Peter Pan" or "Peter Rabbit" --

14 MR. TRUDEAU: Sure.

15 MS. ELLER: -- or one of the stories that he has
16 memorized, which is what little children do. They'll memorize
17 those stories. And if you miss a word, boy, they catch you.

18 So I went home thinking, you know, this is what had
19 happened. And I said to him, "Mitch, can you read?" And he
20 goes, "Yup." And I said, "Well, read to Mommy."

21 MR. TRUDEAU: Yeah.

22 MS. ELLER: And I expected him to go in his bedroom,
23 get one of the stories I read to them at night. No. He --

24 MR. TRUDEAU: "Winnie the Pooh" or something, right?

25 MS. ELLER: Yeah. He reaches in the bookcase, he pulls

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1 out this book -- book by Pearl S. Buck, he opens it up and he
2 starts to read to me. And I said, "I didn't know you could read.
3 How did you learn to read?" And he goes, "Pat taught me." And I
4 said, "Whoa, whoa, wait a minute. Pat" -- and Pat was six --

5 MR. TRUDEAU: Right.

6 MS. ELLER: -- taught Mitch, who was five, to read.

7 MR. TRUDEAU: A six-year-old is teaching the
8 five-year-old.

9 MS. ELLER: And I said, "When did Pat teach you to
10 read?" And he said, "You know, Mom, every day he brings his
11 papers home. He erases them. We play school. And he "be's" the
12 teacher."

13 So, the six-year-old was erasing his materials and
14 teaching it over again to the five-year-old.

15 So, at that point, I said, Wait a minute. All the
16 stuff they've been telling me in the college of education --
17 about how half the kids can't learn to read, or a fourth of the
18 kids can't learn to read, or you have to do this, that, and the
19 other -- is baloney. If a six-year-old, with the right
20 information, can teach a five-year-old to read, then there's
21 something that they're not telling us in the college of
22 education.

23 MR. TRUDEAU: Well, is it because your children are
24 gifted? I mean, aren't there some kids just smarter --

25 MS. ELLER: They'd like to think they are. Both

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1 laugh.)

2 MR. TRUDEAU: Okay.

3 MS. ELLER: In fact, I have four, and they'd all like
4 to think that they're smarter than Mother. Actually -- actually,
5 they are. My children are smarter than I am. So, that's --
6 brings up a really good point, Kevin.

7 The children today are not dumb. That's not why half
8 of them can't read. That's not why half the American public is
9 illiterate. It is because we have changed the method we use in
10 the schools.

11 Now, to get to the other part of yours -- of your, ah,
12 question, why am I so passionate about this? Well, in 1974, I
13 was teaching school in Alaska. And every one of my first graders
14 could read the newspaper. They were writing letters to Congress.
15 They were writing letters to the soldiers in Vietnam, getting
16 back answers, writing again.

17 MR. TRUDEAU: Yeah.

18 MS. ELLER: Um, the superintendent came in and he said,
19 "Okay, there's no other teacher in all the 54 schools that are --
20 that's doing this. You're going to train all the teachers." And
21 I went, "Ah! Do you see those 47 boxes? I mean, every night I
22 dig in there to decide what I'm going to do. Come on, surely
23 there's a program that's already published that does what I do,
24 because it's not that unique. It's what good teachers have
25 always done. It's just teaching them the phonics, teaching them

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1 the comprehension and making it fun."

2 So, he finally said, "Okay. I'm going to send you
3 outside" -- that's what they call the rest of the United States -
4 -

5 MR. TRUDEAU: Right.

6 MS. ELLER: -- "outside of Alaska. And I want you to
7 look at every published program in America."

8 So, I looked. For three months, I visited schools all
9 over and I looked at every reading program that was being used in
10 the schools. And I found a program that was better than what I
11 did. It was called "Action Reading." It was developed by a high
12 school teacher in Newark, New Jersey, who was frustrated that
13 high school kids couldn't read.

14 MR. TRUDEAU: Right.

15 MS. ELLER: Moved down, grade by grade, developed this
16 program in first grade, and it was all reusable and it all fit in
17 one box. My husband loved it. Didn't have to move 47 boxes
18 anymore.

19 That is the program I took back. We started using it
20 in the Anchorage School District. Every child that went through
21 it learned to read. It was phenomenal.

22 And then what happened in my -- in my particular case
23 is, the principal came in at the end of the year and he said,
24 "Guess what, Jeanie, we have all these fifth and sixth graders
25 who didn't get "Action Reading" and they can't read.

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1 Next year, you have to teach those fifth and sixth graders."

2 Well, I found that I could do that in a semester,
3 instead of a whole year.

4 MR. TRUDEAU: Uh-huh (yes).

5 MS. ELLER: Then, the high school principal said,
6 "Guess what?"

7 MR. TRUDEAU: Guess what?

8 MS. ELLER: "We need to borrow her, because we have
9 kids in the high school who can't read."

10 MR. TRUDEAU: Yeah.

11 MS. ELLER: I found out you could do that in six weeks,
12 because the older the person --

13 MR. TRUDEAU: The quicker they can learn it.

14 MS. ELLER: Right.

15 MR. TRUDEAU: That's right.

16 MS. ELLER: The more they can absorb, plus they have
17 all the small motor skills. They've already got the -- the, ah,
18 auditory/visual connection. There's a lot of things that -- that
19 you develop --

20 MR. TRUDEAU: Right.

21 MS. ELLER: -- as you go along. And then I started
22 doing summer school and then summer camps, where I taught kids to
23 read in two weeks. And, eventually, I worked with Dr. Curatan,
24 the author of the "Action Reading," and we decided, because we
25 got so many calls from people saying, "I can't come to you. I

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1 can't afford your camp. I can't send my child."

2 MR. TRUDEAU: Right.

3 MS. ELLER: "What can you send me?"

4 MR. TRUDEAU: Right.

5 MS. ELLER: And they couldn't afford the school
6 program, even though it's very inexpensive and reusable, they
7 wanted something they could afford, something they knew would
8 work.

9 So, I racked my brain, I prayed. Finally, we decided
10 we'd do the home program, so we did it. With audio tapes, I do
11 the teaching on the tape.

12 MR. TRUDEAU: Right, right.

13 MS. ELLER: We have a video that helps people, gives
14 them an overview, shows them where we got our system of reading
15 and writing, our alphabet, the whole thing. Explains how the
16 whole thing works. And also shows them preschoolers and -- and
17 elementary children and high school kids and college kids and
18 senior citizens --

19 MR. TRUDEAU: Right.

20 MS. ELLER: -- who've learned to read with this
21 program.

22 And when you go through this program, you start at the
23 beginning and you take every logical step right through it. And
24 when you come out, you are a fluent, independent reader. And
25 I've put my 30 years of teaching credibility on the line. It

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1 absolutely is guaranteed to work.

2 MR. TRUDEAU: Well, if you're watching right now and
3 you do want information on the program, "Action Reading" -- it's
4 a home study course. It's fun and easy to go through. It just
5 takes a few short hours.

6 And what age level can go through it?

7 MS. ELLER: Well, parents can use it with preschoolers.

8 MR. TRUDEAU: Right.

9 MS. ELLER: Anyone eight and above can do it all on
10 their own.

11 MR. TRUDEAU: Eight and above can go through it, and
12 preschoolers with their parents.

13 Call the number on the screen if you want more
14 information on Jeanie's program. And we did work out a special
15 arrangement. You will receive a substantial discount if, you do
16 call today, on the program.

17 Now, let's talk about, you said, age levels. You
18 mentioned, as, ah, eight and above can go through it on their
19 own. There are other phonics programs on the market -- some of
20 them are really expensive -- and I thought some of them were
21 pretty good.

22 What's the difference between your phonics program and
23 some of the other ones that people may be familiar with?

24 MS. ELLER: Okay, there are -- there are some good
25 phonics programs out there that work, and some of them are being

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1 used in schools. And those programs are comprehensive.

2 Unfortunately, there have been a -- a number of
3 programs that have been made available to the public that are not
4 very comprehensive. They start out by teaching the -- the person
5 the names of the letters and the sounds, and then they go right
6 to -- well, open the workbook and read the sentences.

7 And that's, like, wait, wait, wait. How do I get from
8 just saying letter names and sounds to reading sentences?

9 So, they -- they have a big gap --

10 MR. TRUDEAU: Right.

11 MS. ELLER: -- missing.

12 MR. TRUDEAU: Okay.

13 MS. ELLER: So, they're not teaching the comprehension.
14 They're not act- -- actually teaching how the system of English
15 works. They're not teaching the whole systematic thing.

16 The program that I use, first of all, it's very
17 inexpensive. It's reusable. You -- you might need to get
18 another workbook, but everything else -- the tapes you can use
19 over with -- if you have other children in your family. You
20 know, if you want to share it with your church or --

21 MR. TRUDEAU: Right, uh-huh (yes).

22 MS. ELLER: -- something. Ah, the video, of course,
23 you can share with your friends and neighbors.

24 And the games are phenomenal, because they're actually
25 just drill. But the people playing them get so engrossed in just

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1 the game idea that they don't realize they're doing drill.

2 So, what -- what the difference is, is that we take
3 every step. First of all, we explain where we got our system of
4 reading and writing. And most teachers don't know this.

5 MR. TRUDEAU: Right.

6 MS. ELLER: They don't realize that those letters,
7 those symbols, come from pictographs. They actually represented
8 something. Like the "A" represented a bull, the head of a bull.
9 And then it became just the lines of that. And then, eventually,
10 the Phoenicians developed the alphabet. So, it changed from
11 being a meaning-bearing symbol to a sound-bearing symbol.

12 MR. TRUDEAU: Uh-huh (yes).

13 MS. ELLER: And that was the invention of the alphabet.

14 MR. TRUDEAU: Right.

15 MS. ELLER: And that's the concept that teachers are
16 not given. They don't realize that you can't memorize half a
17 million words by sight. You've got to learn that code.

18 And so, we explain all that and then we show them how
19 to put those sounds together. And we do not start by teaching
20 them the names of the letters. Everybody I've ever worked with,
21 whether they were little children or adults, already knows the
22 ABCs.

23 MR. TRUDEAU: Sure.

24 MS. ELLER: But A-B-C doesn't make a word. C-A-T does
25 not make a word. If I go C-A-T, C-A-T, C-A-T, you don't hear a

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1 word.

2 MR. TRUDEAU: Right.

3 MS. ELLER: But if I show you the sounds and go "Kuh-
4 aah-tuh" and you go left to right, because in English you can
5 only read left to right; you can't go right to left, like you do
6 in Hebrew.

7 MR. TRUDEAU: Right.

8 MS. ELLER: Then you go, "Kuh-aah-tuh" and the word
9 "cat" comes right out of your mouth. As it does with my little
10 granddaughter, who's only two-and-a-half.

11 MR. TRUDEAU: Two-and-a-half.

12 MS. ELLER: Two-and-a-half. She's already sounding out
13 words. But, see, what happened is, her mother and father did not
14 teach her the ABCs. When she looks at an "M", they don't call it
15 an "M". They call it the "Mommy" letter, "mah-mah-mah". And
16 there's the "Daddy", the "dah-dah-dah". And her letter is the
17 same as yours, the "kah-kah-kah" letter.

18 MR. TRUDEAU: Right, right.

19 MS. ELLER: So, she'll look at something and she'll go,
20 "dah-o-g". Grandma, that's dog. She doesn't go D-O-G, D-O-G, D-
21 O-G, because that doesn't make a word.

22 MR. TRUDEAU: Interesting.

23 MS. ELLER: So -- and -- and it isn't that she's the,
24 you know, the most brilliant child in the world. She's the most
25 beautiful, but she's not the most brilliant.

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1 But -- but, really, any child that you show them how
2 that code works, you can't stop them from reading. They crack
3 that code. And that code is the key.

4 When I taught the four illiterate adults to read in two
5 weeks for the Oprah Winfrey Show --

6 MR. TRUDEAU: Uh-huh (yes).

7 MS. ELLER: -- one of the ladies, the third day -- this
8 was a lady who was 30 years old. She had never learned to read.
9 She dropped out of school in eighth grade, when she was pregnant
10 with the first of six children. Just a tragic, tragic story.
11 Been on drugs. Been on welfare. Had her children removed.
12 Everything. Wanted desperately to learn to read, get her
13 children back, and had -- you know, had taken care of her drug
14 problem.

15 MR. TRUDEAU: Right.

16 MS. ELLER: The third day, she said, "Jeanie, I always
17 knew there was a secret code that nobody showed me."

18 You see, if you don't know that there's an alphabetic
19 system, if nobody shows you that, it is a secret.

20 MR. TRUDEAU: So --

21 MS. ELLER: If you don't know there's a simple way to
22 do it.

23 MR. TRUDEAU: So, now, you were on Oprah.

24 MS. ELLER: Yes.

25 MR. TRUDEAU: You were on a lot of other -- I know you

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1 do, what, 400 radio appearances a year, or something?

2 MS. ELLER: Oh, I've done about 1,500.

3 MR. TRUDEAU: Okay, radio shows and you've been on
4 television and written up in newspapers, the program.

5 But you're talking about this secret code. The
6 government says -- you were mentioning to me -- that teaches
7 certain kids just can't read, and you're saying that's hogwash.

8 MS. ELLER: It is. It's absolute hogwash. I've been
9 teaching for 30 years and I've never had anyone not learn to
10 read.

11 MR. TRUDEAU: Because I just watching a show the other
12 day on -- on -- on TV and they were saying, this guy's trying to
13 read. He's tried -- he tried a phonics program himself. He --
14 he still can't read. He's frustrated. He thinks he's dumb.

15 And they said -- they made the statement, the only way
16 he can read is by hard, hard work, and he still may never learn
17 how to read.

18 MS. ELLER: No, that is absolutely not true, and I hope
19 he's watching this show, because if he'll get this program, I
20 guarantee you he'll learn to read. I -- I know what you're
21 talking about.

22 What they do is, they start by teaching the person the
23 ABCs.

24 MR. TRUDEAU: Uh-huh (yes).

25 MS. ELLER: And then, they have them start memorizing

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1 sight words. Now, that's exactly what the "Dick and Jane"
2 methodology was based on, that you memorize four hundred of the
3 most frequently used words in first grade. That's called first
4 grade level of reading.

5 MR. TRUDEAU: Right.

6 MS. ELLER: By the time you get to sixth grade, you're
7 supposed to have memorized six -- ah, three thousand of the most
8 common words in English. That's called sixth grade-level of
9 reading.

10 Newspapers are now written at sixth grade level. They
11 use the same three thousand --

12 MR. TRUDEAU: Three thousand.

13 MS. ELLER: -- words over and over --

14 MR. TRUDEAU: Over and over, okay.

15 MS. ELLER: -- ad nauseam. Um, and half the American
16 people cannot read it. The problem is, adults start out and they
17 memorize maybe 15 words, maybe 100 words, maybe 200 words. But
18 they cannot pick up a newspaper and read anything --

19 MR. TRUDEAU: Right.

20 MS. ELLER: -- because there's always three or four
21 words in the sentence that they don't know what it means. And
22 what adults say to me is, it looks like the blank in his blank
23 are going to the blank --

24 MR. TRUDEAU: Well, isn't it --

25 MS. ELLER: -- because they don't know what those other

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1 words are.

2 MR. TRUDEAU: -- but isn't that vocabulary? Or is it -

3

4 MS. ELLER: No, no --

5 MR. TRUDEAU: -- different than from --

6 MS. ELLER: -- because if you -- if you tell them what

7 the words are, they know those words. They speak those words.

8 The people that I taught to read on the Oprah Show, as soon as

9 they could decode, decipher the newspaper, they knew those words.

10 They were articulate people. They spoke the language. They

11 understood the language. They just could not decipher the

12 language.

13 MR. TRUDEAU: So, they -- if you told them what the

14 word was, they knew the meaning.

15 MS. ELLER: Oh, yes. Many of them --

16 MR. TRUDEAU: But they just couldn't -- they didn't

17 know what the words said.

18 MS. ELLER: They couldn't decode it for themselves.

19 MR. TRUDEAU: Now --

20 MS. ELLER: So, that's the problem.

21 MR. TRUDEAU: -- now, is your program self-tutorial?

22 Because this is a big issue. A lot of people out there --

23 because I bought this program for my brother's son --

24 MS. ELLER: Uh-huh (yes).

25 MR. TRUDEAU: -- okay, because, you know, he's seven.

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1 years old. I thought, he -- I want him to go, because he's going
2 to be eight. Well, if he can't go through it himself, at least I
3 know my brother will walk him through the program.

4 For an eight-year-old and above, can they go through
5 this program themselves?

6 MS. ELLER: Absolutely.

7 MR. TRUDEAU: Will they have fun doing it?

8 MS. ELLER: Absolutely. Because (both laugh) --

9 MR. TRUDEAU: Okay.

10 MS. ELLER: -- this program is multi-sensory. That's
11 why it's called "Action Reading". Because when Dr. Curatan first
12 started developing this, at first grade, first, he found out that
13 the children were all TV babies. That means, if you didn't show
14 them a picture, they didn't hear you.

15 MR. TRUDEAU: Right.

16 MS. ELLER: So, he had to work on their auditory
17 skills. So, the -- what we do with this program is, we get
18 people to understand that words are just sounds that you can put
19 together and take apart.

20 So, in English, we have 26 letters. We have 44 sounds
21 we use when we talk. And we have 70 ways to write down those 44
22 sounds. That's called the code. That's the alphabetic code. We
23 call them phonograms. Written forms of the sounds.

24 MR. TRUDEAU: Okay.

25 MS. ELLER: Okay. With those 70 phonograms, you can

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1 read anything in English. Now, when I first started this battle,
2 I call it now --

3 MR. TRUDEAU: Well, hold -- hold on one second before
4 you go on, because I want people to know, if you do want to call
5 and get information on Jeanie's program, which I highly
6 recommend, pick up your phone and call the 800 number that's on
7 the screen.

8 If -- if you want to read yourself. If you know
9 somebody -- ah, as I mentioned, I gave this to my -- my
10 brother's, ah, son, to learn how to read. And it's really the
11 most comprehensive, easiest, fastest way that anyone can learn
12 how to read.

13 MS. ELLER: Absolutely.

14 MR. TRUDEAU: Is this correct?

15 MS. ELLER: Absolutely, because it not only teaches the
16 decoding, the phonics part, it teaches comprehension. It teaches
17 the spelling patterns of English. And it teaches you penmanship
18 -- good, old handwriting.

19 MR. TRUDEAU: You know, I was just -- I was -- I get
20 notes in from, ah, people. They write things to me. And I look
21 and say, where do these kids learn how to write? They can't even
22 write.

23 MS. ELLER: We're not teaching handwriting in schools
24 anymore.

25 MR. TRUDEAU: Well, that -- there -- there's your

EXHIBIT J

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1 answer.

2 MS. ELLER: And we also aren't teaching spelling in the
3 schools anymore, because they have a new philosophy that, if you
4 correct their spelling, you'll stifle their creativity; they
5 won't want to write.

6 MR. TRUDEAU: Um --

7 MS. ELLER: Sounds crazy to normal people, but that's
8 what teachers are being told.

9 MR. TRUDEAU: Is it -- does it -- now, if you learn how
10 to read. Let's take a child. Basically, if he becomes an
11 affluent -- how did you pronounce that? Af--?

12 MS. ELLER: Fluent, not affluent.

13 MR. TRUDEAU: Fluent, fluent.

14 MS. ELLER: Affluent is rich. (Both laugh.)

15 MR. TRUDEAU: Well, if they become fluent, will they
16 become affluent?

17 MS. ELLER: Well they have the ability then.

18 MR. TRUDEAU: But will -- but now -- now you know this,
19 because you've been in the teaching setting. If a child can read
20 -- and if a parent is watching right now, I guess you -- you told
21 me earlier, hey, ask yourself the question -- hand your child
22 something and see if they can read it.

23 MS. ELLER: Oh, absolutely. That is the most crucial
24 thing we -- we need to address. Because parents assume that,
25 because their children are in school -- they're trusting them to

EXHIBIT J

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1 the schools like I trusted my little boys -- that they're
2 learning to read. That is not an assumption you can make.

3 What you must do is, today, as soon as this show is
4 over, sit down with your child, hand them something they have not
5 memorized, like today's newspaper, pick out a story in today's
6 newspaper that's suitable for the age of your child, if you can
7 find one --

8 MR. TRUDEAU: Right, right.

9 MS. ELLER: -- that isn't all blood and gore. And if
10 your child is in second grade or above, your child should be able
11 to fluently and independently read a story in the newspaper.
12 When they come to a word they've never seen --

13 MR. TRUDEAU: They should read it out loud to you.

14 MS. ELLER: Yes, absolutely, read it out loud.

15 MR. TRUDEAU: Out loud.

16 MS. ELLER: How else are you going to know they're
17 reading?

18 MR. TRUDEAU: Right, okay.

19 MS. ELLER: Okay.

20 MR. TRUDEAU: Honesty?

21 MS. ELLER: Okay. And accurately. See, when they come
22 to a word they've never seen, they should be able to sound it
23 out, then pick up their speed and go right on.

24 And then, the second most important thing is, if they
25 can do that --

EXHIBIT J

1 MR. TRUDEAU: Uh-huh (yes).

2 MS. ELLER: -- then ask them comprehension questions
3 about what they just read. Who did it? Where did it happen?
4 When did it happen? Tell me in your own words what this story
5 was about.

6 According to the United States Department of Education,
7 in a document called, "What Works," the teaching of reading
8 should be taught in first grade with intensive, systematic direct
9 instruction of the phonetic system. It should be completed by
10 the end of first grade, second grade at the very latest.

11 And so, therefore, if your child is in second grade or
12 above, they should be able to fluently and independently read a
13 story in the newspaper.

14 Now, there's going to be a lot of people, Kevin, who
15 are going to find out their children can't do that. So, they've
16 got several choices. They can go to the school and say, what
17 method are you using?

18 MR. TRUDEAU: Right.

19 MS. ELLER: Are you having reading class after second
20 grade? Why are you doing that? Show me the research. Ah,
21 that's going to be a long, slow battle, because, I know, I've
22 been fighting it now for 20 years.

23 MR. TRUDEAU: Sure.

24 MS. ELLER: The best thing to do, the best way to solve
25 illiteracy in America. Get yourself literate. Get yourself

EXHIBIT J

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1 literate. Get your children literate. And then, start trying to
2 make changes in the bureaucracy.

3 MR. TRUDEAU: Now, if your child becomes this fluent
4 reader, be able to -- if it's first grade, second grade -- picks
5 up the newspaper, "Mommy, let me show you this," and reads this
6 thing fluently, out loud. If they can't do that -- and if they
7 could, they'll do better in school.

8 MS. ELLER: Oh, let me tell you what'll happen to them.

9 MR. TRUDEAU: They -- they -- go ahead.

10 MS. ELLER: They'll be in the top five percent in the
11 nation. Accord- --

12 MR. TRUDEAU: That easy?

13 MS. ELLER: -- according to --

14 MR. TRUDEAU: You're saying that -- that easy?

15 MS. ELLER: It's -- well, you figure it out, okay?
16 You're a bright man. According to the United States Department
17 of Education, just five percent of our 17-year-olds can read at
18 an advanced level. This is also from "What Works." Okay, that's
19 one out of 20, right?

20 MR. TRUDEAU: Right.

21 MS. ELLER: All right. So, what we're saying is, 20 --
22 for every 20 kids who start first grade --

23 MR. TRUDEAU: So, the grades are going to go up?

24 MS. ELLER: -- one out of those 20 is going to learn to
25 read in school; 19 are not.

EXHIBIT J

1 MR. TRUDEAU: So, the grades will go up.

2 MS. ELLER: You'll be in the top five percent in the
3 nation.

4 MR. TRUDEAU: I bet you their self-esteem --

5 MS. ELLER: Oh --

6 MR. TRUDEAU: -- their self-confidence --

7 MS. ELLER: -- incredible what'll happen.

8 MR. TRUDEAU: They'll feel better about themselves.

9 Ah, SAT scores?

10 MS. ELLER: Oh, Alaska had -- I don't know what the
11 scores are for this year, but the last time I looked, Alaska had
12 the highest SAT scores in the nation.

13 MR. TRUDEAU: So, the SAT scores go up, they get --
14 they get into the college of their choice? If they get a good
15 education, if they come out, ah, the top five percent, they're
16 making more money. They get into the job of their choice.

17 MS. ELLER: Then they can be affluent.

18 MR. TRUDEAU: If some -- exactly. If they're fluent at
19 first, then affluent later.

20 MS. ELLER: You got it.

21 MR. TRUDEAU: If an adult is watching us right now and
22 they're at a certain income level, if -- you're telling me, if
23 they can learn to read and read fluently, they have a better
24 chance of in- -- making more money, of, ah, improving their own
25 rate of success in their own career.

EXHIBIT J

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1 MS. ELLER: Absolutely. I had a man call me -- you
2 just made me think of this -- he had been a Vietnam Vet, stayed
3 in, went into the National Guard, couldn't read. Only his wife
4 knew he couldn't read. And anything he had to read, he would go,
5 "Oh, I forgot my reading glasses. What does it say?"

6 MR. TRUDEAU: Ah.

7 MS. ELLER: Or, he would take it home, have his wife
8 read to him -- because his wife knew he couldn't read -- he'd
9 come back.

10 He called me up. He was absolutely desperate. He was
11 getting a promotion and he had to read. It was a desk job. And
12 he said he'd gone to several places. They told him it was going
13 to take him two years, three years, six years to learn to read.
14 He said, "I don't have that kind of time."

15 MR. TRUDEAU: Right.

16 MS. ELLER: "What can you do?" I said, "Take this
17 program. I guarantee you, if you'll go through it, if you'll
18 start back at square one and go through this program, when you
19 finish, you'll be able to read anything".

20 He called me back in a month. He got his promotion.
21 He could now read anything. And that man was a new person. I
22 mean, you could hear it. You could hear it --

23 MR. TRUDEAU: You can hear it.

24 MS. ELLER: -- in his voice.

25 MR. TRUDEAU: Folks, if you're watching right now and

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Complaint

EXHIBIT J

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1 you want more information on Jeanie's program, please call the
2 800 number. We highly recommend and endorse this program. I
3 bought it myself for my -- my brother's son. I think you'll see
4 some fantastic results for you and the children and the people
5 that you love.

6 This is Kevin Trudeau. Thanks again for watching me.
7 And watch me on another edition of "A Closer Look."

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EXHIBIT K

**ACTION READING
SUMMARY**

About Jeanie Eller

- Her program is endorsed by The National Right to Read Foundation and The National Reading Reform Foundation!
- Nationally renowned teaching and reading expert.
- 30 years of teaching experience
- Trains or Retrains teachers in "In Service Meetings"
- Has appeared on Oprah Winfrey's show

Side notes from Program

- 85% of all schools teach kids to read by sight
- 15% use phonics
- By the year 2000, two-thirds of our country will be illiterate (functionally disabled)!
- More than 1 million children each year graduate without the ability to read.

For Children

- Excellent home study program for preschoolers
- Children 8 and older can do the program on their own
- The audio cassettes are filled with songs and rhymes that hold their attention
- The video tape is fun for kids because Jeanie has FUN pictures on the flash cards that they like and they get to make lots of funny sounds that later translates into reading!
- Helps boost self esteem and confidence
- Gives kids an edge in school that makes it easier for them to excel
- Helps improve comprehension of materials read
- Helps enhance penmanship abilities
- Incorporates all of the learning senses through art, games, body movements, and music to create an active and entertaining experience that kids won't think is "work".
- Excellent for kids raised in homes where English is NOT spoken

EXHIBIT K

**ACTION READING
SUMMARY**
continuedFor Adults

- Relieves embarrassment of not being able to read (newspaper, food labels, bus schedules, menus, job applications, etc.)
- Boost confidence and self esteem
- Can make a person more employable
- Easier and quicker for adults to learn, because most already know the vocabulary - they just need to learn how to "decode" written words and sentences.
- Other:
- Uses intensive systematic phonics (based on word sounds, not spellings)
- Most people can complete the entire program and learn to read within 4-6 weeks.

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125 F.T.C.

EXHIBIT K

ACTION READING SCRIPT

Thank you for calling Action Reading my name is _____, and who and I speaking with?

Hi _____, are you calling about Fast Track Action Reading program?

[Caller] Yes I am.

Great! I can help you with that.

Is this for a child or an adult? (If a child) how old is he/she?

OK good! Jeanie's program can definitely help!

As a matter of fact it's endorsed by The National Right to Read Foundation and The National Reading Reform Foundation. Plus, it's backed by a 100% money back guarantee!

The key to Jeanie's proven approach is the use of all learning senses, through art, games, body movements and music to create an active, entertaining experience. And Jeanie not only teaches you how to read, but also comprehension and writing skills. The program includes over 9 hours of audio cassette tapes, a 100 page guide book, flash cards, 7 game boards and playing pieces, along with a bonus video tape. And the best part is the value. Normally, Jeanie charges schools \$1500 per day to learn about her proven methods. But you can take advantage the same information and receive the complete Action Reading program for just \$139.97, plus S&H. And Jeanie is so sure her program works, she offers you a full, three month, money back guarantee in writing. If for any reason you're not satisfied, simply return it for a full refund of the product purchase price - no questions asked! And all I need to get the program out to you is your address and credit card number - would you prefer to use Visa, Mastercard or Discover?

[Capture all information]

_____ your total including shipping and handling is \$152.47 and you'll receive your program in 2 - 4 weeks. If you have any questions you may call our customer service number at 1-800-634-2990. Thank you for calling and have a great day!

EXHIBIT K

**ACTION READING
TOP QUESTIONS AND ANSWERS**

-
1. **How can it improve comprehension?**
Even though we've heard a lot of words before in conversation, a person who can't read wouldn't recognize them. Action Reading teaches you how to read words for their meaning. (It's like putting a person's face to their name, when you have only spoken to them on the telephone.)
 2. **What age group can use this program?**
From pre-school to adults. Pre Schoolers may take 2 years to complete, while adults as little as 4 weeks.
 3. **Does it work for adults as well as children?**
Absolutely! Age has little to do with learning to read.
 4. **How does it compare to other programs? (i.e., Hooked on Phonics)**
Action Reading is less expensive and much more comprehensive. It actually teaches the skill of reading while incorporating all of the learning senses.
 5. **Can children use the course on their own?**
Children 8 years and up can complete the course on their own. We recommend that parents still monitor and assist.
 6. **Does Jeanie guarantee that she can teach anyone to read?**
Action Reading can teach anyone who can see, hear, think and talk to read...guaranteed or your money back!
 7. **Can a child with ADD learn to read with Action Reading?**
Action Reading is a multi-sensory, active program that can help keep a person's attention. It's unique, proven method incorporates all of the learning senses through art, games, body movements and music to create an active, entertaining experience that does not seem like work.
 8. **Is the course too child-like for an adult?**
Absolutely not! Even adults need to start from the beginning.

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EXHIBIT K

9. Is Jeanie still teaching seminars? How much are they?

Jeanie's in school training seminars are \$1500 per day. However, you can benefit from the same information, in the comfort of your own home, for only a fraction of the cost.

10. Can someone with Dyslexia learn to read with Action Reading?
Action Reading teaches left to right tracking and it explains how the skill of reading works.

11. Is there a lot of memorization?
No. Unlike the way most schools teach kids by memorizing thousands of words by sight. A person only needs to learn the 70 unique sounds of the English language. This unique, proven method is based on word sounds, not spellings.

12. Will an adult complete the course the same way as a child?
An adult will complete the course exactly as a child would, however, they will likely complete it much easier and quicker.

13. How can this course help the mentally disabled?
It all depends on the degree of the disability. However, Action Reading is logically and systematically designed so that the student masters one step before moving on to the next. The parent or teacher can set the pace to match the student's learning abilities, and it can be completed over and over until the student masters the course. The program is structured yet fun, while praise and pride of accomplishment are built in.

14. How does it work?
Jeanie's proven, phonics based method incorporates all of the learning senses through art, games, body movements, and music to create an active and entertaining experience that doesn't seem like work.

Learning to read has been compared to cracking a code. Once you know the secret it's easy to decode a sentence. Action Reading teaches the sounds and patterns of our language and how to use them for decoding.

15. How long does it take to complete?
You can complete the course at your own pace and most students can complete the entire program with-in just 4-6 weeks.

EXHIBIT K

16. Delivery time?

- 2 - 4 weeks for credit card orders
- 2 - 4 weeks for phone/mail checks
- 4 - 5 business days for Federal Express (CC orders only)

17. Shipping charges?

- Regular fourth class mail - \$12.50
- Federal Express - \$9.50 extra

18. Caller wants to speak with Jeanie Eller or other Mega personalities.

They may write to Mega Systems at:

Mega Systems Inc.
Action Reading
PO Box 11031
Merrillville, IN 46410

19. What does the program contain?

- 6 audio cassettes
- Visual aid flash cards
- 7 game boards with playing pieces
- 100 page workbook
- Bonus video tape

EXHIBIT K

**QUESTIONS, OBJECTIONS AND
REBUTTALS**

Remember...

People are not calling to figure out why they should buy, they are calling to figure out why not to buy!

1. I want to think about it.

- Don't make your decision now, decide in a month or two after you/ your child have seen the results from the program. Jeanie is so confident that her program works she gives you a full three months to decide!
- What could be a better gift than the gift of reading? Once a child knows how to read, the sky's the limit!
- Why? What's your hesitation?
- Exactly, I wouldn't want you to base your decision on a 5 minute phone call. It wouldn't be fair to you or your _____ problem. Let's get this out to you so that you can base your decision on results - that way you can make an educated decision.
- Exactly! that's why Jeanie Eller gives you an entire three months. So that you can not only think about it, but you can experience the results that her guarantees you will receive.
- What question do you still have _____ that's causing you to hesitate?

2. How much is the book?

- Let me tell you Mr./Mrs./Ms. _____ exactly what you will be receiving, your discount, and how it will benefit you. O.K.?

Complaint

EXHIBIT K

3. Can you send me written information?

- Let me tell you Mr./Mrs./Ms. _____ exactly what you will be receiving, your discount for ordering today and how the Jeanie's program will benefit you. O.K.?
- I can give you all the information you need. What specifically would you like to know?
- I wish the literature told the whole story. In fact, it will probably raise key questions that I would be able to answer for you now. (NO PAUSE...ask probing question).

4. I need to speak with my wife or husband.

- That's exactly what Jeanie Eller wants you to do. She allows us to send the entire program to you, on a no risk basis - so that you and your wife can go through it together and really determine the value of the information and see how it can really benefit your family.
- Let's get this out to you so that you and your wife can review it together. Don't ask her to make a decision on the price, but on the information and the results. Remember you have a full three month money back guarantee.
- Why don't you talk with them right now. I can wait.

5. It's too expensive/ I'm on a fixed income/ I can't afford it.

- Three-pay- What if I could get the entire program out to you for just \$46.65 a month for three months; would that be better for you?
- If this can help you _____, wouldn't it be worth reviewing?
- Would you be using a credit card to place your order today? Great then what I'll be able to do is to put you on our 3 pay plan, and your last name is?
- _____ I'm sure you would agree that a product is worth what it does for you. Let's explore what benefits Action reading offers you.

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EXHIBIT K

- If I could demonstrate how Action Reading would be worth every penny we're asking, you would be willing to take advantage of what we're offering today, right?
 - _____ The value of Action reading is what it will do for you, not what you have to pay for it, right?
 - Price is an important consideration, isn't it? Would you consider value equally important? Let me tell you about the value of our products.
 - „I can appreciate your situation and that's why Jeanie Eller offers you an easy 3 payment plan so you can still take advantage of the discount today. By using the 3 pay plan Jeanie Eller's program becomes more affordable and best of all, there are no financing fees or added costs. Let me give you a breakdown of the payments so we can get this right out to you?
6. I'm not interested.
- May I ask why?
 - _____ What result would make the price worth it in your opinion?

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EXHIBIT K

HOW TO EXPLAIN THE 3 PAY PLAN

I can appreciate your situation, and that's why Jeanie offers an easy 3 pay plan, so you can still take advantage of her proven program. By using the 3 pay plan her program now becomes easier to own, and best of all, there are no financing fees or added costs. Let me give you a breakdown of the payments so we can get this out to you OK?

Your payments will be split up with the first payment consisting of 1/3 of the product price plus applicable shipping charges. The second and third payments consist of two equal payments of the remaining 2/3 of the product price. That breaks out to:

<u>1st Payment</u>	<u>2nd Payment</u>	<u>3rd Payment</u>
\$59.15	\$46.65	\$46.65

DOESN'T NOT HAVE A CREDIT CARD

Do you have a checking account?

YES

Great! A lot of people like yourself are not using credit cards, that's why Jeanie offers you check by phone, so that you can still take advantage of the discount today. Go ahead and get your checkbook and I'll walk you through the process.

- (Name) may I have your address?
- And your daytime telephone number with area code first?
- May I have the name of your bank?
- And the city and state that your bank is located in?
- May I have the check number located in the upper right hand corner of the next check in your checkbook?
- There is a long series of numbers on the bottom of that check. Will you please read all of them to me starting from left to right? Please read just the numbers and not the symbols. Make sure you do not leave any numbers out.

Great! (Name) your total including shipping and handling is \$152.47 and you will receive your program in 2-4 weeks. If you have any questions you may call our customer service number at 1-800-634-2990. Thank You for calling and have a great day!

Complaint

125 F.T.C.

EXHIBIT K

WANTS MORE INFORMATION ON CHECK BY PHONE

(Name) when you send a check to a company they use the information off the front of the check to process it, well that same information is what we are now able to process by phone. With the bank name, the check number and the numbers off the bottom of the check we'll be able to secure your order today, and expedite it right away.

Also, (Name) what you can do is contact your bank and let them know that you have given Mega Systems the authority to put check #____ through for a one time charge of \$____ not a penny more or less. This way you can be assured that you still have control of your account O.K.?

**WILL NOT USE CHECK BY PHONE
DOES NOT HAVE CHECKING ACCOUNT**

Let me send you an invoice with a postage paid return envelope for your convenience.

If you have any questions you may call our customer service number at 1-800-634-2990.

Complaint

EXHIBIT L

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: HOWARD BERG'S MEGA READING
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 31

TRUDEAU COMPLAINT EXHIBIT L
TRU-VANTAGE COMPLAINT EXHIBIT A
BERG COMPLAINT EXHIBIT A

Complaint

125 F.T.C.

EXHIBIT L

1 MR. TRUDEAU: Thanks for watching. I'm Kevin Trudeau,
2 and this is another edition of Vantage Point. How would you like
3 to read 25,000 words a minute? How about reading an entire book
4 just like this in about twenty minutes instead of ten hours?
5 Imagine reading a newspaper or magazine in a fraction of the time
6 it would normally take. Well, my guest today can do just that as
7 well as comprehend and remember everything. Howard Berg is the
8 world's fastest reader. He's in the Guinness Book of World
9 Records. He's the founder of the Berg Reading Institute and
10 author of Mega Reading. He's been featured on virtually
11 thousands of radio and television shows as well as written about
12 in literally hundreds of newspapers and magazines all around the
13 world. Howard, thanks for being my guest today.

14 MR. BERG: Well, it's great to be here, Kevin.

15 MR. TRUDEAU: OK, you take a book like this, and how
16 long would it take you to read it?

17 MR. BERG: Well, top speed, five or six minutes.

18 MR. TRUDEAU: Five or six minutes.

19 MR. BERG: I've been tested. I was on "Regis and
20 Kathie Lee," and they gave me a book about that size.

21 MR. TRUDEAU: This would be a great book to read, by the
22 way, for somebody, obviously Warren Buffet is the world's
23 greatest investor.

24 MR. BERG: Yes, and they had me read a book, and they
25 told me I was going to talk about the book, but they changed the

EXHIBIT L

1 game when I got there. Instead, they had the author come on as a
2 surprise to test me and see me if I had really learned the book.
3 And I got every question right, by not just reading it, but
4 retaining and comprehending and focusing.

5 MR. TRUDEAU: Now this was on "Regis and Kathie Lee,"
6 and the book was about, how long a book was it?

7 MR. BERG: Between 240 and 300 pages.

8 MR. TRUDEAU: And how long did it take you to read that
9 book?

10 MR. BERG: I read it like four times, so it took twenty
11 minutes. I was memorizing, I wasn't reading, I was memorizing it
12 for a test.

13 MR. TRUDEAU: Wait a minute, let me make sure I got
14 this straight. You took a book, it took you twenty minutes to
15 read it four times, to memorize it. Now, here's the question.
16 Obviously, you're the world's fastest reader. You're in the
17 Guinness Book of World Records. Is this something that everybody
18 can do, or is it just a gift that you have?

19 MR. BERG: Let me tell you, someone else asked me that
20 question. I was in Canada, and Dini Petty who's a national talk
21 show host in Canada said the same thing. She said, "Howard, it
22 sounds too good to be true that anyone could do it." I said,
23 "Dini, how about you pick a few audience members, and you and
24 them come to my workshop in Toronto, and we'll see what happens."
25 So Dini and her audience showed up. One of them was a student.

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125 F.T.C.

EXHIBIT L

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1 one of them was a professional. Dini forgot her glasses, so
2 someone had to run back and get them. It's good to have your own
3 talk show. And at the end of the workshop, Dini had slightly
4 doubled, and the two other people were close to quadrupling their
5 reading speed.

6 MR. TRUDEAU: That workshop is just a couple hours.

7 MR. BERG: Less than four hours. And they went on
8 national television in Canada. And Dini went on the air and
9 says, "Howard's really onto something. I think everyone in
10 Canada should be using this." And then off the air, she came up
11 to me, and she said, "I have a son, and I wanted to know if the
12 next time you're in Toronto, could my son please come to your
13 workshop, because I think every child should be getting these
14 skills. Because I know how much they helped me."

15 MR. TRUDEAU: So now your course actually releases a
16 person's natural ability to speed read.

17 MR. BERG: And it's easy, it's fun, and it's
18 systematic.

19 MR. TRUDEAU: We're going to test you right now. I
20 have over here, by the way, stacks of books, and we're going to
21 test Howard. The first book I have is by Jerry Spence, How To
22 Argue And Win Every Time, Jerry Spence. I love this guy, by the
23 way, he's fantastic. And I'm going to give you a little portion
24 of this book, Howard, and I want you to read it. We're going to
25 time Howard and see how fast it's going to take him. Then I'm

EXHIBIT L

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1 going to quiz him. This is an easy one, we'll start off as an
2 easy one. It's just about the author. A great book, it's about
3 the author. OK, now hold on, here's the page, put your finger in
4 there, don't open it yet. OK, now hold on because I'm going to
5 time you with my stopwatch. OK, ready?

6 MR. BERG: Yes

7 MR. TRUDEAU: Go.

8 MR. BERG: Good

9 MR. TRUDEAU: About --- little over four seconds.

10 MR. BERG: I haven't warmed up yet.

11 MR. TRUDEAU: Four seconds?. OK, now give me the book.

12 MR. BERG: OK

13 MR. TRUDEAU: Now you've read that?

14 MR. BERG: Yes, I have.

15 MR. TRUDEAU: OK. Well, I'm going to test you on a
16 couple questions on this thing.

17 MR. BERG: No problem.

18 MR. TRUDEAU: All right. First thing -- now, by the
19 way, I went through these books that I'm going to be giving
20 Howard and it took me eight hours yesterday. Because I went to
21 the book store, bought a whole bunch of books, and I said I'm
22 just going to buy random books and we're going to test you.
23 Okay.

24 Now, it talks about in here the different people that
25 he was the defense attorney for.

Complaint

125 F.T.C.

EXHIBIT L

5

1 MR. BERG: Yes, it did.

2 MR. TRUDEAU: Give me a couple of the people.

3 MR. BERG: There were two. There was Randy Weaver

4 MR. TRUDEAU: Right.

5 MR. BERG: And Imelda Marcos.

6 MR. TRUDEAU: Correct. Where does he live?

7 MR. BERG: Jackson Hole, Wyoming.

8 MR. TRUDEAU: Correct. And he has a wife. What's his

9 wife's name?

10 MR. BERG: Emma Jean.

11 MR. TRUDEAU: Correct. Emma Jean.

12 MR. BERG: Yes.

13 MR. TRUDEAU: All right. Hold on, we're going to --

14 MR. BERG: A little slow.

15 MR. TRUDEAU: Well, a little slow. Okay. We're going

16 to make it a little bit tougher now. Here's an other book.

17 Here's another book. Math Magic by Scott Flansburg. Scott is a

18 good friend of mine. We're going to have Scott on the show.

19 He's the human calculator.

20 Now, this book teaches you how to do math calculations

21 in your head. Now, this is going to be a good test, folks. Now

22 -- because imagine this. What -- the techniques -- the

23 technology that Howard has -- Howard has that he teaches people

24 is how to read books and obviously knowledge is power but only if

25 you can remember it and use it.

973

Complaint

EXHIBIT L

6

1 MR. BERG: And apply it.

2 MR. TRUDEAU: And apply it. Okay. So, I'm going to
3 give you a chapter. This is the entire chapter seven.

4 MR. BERG: Okay.

5 MR. TRUDEAU: I'm going to time you.

6 MR. BERG: Okay.

7 MR. TRUDEAU: Let's get this cleared out here. And
8 this is on multiplication tricks.

9 MR. BERG: Okay.

10 MR. TRUDEAU: You're going to read this. And then I'm
11 going to test your multiplication skills because this is going to
12 teach you how to do multiplication in your head.

13 MR. BERG: Do I get to use a calculator?

14 MR. TRUDEAU: No calculator.

15 MR. BERG: Okay.

16 MR. TRUDEAU: Okay. All right, hold on. Hold on, I'm
17 going to time you. I'll say go. Ready, set, go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: Okay.

21 MR. TRUDEAU: Twenty four seconds. Twenty four and a
22 half seconds.

23 MR. BERG: There was a lot of pages.

24 MR. TRUDEAU: A lot of pages. Now, you're telling me
25 you read that?

EXHIBIT L

7

1 MR. BERG: I learned it.

2 MR. TRUDEAU: You learned it?

3 MR. BERG: Yes, and so could you. That's the whole

4 point.

5 MR. TRUDEAU: All right. Well, let me test you on

6 this. This is on multiplication -- it's on multiplication

7 skills. Okay?

8 MR. BERG: Okay.

9 MR. TRUDEAU: Let me give you a couple of

10 multiplication tables here. Okay. 45 times 45?

11 MR. BERG: That would be 2,025.

12 MR. TRUDEAU: You just did that in your head?

13 MR. BERG: That's right. It teaches you how to do it.

14 That's the whole point.

15 MR. TRUDEAU: You don't have a calculator here by the

16 way? Can we -- Paul, make sure we get that -- I want to make

17 sure someone gives me a thumbs up if that's the right answer.

18 Let me give you another one here.

19 MR. BERG: It's right. Okay.

20 MR. TRUDEAU: 75 times 75?

21 MR. BERG: 5,625.

22 MR. TRUDEAU: I want Paul to make sure -- give me like

23 some -- we got a thumbs up there? He's right.

24 MR. BERG: Of course I'm right.

25 MR. TRUDEAU: And you learned that just now?

EXHIBIT L

8

1 MR. BERG: That's the whole point, Kevin. It's
2 something everyone should be doing. You know, the United States
3 has been rated in 49th position in literacy by the United
4 Nations. I think all our viewers should be concerned. They just
5 had a front page story in USA Today about how our education
6 system is failing to teach the students.

7 MR. TRUDEAU: Uh-huh.

8 MR. BERG: Time Magazine talked about the educational
9 crisis. Even the teachers unions are becoming concerned.
10 Governor Bush has just made the most highest priority in his
11 second term of office is teaching reading skills, because 25
12 percent of the children in Texas don't know how to read. This is
13 what it's about.

14 I teach children not just how to read faster but to
15 comprehend, retain and stay focused. Because face it, how many
16 times have you or the people at home take a test or gone to an
17 important meeting and got tense. You got frightened. You got
18 worried. And all that information that you stored and worked so
19 hard at learning was forgotten.

20 So, Mega Reading is a complete accelerated learning
21 system that doesn't just teach you to read quickly.

22 MR. TRUDEAU: Right.

23 MR. BERG: On a skimming level.

24 MR. TRUDEAU: Right.

25 MR. BERG: But to comprehend, apply and use it. Even

Complaint

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EXHIBIT L

1 under test situations.

2 MR. TRUDEAU: And it just takes a few short hours to
3 learn. Correct?

4 MR. BERG: Couple of hours. That's it.

5 MR. TRUDEAU: Now, let me ask you a question. There's
6 been speed reading courses been around for years.

7 MR. BERG: That's true.

8 MR. TRUDEAU: Evelyn Wood is probably the most common
9 and I'm sure there's dozens of other speed reading courses.

10 MR. BERG: Yes, and some of them are quite good.

11 MR. TRUDEAU: But the biggest challenge most people
12 found is, number one, it took days, weeks, months of practice and
13 training.

14 MR. BERG: Absolutely. Hours a day.

15 MR. TRUDEAU: Right.

16 MR. BERG: With days, weeks and months. It's not just
17 days, weeks, and months, but hours a days each of those days.

18 MR. TRUDEAU: So, how is yours different than those in
19 that respect?

20 MR. BERG: First of all, the program takes less than
21 four hours to learn.

22 MR. TRUDEAU: That's it?

23 MR. BERG: That's it.

24 MR. TRUDEAU: One time?

25 MR. BERG: One time.

EXHIBIT L

10

1 MR. TRUDEAU: Like learning how to ride a bike.

2 MR. BERG: And you never forget how once you know how.
3 Once you release it, it's there.

4 MR. TRUDEAU: You're releasing someone's ability. So,
5 it's radically different than these other courses.

6 MR. BERG: Can you cross the street and look at the
7 traffic and know where you're going? Look at all the information
8 that your brain has to process in an instant. That same brain
9 should be reading a book just as effortlessly and that's what I
10 teach.

11 MR. TRUDEAU: Well, now -- so, these other courses that
12 have been out there, your program is a revolutionary -- it's
13 totally different.

14 MR. BERG: Let me tell you a story, Kevin.

15 MR. TRUDEAU: Yeah.

16 MR. BERG: The former president of Evelyn Wood, the
17 chairman of Evelyn Wood is Maurice Thompson, Jr. I have a letter
18 from him.

19 MR. TRUDEAU: Right.

20 MR. BERG: Tommy asked me to train him and his family
21 last September. The former president of Evelyn Wood asked me to
22 train his family. Now, this is the man who knows speed reading.

23 MR. TRUDEAU: Right.

24 MR. BERG: His son quadrupled -- I think he went from
25 two to 860 words a minute in less than four hours. And he

Complaint

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EXHIBIT L

11

1 mentioned how his grades immediately shot up from the previous
2 term. And would you like to read the comment he has on the
3 bottom. I'm really proud of this. This is the former president
4 of Evelyn Wood.

5 MR. TRUDEAU: It says, I feel you have moved one step
6 beyond speed reading --

7 MR. BERG: That's right.

8 MR. TRUDEAU: -- to speed learning. Bringing the
9 discipline to the 21st first century.

10 MR. BERG: Exactly. Now, I'm proud of that.

11 MR. TRUDEAU: So, what you're actually have is really a
12 revolutionary break through in what you've developed.

13 MR. BERG: Totally different. Now, other programs were
14 mechanical. That's why they took so long. They required
15 repetition. Like learning to type or playing an instrument, to
16 work.

17 MR. TRUDEAU: Right.

18 MR. BERG: And a lot of people found they loss their
19 speeds almost as quickly as they gained them.

20 MR. TRUDEAU: Right.

21 MR. BERG: I read 80 to 90 pages a minute at my top
22 speed. But I don't read 80 to 90 pages a minute every time I
23 open a book. Sometimes I want to relax. Sometimes I'm a little
24 tired, I want to read in bed.

25 MR. TRUDEAU: Right.

EXHIBIT L

12

1 MR. BERG: So, I have that option. With the other
2 programs because it was conditioned, it was all or nothing. If
3 you slowed down, that was the end of your speed. And most people
4 told me they only got a very superficial understanding, like a
5 skim.

6 I'm working with companies like Pfizer (Phonetic),
7 Mobil Oil, that have high tech reading. And they used it because
8 it was easy to retain complicated information.

9 MR. TRUDEAU: So, even the detailed complicated
10 material, people can read quickly and grasp it and comprehend it
11 and recall it.

12 MR. BERG: Over long periods of time.

13 MR. TRUDEAU: Now, how about students? Means straight
14 As with less study time?

15 MR. BERG: Not only do they get straight As with less
16 study time, but think about this, Kevin, they get better self
17 esteem. They begin to feel confident. Now, you spend over
18 15,000 hours when you go to school.

19 MR. TRUDEAU: Right.

20 MR. BERG: Think about that. And out of all of those
21 hours and the people at home think about it, too, how many of
22 those hours did they spend teaching you how to learn?

23 MR. TRUDEAU: Right.

24 MR. BERG: They call it an education system and they
25 never even teach you how to learn.

Complaint

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EXHIBIT L

13

1 MR. TRUDEAU: And people obviously in business because
2 you work with virtually dozens of major corporations and Fortune
3 500 companies.

4 MR. BERG: All over the country.

5 MR. TRUDEAU: So, people can make more money because
6 there's so much material to learn today, so much reading that
7 people have to grasp.

8 MR. BERG: I have an interesting letter here from
9 Pfeiffer. Pfeiffer is the leading publisher in the world on
10 human resource training materials.

11 MR. TRUDEAU: Okay.

12 MR. BERG: Every corporate trainer has heard of these
13 people.

14 MR. TRUDEAU: Right.

15 MR. BERG: They hired me to train their editors not
16 only in how to speed read but how to make books easier to
17 comprehend, because my program teaches people how to understand
18 text.

19 MR. TRUDEAU: Right.

20 MR. BERG: Not just blur through it.

21 MR. TRUDEAU: Right.

22 MR. BERG: And the head editor -- the managing editor
23 says here that this program that I gave him gave him a distinct
24 advantage to their publishing program.

25 MR. TRUDEAU: Hmm.

EXHIBIT L

14

1 MR. BERG: That's the managing editor of the world's
2 largest human resource publisher. Here's a letter from the York
3 Prep School. The head master is Ronnie Stewart. He's an Oxford
4 graduate. This man knows education.

5 MR. TRUDEAU: Right.

6 MR. BERG: You don't get better than Oxford. And
7 here's what it says. "Howard, just a note to let you know how
8 positive the feedback was of your lectures to the 11th and 12th
9 grades. So positive in fact, that whenever it's convenient for
10 you, I would love -- I like that word -- I would love for you to
11 come and do the ninth and tenth grades on a similar basis." And
12 we've already booked them.

13 ON SCREEN: For more info call: 1-800-293-9666. This
14 is a paid commercial program for Tru-Vantage International.

15 MR. TRUDEAU: That's great. Folks, if you want more
16 information on Howard's program, Mega Reading program, it's a
17 home study course that you can go through at your leisure and it
18 will virtually release your own super reading speed, mega
19 reading. You'll be able to read almost as fast as Howard.
20 Virtually quadruple, five, ten times your reading speed right
21 now. Call the number on your screen. And I've worked out a
22 special arrangement with Howard. He'll give you an over 50
23 percent discount off the regular price of the program. So, call
24 right now to get some more information on it.

25 Now, let's -- let's continue with the testing here. :

EXHIBIT L

15

1 got another book. How to Win Friends and Influence People by
2 Dale Carnegie. Great book. Everybody should read this book.
3 Now, let's see. I went through this last night and I got chapter
4 six. I want you to read the entire chapter six and give us a
5 quick synopsis of the chapter.

6 Okay. Now, I'm going to time you again. And folks,
7 the important thing is what Howard is saying is every single
8 person -- now, you've taught how many -- what thousands and
9 thousands of people?

10 MR. BERG: Thousands. Can I say something?

11 MR. TRUDEAU: Yeah.

12 MR. BERG: I have a letter here from a girl who has
13 brain damage.

14 MR. TRUDEAU: Right.

15 MR. BERG: Brain damage. She was in a car accident and
16 half her brain stopped functioning. It was electrically dead.

17 MR. TRUDEAU: Right.

18 MR. BERG: And she writes. It says that on a coffee
19 break in my word shop, she went three to 600 words per minute.
20 This is someone with severe brain damage. So yes, it works for
21 anyone. And you can't get worse than that.

22 MR. TRUDEAU: At what age, by the way? How old?

23 MR. BERG: The youngest student I ever had was eight.
24 I was in Toronto. I was doing a live workshop and the vice
25 principle of a school was there with his wife. His name was Ted

EXHIBIT L

16

1 Ted said, "Howard, we would really love for you to come to our
2 elementary school. My wife and I just quadrupled."

3 MR. TRUDEAU: Right.

4 MR. BERG: And we think you can do this for our kids.
5 I said, how old are they? He said third, fourth grade. I said,
6 it's kind of young. Normally, in that age group I teach the
7 memory and learning skills. And I've done that all over the
8 country because a lot of kids aren't reading yet at that age.

9 MR. TRUDEAU: Right.

10 MR. BERG: He said, our students are reading and
11 reading well. Let's try it. I said, fine. And the parents
12 came. How many things did parents do today with their families?

13 MR. TRUDEAU: Right, right, right.

14 MR. BERG: Okay. At the end of the workshop, every
15 child and parent had at least doubled except for one.

16 MR. TRUDEAU: Uh-huh.

17 MR. BERG: That child was reading at five seconds a
18 page and I quizzed her.

19 MR. TRUDEAU: Five seconds.

20 MR. BERG: Five seconds a page. And the vice principal
21 was there.

22 MR. TRUDEAU: And they're reading it?

23 MR. BERG: Comprehending it and retaining it.

24 MR. TRUDEAU: All right. Well, we're going to test you
25 right now. Okay, this is chapter six.

EXHIBIT L

17

1 MR. BERG: Okay.

2 MR. TRUDEAU: Dale Carnegie's How to Win Friends.
3 Ready?

4 MR. BERG: Yes.

5 MR. TRUDEAU: Go.

6 (Whereupon, there was a brief pause while Mr. Berg was
7 reading the book.)

8 MR. TRUDEAU: This is amazing. You're reading it?
9 Okay, give it back. That was about 16 seconds.

10 MR. BERG: Right.

11 MR. TRUDEAU: Okay. Now, tell us -- just give me a
12 quick synopsis of that chapter.

13 MR. BERG: Well, the concept was make people feel
14 important and do it sincerely. And by the way, Kevin, you're
15 doing an excellent job with this show and I really mean that.

16 MR. TRUDEAU: Thank you very much. Okay, wait --
17 you're -- the name of that chapter by the way was, How To Get
18 People To Like You.

19 MR. BERG: By the way, one of my favorite uses of speed
20 reading is learning new skills such as I just showed you.

21 MR. TRUDEAU: Right.

22 MR. BERG: Learning how to use a computer or do better
23 with relationships. So, this -- (inaudible) -- anything.

24 MR. TRUDEAU: To learning anything. Tell us a little
25 about that chapter.

EXHIBIT L

f8

1 MR. BERG: Okay, it starts off he's in a post office
2 and he see's a postal employee that he's familiar with and the
3 guy looks very very depressed and down. And he starts talking to
4 the guy and finds out the guy feels that nobody really
5 appreciates what he's doing.

6 MR. TRUDEAU: Uh-huh.

7 MR. BERG: And so, he starts telling the guy how
8 important he is and how much he appreciates him. And the guy
9 just perks up and he says that's what it's all about. You want
10 people to like you. Let them know how important they are and it
11 improves their self esteem. And they relate that to you as the
12 cause.

13 MR. TRUDEAU: Uh-huh. Now, what -- there was a
14 principle discussed in this.

15 MR. BERG: Yes, the principle was make people feel
16 important and be sincere.

17 MR. TRUDEAU: Make people feel important and -- now,
18 you just said almost verbatim. It says make people feel
19 important and do it sincerely.

20 MR. BERG: Well, you may not get every word. You know,
21 when you're going a page and a half a second, you might miss an L
22 Y. Okay.

23 MR. TRUDEAU: And actually -- wait a minute. Wait, we
24 got to do another book now.

25 MR. BERG: Okay.

Complaint

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EXHIBIT L

19

1 MR. TRUDEAU: This book by the way, this is my book.
2 This is my book, Kevin Trudeau's, Mega Memory. Everybody should
3 read this book. Everybody go out and get this book. It's my
4 book Mega Memory. Now, it's the first -- you know we sold three
5 and a half million copies of my Mega Memory program.

6 MR. BERG: That's a lot.

7 MR. TRUDEAU: Yeah, and this is a great book. Just
8 says published by William Morrow. It's in all the book stores.
9 Call, you can get it.

10 MR. BERG: Now, make the call.

11 MR. TRUDEAU: Now, make the call now. Now, I want you
12 to read just chapter one.

13 MR. BERG: Okay.

14 MR. TRUDEAU: On how to use this book, and then give us
15 a quick synopsis on this. Not that we don't trust you. Go.

16 (Whereupon, there was a brief pause while Mr. Berg was
17 reading the book.)

18 MR. BERG: Okay, that's 11 pages.

19 MR. TRUDEAU: About 16 seconds.

20 MR. BERG: Okay. And I'm getting closer to my speed.

21 MR. TRUDEAU: And you read this? You read this?

22 MR. BERG: Yes. It's first -- it sets the ground
23 rules.

24 MR. TRUDEAU: And anybody who gets this course from us
25 can do what you just did?

EXHIBIT L

20

1 MR. BERG: Thousands of people are doing what I just
2 did.

3 MR. TRUDEAU: All right, tell me about the book. I
4 know all about it because I just wrote it.

5 MR. BERG: Okay. I guess you would know. This is like
6 Regis and Kathy Lee all over.

7 MR. TRUDEAU: Yeah, the author. Exactly. Okay.

8 MR. BERG: Well, it starts off talking about what you
9 should do to develop your mega memory, about setting up a
10 specific time and place to do it, avoiding certain foods, how
11 much time you should be doing, how to prepare yourself. And
12 that's essentially what the first chapter is about. Getting set.

13 MR. TRUDEAU: Now, there was four things I mentioned.
14 The four steps you go through.

15 MR. BERG: Yes, there were. Let me think. First there
16 was unconscious incompetence, where you don't know what you're
17 doing.

18 MR. TRUDEAU: Right.

19 MR. BERG: You don't even know you don't know what
20 you're doing.

21 MR. TRUDEAU: Right.

22 MR. BERG: The second one was conscious incompetence,
23 where you know you don't know what you're doing.

24 MR. TRUDEAU: Right, right.

25 MR. BERG: Okay. And the third one -- the third one

EXHIBIT L

21

1 was conscious competence, where you know what you're doing
2 but you have to think about it. Sort of like when you're riding
3 a bike and you know you have to think how to stay on the bike.

4 MR. TRUDEAU: Right.

5 MR. BERG: And the fourth step was unconscious
6 competence, where it's at released skill and you're doing
7 instinctively. You don't have to think about it.

8 MR. TRUDEAU: That's the point I want to talk about.
9 Because your course gets people very quickly to that unconscious
10 competence level where it happens automatically.

11 MR. BERG: In hours. In hours.

12 MR. TRUDEAU: So, it's like learning how to ride a bike
13 or learning how to swim. You don't have to practice and practice
14 and practice. You're just releasing the skill.

15 MR. BERG: No. I have a story about that.

16 MR. TRUDEAU: Hold on for one second because I want to
17 tell people how to get this program.

18 MR. BERG: Okay. Okay.

19 MR. TRUDEAU: If people do want more information on
20 Howard's program The Mega Reading Home Study Course -- folks,
21 this works for everybody. Thousands of people have gone through
22 it. I highly endorse and recommend this program. Howard is the
23 world's fastest reader. There is nothing out there like it
24 anywhere in the world. It'll work for anyone about eight to ten
25 years and up. If you have a student in your life, you need to

EXHIBIT L

22

1 get it for them. If you're in business, if you read papers, if
2 you like to read novels --

3 MR. BERG: The Sunday paper.

4 MR. TRUDEAU: You'll learn this information, you'll
5 read it quickly and you'll be able to recall it. Call the number
6 on your screen. And again, we worked out a special arrangement
7 with Howard. You will get a 50 percent discount while we're on
8 the show. You can call right now and get more information on
9 this program. So, call the number.

10 MR. BERG: You mentioned how you don't have to
11 practice.

12 MR. TRUDEAU: Right.

13 MR. BERG: I have an interesting story. One of my
14 students called me and was really excited. A grandmother and she
15 learned how to do this at my live program and then she didn't use
16 for like six weeks.

17 MR. TRUDEAU: Right.

18 MR. BERG: And with any speed reading program if you
19 don't use it for six weeks, you can kiss it goodbye. It's over.

20 MR. TRUDEAU: Right.

21 MR. BERG: Her grandson came to her. He had a book
22 report and he needed her to help him. She read the book in 15
23 minutes. He got an A. She said, Howard, I don't know he did it.
24 I haven't use the program in six weeks. I opened the book and
25 like that it came right back to me. I said that's what it's

EXHIBIT L

23

1 about. You already have the ability. I'm just showing you how
2 to release it.

3 MR. TRUDEAU: Well, we're going -- we're going to test
4 you again. I keep testing you because this is really impressive
5 to me. All right, I got another book here. And I went to the
6 book store and picked these up. Rush Limbaugh, See I Told You
7 So. I like Rush by the way. We advertise a lot on his show.
8 Rush is a great guy.

9 MR. BERG: Um-hum.

10 MR. TRUDEAU: I have a personally autographed copy of
11 this book by the way.

12 MR. BERG: Do you?

13 MR. TRUDEAU: Yes, Rush sent to me. Okay. I want you
14 to read a chapter here. Let me see if I can find the chapter
15 about Rush. We went to Rush. Okay.

16 MR. BERG: Don't rush.

17 MR. TRUDEAU: Don't rush, don't rush. Now, by the way,
18 when I'm finding this chapter -- because I read things last
19 night. Okay?

20 MR. BERG: Yeah.

21 MR. TRUDEAU: Anybody can do this I mentioned?

22 MR. BERG: Anybody.

23 MR. TRUDEAU: And the age -- how old was the oldest
24 person that went through this?

25 MR. BERG: I had a woman at 88 years old and she's in

EXHIBIT L

24

1 Pasadena. And she took the program and I told them where I was
2 staying. The next day in my hotel I get a phone call and I say
3 oh, what's wrong. I said nobody calls me. Everybody learns it.

4 MR. TRUDEAU: Right.

5 MR. BERG: I say what's the problem. She says no
6 problem. I just called to tell you -- her name was Ruth. She
7 says, Howard, I went home after taking your program. I'm 83
8 years old and I read two 300 page books in under three hours.
9 I'm 83 years old.

10 MR. TRUDEAU: Wow.

11 MR. BERG: Do you know how happy I am? She says, I
12 don't know how much more time I have left, but there's so many
13 things I want to do and learn and you've just given me the tools
14 for doing it.

15 MR. TRUDEAU: You know, there are so many books out
16 there with so much material that -- newspapers, publications for
17 business people, you know, magazines, publications they have to
18 read, books and all these manuals. Learning computers. Thick
19 manuals.

20 MR. BERG: Thick manuals.

21 MR. TRUDEAU: You know, you were telling me that you
22 learned computers in one night.

23 MR. BERG: That's absolutely true. I bought at K-Pro
24 II (phonetic). Never saw or used a computer before. The first
25 night I hooked up everything.

EXHIBIT L

25

1 MR. TRUDEAU: Right.

2 MR. BERG: I learned Wordstar, DataStar, and Formstar
3 and published an article the next day. And that's the truth.
4 And I'll tell you a little funny story.

5 MR. TRUDEAU: And anybody can do this, right?

6 MR. BERG: Anybody can do it. And what happened was
7 the margins weren't perfect and I thought something was wrong.
8 And then someone said, do you know it takes 80 hours normally to
9 do what you did in three. And I said I guess I should feel a
10 little bit better then.

11 MR. TRUDEAU: Now, by the way, before -- well, I want
12 to do this test. I am going to have one more test. Okay. We
13 got one more. This is the chapter. Put your finger in there.
14 I'm going to get my little trusty -- this is for amazing on the
15 time. Ready?

16 MR. BERG: Yep.

17 MR. TRUDEAU: Go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: The pages are sticking. Okay. Well, that
21 slowed me down a bit.

22 MR. TRUDEAU: Okay, yeah. Still about 17 seconds.

23 MR. BERG: Okay, I apologize for that.

24 MR. TRUDEAU: Okay. All right. It's Rush's book.

25 Now, what was the gist of that book?

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1 MR. BERG: The gist was that government's too big.
2 We've got to make it smaller and vote conservative republican.
3 Okay. But he really has a lot of points. He talks about welfare
4 and how about 27 or 28 cents out of every dollar gets to the
5 reciprocate because the rest of that is being spent on
6 administration. And that's an example how government waste is
7 not helping us.

8 MR. TRUDEAU: And that's -- when you were on Regis and
9 Kathy Lee, you had the author come in. You read the book.

10 MR. BERG: (Inaudible).

11 MR. TRUDEAU: And he gave you very tough questions.

12 MR. BERG: I still remember one of them. He asked me
13 what did he say about -- let's see. He asked me several
14 questions. He asked me what did he say about the Pirates of
15 Penzance. It was a trick question. The book was called Going to
16 Movies and it was a vignette. Every two pages was another movie.
17 So, it wasn't a story. It was hundreds of little movie
18 vignettes.

19 MR. TRUDEAU: Right.

20 MR. BERG: And I said, Craig, that's a trick question.
21 Because it wasn't -- there was chapter in there about a different
22 movie and the Pirates of Penzance was used as an example of how
23 if the director had used the techniques of Pirates of Penzance
24 intent instead of the techniques he had chosen, his movie would
25 have been a better picture. I said, so you're actually trying to

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1 trick me because that wasn't even what the chapter was about.

2 MR. TRUDEAU: So, anybody can do this?

3 MR. BERG: Anybody. In fact, I had a blind student in
4 Huntsville, Alabama.

5 MR. TRUDEAU: Yeah.

6 MR. BERG: I swear to you it's true.

7 MR. TRUDEAU: Wait a minute. You can't read if you
8 can't see.

9 MR. BERG: She was reading in Braille.

10 MR. TRUDEAU: Oh, okay.

11 MR. BERG: And she took the program to learn the memory
12 skills. Because a lot of people when they hear speed reading,
13 they think fast reading. With Mega Reading it's not just fast
14 reading, it's fast learning. Remember what Tommy said, it's a
15 complete accelerated learning program. And what I teach them is
16 storing, retrieving, recalling, focusing.

17 Here's an important skill. Knowing what to look for.
18 How many times have you studied for a test -- people at home.
19 You study for a test, you take the test and none of the questions
20 you studied are asked. Everything else they ask. You go to an
21 important meeting and everything you thought was important was
22 not asked.

23 Well, if you don't know what to look for, you're going
24 to miss it. And I teach how to figure out what to look for.

25 MR. TRUDEAU: Now, you're not -- I was just --

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1 interesting to note because obviously there are so many books out
2 there, like Wealth Without Risk by Charles Givens (phonetic)
3 which is a phenomenal book, How to Attract Anyone Anytime by
4 Susan Raven (phonetic), Les Brown (phonetic), Live Your Dreams.
5 There are so many phenomenals out -- Mary K. Ash (phonetic) and
6 we can't do all of these.

7 MR. BERG: No.

8 MR. TRUDEAU: (Inaudible).

9 MR. BERG: I could.

10 MR. TRUDEAU: Yeah.

11 Well that's -- this is the amazing thing. How about
12 learning David Letterman's top ten list.

13 MR. BERG: I did a show America's Talking about a year
14 ago. They had me read 18 700 page books in an hour and a half
15 and they quizzed me on them and I got every question right.

16 MR. TRUDEAU: Well, like -- I got Larry King's book. I
17 got Bill Gates' book. I got Colin Powell. I got -- now, the
18 Internet for Dummies, if people want to learn how to run the
19 Internet. I got -- here's magazines.

20 MR. BERG: By the way, Forbes Magazine just did an
21 article on this.

22 MR. TRUDEAU: No kidding.

23 MR. BERG: Forbes said this is a wonderful program for
24 business people.

25 MR. TRUDEAU: I got the New York Times. I got all this

EXHIBIT L

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1 -- now, how about biology. I mean look at -- folks, look at
2 these books. And I'm putting these all in front me just to show
3 you the point here. Calculus. Now, you're telling me -- this is
4 what kids have to go through in school.

5 MR. BERG: Right.

6 MR. TRUDEAU: Look at this book. They have read this.
7 You're telling me -- I know this is a mess here. But if a person
8 calls and gets your program, they'll be able to go through these
9 books. Now, let's be honest here. I got all these books here.
10 See if you can get a wide shot of this. I got Howard Stern's
11 book. I was invited to Howard Stern's birthday party.

12 MR. BERG: I read his book Private Parts in six minutes
13 on Comedy Central and then he tested me on the book and I got it
14 right.

15 MR. TRUDEAU: Howard did?

16 MR. BERG: Right.

17 MR. TRUDEAU: Howard did?

18 MR. BERG: I was on John Stewart's (phonetic) show and
19 Howard was the guest. He had just written Private Parts. It's
20 as thick as this book.

21 MR. TRUDEAU: Right.

22 MR. BERG: It took me I think six and a half minutes to
23 read and then he quizzed me and I got all the questions right.

24 MR. TRUDEAU: Okay. If somebody buys your program and
25 goes through like everything that's on the desk right here, the

EXHIBIT L

1 New York Times, all these books, how long would it take them to
2 do that? First it takes them a few hours to learn the technique.
3 Right?

4 MR. BERG: I would -- it just takes about three --
5 three, four hours to learn the technique.

6 MR. TRUDEAU: Normally it would take, what, a week?
7 Two, three weeks? A hundred hours to learn all this stuff -- to
8 go through all this stuff?

9 MR. BERG: I would say for the average person that
10 would be being kind.

11 MR. TRUDEAU: So, maybe 150 to 200 hours?

12 MR. BERG: I'd say several months for some of the
13 science books for certain people.

14 MR. TRUDEAU: That's right because that's all
15 scientific.

16 MR. BERG: It's not just light reading there.

17 MR. TRUDEAU: A person calls and gets your program, how
18 long?

19 MR. BERG: I'd say you could do that easily in at least
20 a month tops. Two weeks to a month depending upon your
21 background.

22 MR. TRUDEAU: Folks, you heard this. You can call
23 right now, get Howard's program. It takes just a few short
24 hours. It's easy. It's fun. Anybody can do it. You'll be the
25 greatest conversationalist. Kids get straight As with less study

Complaint

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1 time. You'll make more money in business because you'll be able
2 to remember all the information. Call the number on your screen.
3 You'll get a 50 percent discount to boot. This is Kevin Trudeau,
4 thanks for watching. This has been another edition of Vantage
5 Point.

6 ON SCREEN: For more information or to order Howard
7 Berg's Mega Reading call: 1-800-283-5666.
8 Tru-Vantage International, 7300 Lehigh Avenue, Niles, IL 60714
9 (847)647-0300.

10 The proceeding has been a paid advertisement for Tru-
11 Vantage International.

12 (Whereupon, the taping was concluded.)
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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 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 Mega Systems International, Inc. is an Indiana corporation with its principal office or place of business at 2025 East 175th Street, Lansing, Illinois.
2. Respondent Jeffrey Salberg is an officer of the corporate respondent. His principal office or place of business is the same as that of Mega Systems International, Inc.
3. 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.
4. 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. Unless otherwise specified, "*respondents*" shall mean Mega Systems International, Inc., corporation, its successors and assigns and its officers; and Jeffrey Salberg, individually and as an officer of the corporation; and each of the above's agents, representatives and employees.
3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Eden's Secret Nature's Purifying Product or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. Such product causes significant weight loss;
- B. Such product prevents or cures illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome;
- C. Such product will cleanse the body of harmful toxins; or
- D. Such product will purify the body's blood supply.

For purposes of this Part, "substantially similar product" shall mean any herbal-based product that is substantially similar in ingredients, composition and properties.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Sable Hair Farming System or any substantially

similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. Such product will stop, prevent, cure, relieve, reverse or reduce hair loss;
- B. Such product will promote the growth of hair where hair has already been lost; or
- C. Such product is superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

For purposes of this Part, "substantially similar product" shall mean any product that is substantially similar in ingredients, composition and properties.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any hair care product or drug, as "drug" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, that any product promotes hair growth or prevents hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, provided that, this requirement shall not limit the requirements of order paragraph II herein.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kevin Trudeau's Mega Memory System or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product will enable users to achieve a photographic memory. For the purposes of this Part, "substantially similar product" shall mean any product or program that is substantially similar in components, techniques, composition and properties.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with

the labeling, advertising, promotion, offering for sale, sale, or distribution of Kevin Trudeau's Mega Memory System or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication that such product is effective in causing adults or children with learning disabilities or attention deficit disorder to substantially improve their memory, 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. For the purposes of this Part, "substantially similar product" shall mean any product or program that is substantially similar in components, techniques, composition and properties.

VI.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Dr. Callahan's Addiction Breaking System or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss;
- B. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise; or
- C. Such product cures addictions and compulsions, including but not limited to, smoking, eating and using alcohol or heroin.

For purposes of this Part, "substantially similar product" shall mean any product or program that is substantially similar in components, techniques, composition and properties.

VII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Jeanie Eller's Action Reading or any other product or program that provides instruction in any aspect of reading in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, concerning:

- A. The extent to which individuals who use such product will learn to read, or
- B. The success rate of individuals who use 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.

VIII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any 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.

IX.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy 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.

X.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program 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.

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

XI.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not create, produce, sell, or disseminate:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any television commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, clearly and prominently, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the advertisement and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

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

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number, e-mail address or mailing address for viewers to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; or

C. Any radio commercial or other radio advertisement five (5) minutes in length or longer that does not broadcast, clearly and audibly, within the first thirty (30) seconds of the advertisement and immediately before each presentation of

ordering instructions for the product or service or periodically through the program, but no more than approximately ten (10) minutes apart, the following disclosure:

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

Provided that, for the purposes of this provision, the presentation of a telephone number, e-mail address or mailing address for listeners to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the announcement of the disclosure provided herein.

Provided further that, for a period of one (1) year from the date of entry of this order, the specific disclosure language of Subparts XI(B) and (C) shall not apply to any commercial or other video or audio advertisement produced prior to the date of entry of this order that contains a clear and prominent disclosure of the fact that the program is a paid advertisement or presentation within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or program that includes one or more of the following disclosures:

1. "The following is a paid commercial program brought to you by Mega Systems International, Inc."
2. "This is a paid advertisement for [the product or program]."
3. "The preceding has been a paid commercial program brought to you by Mega Systems International, Inc."

XII.

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.

XIII.

It is further ordered, That:

- A. Respondent Mega Systems International, Inc., its successors and assigns, and respondent Jeffrey Salberg, shall pay to the Federal Trade Commission by electronic funds transfer the sum of five hundred thousand dollars (\$500,000) 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, respondent Mega System, Inc., its successors and assigns, and respondent Jeffrey Salberg, shall be jointly and severally liable.

- B. The funds paid by respondent Mega Systems International, Inc., its successors and assigns, and respondent Jeffrey Salberg, 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 certain Mega Systems International, Inc.'s products. 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. Respondent Mega Systems International, Inc., its successors and assigns, and respondent Jeffrey Salberg, 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.

XIV.

It is further ordered, That respondent Mega Systems International, Inc., and its successors and assigns, and respondent Jeffrey Salberg 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.

XV.

It is further ordered, That respondent Mega Systems International, Inc., and its successors and assigns, and respondent Jeffrey Salberg shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and shall deliver a copy of this order or a summary of this order in the form attached hereto as Exhibit A to all other 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 or Exhibit A. Exhibit A shall be printed in its entirety in an easily readable font in at least 12 point dark-colored type against a contrasting background and shall contain no additional language. Bracketed language in Exhibit A may be included at Mega Systems' option but is not required. Respondents shall deliver this order or Exhibit A 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.

XVI.

It is further ordered, That respondent Mega Systems International, 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.

XVII.

It is further ordered, That respondent Jeffrey Salberg, 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.

XVIII.

It is further ordered, That respondent Mega Systems International, Inc., and its successors and assigns, and respondent Jeffrey Salberg 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.

XIX.

This order will terminate on June 8, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this Decision & Order.

EXHIBIT A

NOTICE TO MSI, INC'S EMPLOYEES AND AGENTS
IN THE SALE OF MSI PRODUCTS

MSI has signed an agreement with the Federal Trade Commission that contains rules and standards about the marketing of products to consumers. With MSI's consent, the FTC has issued an order that gives that agreement the force of law. Of particular importance to you are things that can be said or not said to consumers about any product or service. This document contains several specific parts of the agreement and order that persons who deal directly with customers must know. It is important that you read it and understand it. When you sign it, you will be certifying not only your understanding, but your agreement to follow the requirements.

[It is important that MSI follow the agreement carefully to avoid future legal disputes, and you can be sure that we will make every effort to do so. This document is a way that we make sure that you also understand how important it is to follow it and that MSI takes the agreement and other aspects of dealing fairly with consumers very seriously. You could be disciplined for violations or even terminated for the most serious ones. However, this process is not intended to put a burden on you or scare you. To the contrary, MSI puts a lot of effort into making sure its telemarketing scripts are legal and, if you follow them, you will have no problem. However, you should not make claims beyond the script that you are not totally sure of and, if you do not know the answer to a customer's question, you should simply say so, or seek help from a supervisor, but you should not just make one up.]

The following are excerpts from the order that we have promised to follow. [If you have any questions about this form, or the agreement terms, or what they mean, please ask (your supervisor or other person).] Items where numbers are skipped do not apply to you.

I. In connection with the sale of any herbal-based colon or body cleansing product, MSI shall not represent, in any manner, expressly or by implication, that:

- A. Such product causes significant weight loss;
- B. Such product prevents or cures illnesses, including but not limited to fatigue, headaches, depression, arthritis, insomnia, immune suppression, and premenstrual syndrome;
- C. Such product will cleanse the body of harmful toxins; or
- D. Such product will purify the body's blood supply.

II. In connection with the sale any hair growth product, MSI shall not represent, in any manner, expressly or by implication, that:

- A. Such product will stop, prevent, cure, relieve, reverse or reduce hair loss;
- B. Such product will promote the growth of hair where hair has already been lost; or
- C. Such product is superior to Rogaine and Minoxidil in stopping, preventing, curing, relieving, reversing or reducing hair loss.

III. In connection with the sale of any hair care product or drug, MSI shall not represent, that any product promotes hair growth or prevents hair loss, unless the product has been approved by the Food and Drug Administration.

IV. In connection with the sale of Kevin Trudeau's Mega Memory System or any substantially similar memory enhancement product, MSI shall not represent, in any manner, expressly or by implication, that such product will enable users to achieve a photographic memory.

V. In connection with the sale of Kevin Trudeau's Mega Memory System or any substantially similar memory enhancement product, MSI shall not make any representation, in any manner, expressly or by implication that such product is effective in causing adults or children with learning disabilities or attention deficit disorder to substantially improve their memory, unless MSI possesses and relies upon competent and reliable evidence that substantiates the representation.

VI. In connection with the sale of any addiction cure product, MSI shall not represent, in any manner, expressly or by implication, that:

- A. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss;
- B. Such product reduces an individual's compulsive desire to eat, leading to significant weight loss without the need to diet or exercise; or
- C. Such product cures addictions and compulsions, including but not limited to, smoking, eating and using alcohol or heroin.

VII. In connection with the sale of Jeanie Eller Action Reading or any other product or program that provides instruction in any aspect of reading, MSI shall not make any representation, in any manner, expressly or by implication, concerning:

- A. The extent to which individuals who use such product will learn to read, or
- B. The success rate of individuals who use such product,

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

VIII. In connection with the sale of any product or program, MSI shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

IX. In connection with the sale of any product or program, MSI shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, MSI possesses and relies upon competent and reliable evidence that substantiates the representation.

X. In connection with the sale of any product or program, MSI 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.

Nothing contrary to the disclosure shall be stated.

On this ___ day of _____, _____, I have read and understood this document and agree to follow it. [I am signing this voluntarily and understand that I could be disciplined, even terminated, for serious violations.]

_____ Employee _____

[_____ Witness _____]

IN THE MATTER OF

HOWARD S. BERG

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

Docket C-3812. Complaint, June 8, 1998--Decision, June 8, 1998

This consent order requires, among other things, the Texas-based advertiser and distributor, who participated in the production of program-length television commercials promoting Howard Berg's Mega Reading, to possess substantiation for claims regarding the benefits, performance or efficacy of any product or program he advertises, promotes, sells or distributes in the future.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew, and C. Steven Baker.*

For the respondent: *Wallace Collins, Stein & Stein, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Howard S. Berg, individually ("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 Howard S. Berg has advertised, offered for sale, sold, and distributed products to the public, including Howard Berg's Mega Reading. Individually or in concert with others, he participated in the acts or practices alleged in this complaint. He resides at 1001 Greenbriar Lane, Mc Kinney, TX.

2. Respondent participated with Tru-Vantage International, L.L.C. and Kevin Trudeau in the production of a program-length television commercial which runs for 30 minutes or less and fits within normal television broadcasting time slots. The television commercial was and is broadcast on network, independent and cable television stations throughout the United States. During the television commercial, respondent acted as the guest and promoted Howard Berg's Mega Reading.

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 created, and disseminated advertisements for Howard Berg's Mega Reading, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

Berg: I teach children not just how to read faster but to comprehend, retain and stay focused. . . . So, Mega Reading is a complete accelerated learning system that doesn't just teach you to read quickly.

Trudeau: Right.

Berg: On a skimming level.

Trudeau: Right.

Berg: But to comprehend, apply and use it. Even under test situations.

Berg: I'm working with companies like Pfizer, Mobil Oil, that have high tech reading. And they used it because it was easy to retain complicated information.

Trudeau: So, even the detailed complicated material, people can read quickly and grasp it and comprehend it and recall it.

Berg: Over long periods of time.

Berg: They hired me to train their editors not only in how to speed read but how to make books easier to comprehend, because my program teaches people how to understand text.

Trudeau: Right.

Berg: Not just blur through it.

Trudeau: Folks, if you want more information on Howard's program, Mega Reading program, it's a home study course that you can go through at your leisure and it will virtually release your own super reading speed, mega reading. You'll be able to read almost as fast as Howard. Virtually quadruple, five, ten times your reading speed right now.

Berg: I have a letter here from a girl who has brain damage.

Trudeau: Right.

Berg: Brain damage. She was in a car accident and half her brain stopped functioning. It was electrically dead.

Trudeau: Right.

Berg: And she writes. It says that on a coffee break in my word shop, she went three to 600 words per minute. This is someone with severe brain damage. So yes, it works for anyone. And you can't get worse than that.

Berg: At the end of the workshop, every child and parent had at least doubled except for one.

Trudeau: Uh-huh.

Berg: That child was reading at five seconds a page and I quizzed her.

Trudeau: Five seconds.

Berg: Five seconds a page. And the vice principal was there.

Trudeau: And they're reading it?

Berg: Comprehending it and retaining it.

Berg: Anybody. In fact, I had a blind student in Huntsville, Alabama. *****

Trudeau: Yeah.

Berg: I swear to you it's true.

Trudeau: Wait a minute. You can't read if you can't see.

Berg: She was reading in Braille.

Trudeau: Oh, okay.

Berg: And she took the program to learn the memory skills. Because a lot of people when they hear speed reading, they think fast reading. With Mega Reading it's not just fast reading, it's fast learning. Remember what Tommy said, it's a complete accelerated learning program. And what I teach them is storing, retrieving, recalling, focusing.

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that Howard Berg's Mega Reading is successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material.

6. In truth and in fact Howard Berg's Mega Reading is not successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

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

9. 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.

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this complaint.

Complaint

EXHIBIT A

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FEDERAL TRADE COMMISSION

FTC MATTER NO.: 942-3278

TITLE: HOWARD BERG'S MEGA READING
TELEVISION INFOMERCIAL

PAGES: 1 THROUGH 31

TRUDEAU COMPLAINT EXHIBIT L
TRU-VANTAGE COMPLAINT EXHIBIT A
BERG COMPLAINT EXHIBIT A

Complaint

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EXHIBIT A

1 MR. TRUDEAU: Thanks for watching. I'm Kevin Trudeau,
2 and this is another edition of Vantage Point. How would you like
3 to read 25,000 words a minute? How about reading an entire book
4 just like this in about twenty minutes instead of ten hours?
5 Imagine reading a newspaper or magazine in a fraction of the time
6 it would normally take. Well, my guest today can do just that as
7 well as comprehend and remember everything. Howard Berg is the
8 world's fastest reader. He's in the Guinness Book of World
9 Records. He's the founder of the Berg Reading Institute and
10 author of Mega Reading. He's been featured on virtually
11 thousands of radio and television shows as well as written about
12 in literally hundreds of newspapers and magazines all around the
13 world. Howard, thanks for being my guest today.

14 MR. BERG: Well, it's great to be here, Kevin.

15 MR. TRUDEAU: OK, you take a book like this, and how
16 long would it take you to read it?

17 MR. BERG: Well, top speed, five or six minutes.

18 MR. TRUDEAU: Five or six minutes.

19 MR. BERG: I've been tested. I was on "Regis and
20 Kathie Lee," and they gave me a book about that size.

21 MR. TRUDEAU: This would be a great book to read, by the
22 way, for somebody, obviously Warren Buffet is the world's
23 greatest investor.

24 MR. BERG: Yes, and they had me read a book, and they
25 told me I was going to talk about the book, but they changed the

EXHIBIT A

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1 game when I got there. Instead, they had the author come on as a
2 surprise to test me and see me if I had really learned the book.
3 And I got every question right, by not just reading it, but
4 retaining and comprehending and focusing.

5 MR. TRUDEAU: Now this was on "Regis and Kathie Lee,"
6 and the book was about, how long a book was it?

7 MR. BERG: Between 240 and 300 pages.

8 MR. TRUDEAU: And how long did it take you to read that
9 book?

10 MR. BERG: I read it like four times, so it took twenty
11 minutes. I was memorizing, I wasn't reading, I was memorizing it
12 for a test.

13 MR. TRUDEAU: Wait a minute, let me make sure I got
14 this straight. You took a book, it took you twenty minutes to
15 read it four times, to memorize it. Now, here's the question.
16 Obviously, you're the world's fastest reader. You're in the
17 Guinness Book of World Records. Is this something that everybody
18 can do, or is it just a gift that you have?

19 MR. BERG: Let me tell you, someone else asked me that
20 question. I was in Canada, and Dini Petty who's a national talk
21 show host in Canada said the same thing. She said, "Howard, it
22 sounds too good to be true that anyone could do it." I said,
23 "Dini, how about you pick a few audience members, and you and
24 them come to my workshop in Toronto, and we'll see what happens."
25 So Dini and her audience showed up. One of them was a student.

EXHIBIT A

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1 one of them was a professional. Dini forgot her glasses, so
2 someone had to run back and get them. It's good to have your own
3 talk show. And at the end of the workshop, Dini had slightly
4 doubled, and the two other people were close to quadrupling their
5 reading speed.

6 MR. TRUDEAU: That workshop is just a couple hours.

7 MR. BERG: Less than four hours. And they went on
8 national television in Canada. And Dini went on the air and
9 says, "Howard's really onto something. I think everyone in
10 Canada should be using this." And then off the air, she came up
11 to me, and she said, "I have a son, and I wanted to know if the
12 next time you're in Toronto, could my son please come to your
13 workshop, because I think every child should be getting these
14 skills. Because I know how much they helped me."

15 MR. TRUDEAU: So now your course actually releases a
16 person's natural ability to speed read.

17 MR. BERG: And it's easy, it's fun, and it's
18 systematic.

19 MR. TRUDEAU: We're going to test you right now. I
20 have over here, by the way, stacks of books, and we're going to
21 test Howard. The first book I have is by Jerry Spence, How To
22 Argue And Win Every Time, Jerry Spence. I love this guy, by the
23 way, he's fantastic. And I'm going to give you a little portion
24 of this book, Howard, and I want you to read it. We're going to
25 time Howard and see how fast he's going to take him. Then I'm

1226

Complaint

EXHIBIT A

1 going to quiz him. This is an easy one, we'll start off as an
2 easy one. It's just about the author. A great book, it's about
3 the author. OK, now hold on, here's the page, put your finger in
4 there, don't open it yet. OK, now hold on because I'm going to
5 time you with my stopwatch. OK, ready?

6 MR. BERG: Yes

7 MR. TRUDEAU: Go.

8 MR. BERG: Good

9 MR. TRUDEAU: About --- little over four seconds.

10 MR. BERG: I haven't warmed up yet.

11 MR. TRUDEAU: Four seconds?. OK, now give me the book.

12 MR. BERG: OK

13 MR. TRUDEAU: Now you've read that?

14 MR. BERG: Yes, I have.

15 MR. TRUDEAU: OK. Well, I'm going to test you on a
16 couple questions on this thing.

17 MR. BERG: No problem.

18 MR. TRUDEAU: All right. First thing -- now, by the
19 way, I went through these books that I'm going to be giving
20 Howard and it took me eight hours yesterday. Because I went to
21 the book store, bought a whole bunch of books, and I said I'm
22 just going to buy random books and we're going to test you.
23 Okay.

24 Now, it talks about in here the different people that
25 he was the defense attorney for.

EXHIBIT A

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1 MR. BERG: Yes, it did.

2 MR. TRUDEAU: Give me a couple of the people.

3 MR. BERG: There were two. There was Randy Weaver

4 MR. TRUDEAU: Right.

5 MR. BERG: And Imelda Marcos.

6 MR. TRUDEAU: Correct. Where does he live?

7 MR. BERG: Jackson Hole, Wyoming.

8 MR. TRUDEAU: Correct. And he has a wife. What's his

9 wife's name?

10 MR. BERG: Emma Jean.

11 MR. TRUDEAU: Correct. Emma Jean.

12 MR. BERG: Yes.

13 MR. TRUDEAU: All right. Hold on, we're going to --

14 MR. BERG: A little slow.

15 MR. TRUDEAU: Well, a little slow. Okay. We're going

16 to make it a little bit tougher now. Here's an other book.

17 Here's another book. Math Magic by Scott Flansburg. Scott is a

18 good friend of mine. We're going to have Scott on the show.

19 He's the human calculator.

20 Now, this book teaches you how to do math calculations

21 in your head. Now, this is going to be a good test, folks. Now

22 -- because imagine this. What -- the techniques -- the

23 technology that Howard has -- Howard has that he teaches people

24 is how to read books and obviously knowledge is power but only if

25 you can remember to and use it.

EXHIBIT A

6

1 MR. BERG: And apply it.

2 MR. TRUDEAU: And apply it. Okay. So, I'm going to
3 give you a chapter. This is the entire chapter seven.

4 MR. BERG: Okay.

5 MR. TRUDEAU: I'm going to time you.

6 MR. BERG: Okay.

7 MR. TRUDEAU: Let's get this cleared out here. And
8 this is on multiplication tricks.

9 MR. BERG: Okay.

10 MR. TRUDEAU: You're going to read this. And then I'm
11 going to test your multiplication skills because this is going to
12 teach you how to do multiplication in your head.

13 MR. BERG: Do I get to use a calculator?

14 MR. TRUDEAU: No calculator.

15 MR. BERG: Okay.

16 MR. TRUDEAU: Okay. All right, hold on. Hold on, I'm
17 going to time you. I'll say go. Ready, set, go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: Okay.

21 MR. TRUDEAU: Twenty four seconds. Twenty four and a
22 half seconds.

23 MR. BERG: There was a lot of pages.

24 MR. TRUDEAU: A lot of pages. Now, you're telling me
25 you read that?

Complaint

125 F.T.C.

EXHIBIT A

7

1 MR. BERG: I learned it.

2 MR. TRUDEAU: You learned it?

3 MR. BERG: Yes, and so could you. That's the whole
4 point.

5 MR. TRUDEAU: All right. Well, let me test you on
6 this. This is on multiplication -- it's on multiplication
7 skills. Okay?

8 MR. BERG: Okay.

9 MR. TRUDEAU: Let me give you a couple of
10 multiplication tables here. Okay. 45 times 45?

11 MR. BERG: That would be 2,025.

12 MR. TRUDEAU: You just did that in your head?

13 MR. BERG: That's right. It teaches you how to do it.
14 That's the whole point.

15 MR. TRUDEAU: You don't have a calculator here by the
16 way? Can we -- Paul, make sure we get that -- I want to make
17 sure someone gives me a thumbs up if that's the right answer.
18 Let me give you another one here.

19 MR. BERG: It's right. Okay.

20 MR. TRUDEAU: 75 times 75?

21 MR. BERG: 5,625.

22 MR. TRUDEAU: I want Paul to make sure -- give me like
23 some -- we got a thumbs up there? He's right.

24 MR. BERG: Of course I'm right.

25 MR. TRUDEAU: And you learned that just now?

EXHIBIT A

8

1 MR. BERG: That's the whole point, Kevin. It's
2 something everyone should be doing. You know, the United States
3 has been rated in 49th position in literacy by the United
4 Nations. I think all our viewers should be concerned. They just
5 had a front page story in USA Today about how our education
6 system is failing to teach the students.

7 MR. TRUDEAU: Uh-huh.

8 MR. BERG: Time Magazine talked about the educational
9 crisis. Even the teachers unions are becoming concerned.
10 Governor Bush has just made the most highest priority in his
11 second term of office is teaching reading skills, because 25
12 percent of the children in Texas don't know how to read. This is
13 what it's about.

14 I teach children not just how to read faster but to
15 comprehend, retain and stay focused. Because face it, how many
16 times have you or the people at home take a test or gone to an
17 important meeting and got tense. You got frightened. You got
18 worried. And all that information that you stored and worked so
19 hard at learning was forgotten.

20 So, Mega Reading is a complete accelerated learning
21 system that doesn't just teach you to read quickly.

22 MR. TRUDEAU: Right.

23 MR. BERG: On a skimming level.

24 MR. TRUDEAU: Right.

25 MR. BERG: But to comprehend, apply and use it. Even

EXHIBIT A

1 under test situations.

2 MR. TRUDEAU: And it just takes a few short hours to
3 learn. Correct?

4 MR. BERG: Couple of hours. That's it.

5 MR. TRUDEAU: Now, let me ask you a question. There's
6 been speed reading courses been around for years.

7 MR. BERG: That's true.

8 MR. TRUDEAU: Evelyn Wood is probably the most common
9 and I'm sure there's dozens of other speed reading courses.

10 MR. BERG: Yes, and some of them are quite good.

11 MR. TRUDEAU: But the biggest challenge most people
12 found is, number one, it took days, weeks, months of practice and
13 training.

14 MR. BERG: Absolutely. Hours a day.

15 MR. TRUDEAU: Right.

16 MR. BERG: With days, weeks and months. It's not just
17 days, weeks, and months, but hours a days each of those days.

18 MR. TRUDEAU: So, how is yours different than those in
19 that respect?

20 MR. BERG: First of all, the program takes less than
21 four hours to learn.

22 MR. TRUDEAU: That's it?

23 MR. BERG: That's it.

24 MR. TRUDEAU: One time?

25 MR. BERG: One time.

EXHIBIT A

10

1 MR. TRUDEAU: Like learning how to ride a bike.

2 MR. BERG: And you never forget how once you know how.
3 Once you release it, it's there.

4 MR. TRUDEAU: You're releasing someone's ability. So,
5 it's radically different than these other courses.

6 MR. BERG: Can you cross the street and look at the
7 traffic and know where you're going? Look at all the information
8 that your brain has to process in an instant. That's same brain
9 should be reading a book just as effortlessly and that's what I
10 teach.

11 MR. TRUDEAU: Well, now -- so, these other courses that
12 have been out there, your program is a revolutionary -- it's
13 totally different.

14 MR. BERG: Let me tell you a story, Kevin.

15 MR. TRUDEAU: Yeah.

16 MR. BERG: The former president of Evelyn Wood, the
17 chairman of Evelyn Wood is Maurice Thompson, Jr. I have a letter
18 from him.

19 MR. TRUDEAU: Right.

20 MR. BERG: Tommy asked me to train him and his family
21 last September. The former president of Evelyn Wood asked me to
22 train his family. Now, this is the man who knows speed reading.

23 MR. TRUDEAU: Right.

24 MR. BERG: His son quadrupled -- I think he went from
25 two to 80 words a minute in less than four hours. And he

EXHIBIT A

11

1 mentioned how his grades immediately shot up from the previous
2 term. And would you like to read the comment he has on the
3 bottom. I'm really proud of this. This is the former president
4 of Evelyn Wood.

5 MR. TRUDEAU: It says, I feel you have moved one step
6 beyond speed reading --

7 MR. BERG: That's right.

8 MR. TRUDEAU: -- to speed learning. Bringing the
9 discipline to the 21st first century.

10 MR. BERG: Exactly. Now, I'm proud of that.

11 MR. TRUDEAU: So, what you're actually have is really a
12 revolutionary break through in what you've developed.

13 MR. BERG: Totally different. Now, other programs were
14 mechanical. That's why they took so long. They required
15 repetition. Like learning to type or playing an instrument, to
16 work.

17 MR. TRUDEAU: Right.

18 MR. BERG: And a lot of people found they loss their
19 speeds almost as quickly as they gained them.

20 MR. TRUDEAU: Right.

21 MR. BERG: I read 80 to 90 pages a minute at my top
22 speed. But I don't read 80 to 90 pages a minute every time I
23 open a book. Sometimes I want to relax. Sometimes I'm a little
24 tired, I want to read in bed.

25 MR. TRUDEAU: Right.

EXHIBIT A

12

1 MR. BERG: So, I have that option. With the other
2 programs because it was conditioned, it was all or nothing. If
3 you slowed down, that was the end of your speed. And most people
4 told me they only got a very superficial understanding, like a
5 skim.

6 I'm working with companies like Pfizer (Phonetic),
7 Mobil Oil, that have high tech reading. And they used it because
8 it was easy to retain complicated information.

9 MR. TRUDEAU: So, even the detailed complicated
10 material, people can read quickly and grasp it and comprehend it
11 and recall it.

12 MR. BERG: Over long periods of time.

13 MR. TRUDEAU: Now, how about students? Means straight
14 As with less study time?

15 MR. BERG: Not only do they get straight As with less
16 study time, but think about this, Kevin, they get better self
17 esteem. They begin to feel confident. Now, you spend over
18 15,000 hours when you go to school.

19 MR. TRUDEAU: Right.

20 MR. BERG: Think about that. And out of all of those
21 hours and the people at home think about it, too, how many of
22 those hours did they spend teaching you how to learn?

23 MR. TRUDEAU: Right.

24 MR. BERG: They call it an education system and they
25 never even teach you how to learn.

EXHIBIT A

13

1 MR. TRUDEAU: And people obviously in business because
2 you work with virtually dozens of major corporations and Fortune
3 500 companies.

4 MR. BERG: All over the country.

5 MR. TRUDEAU: So, people can make more money because
6 there's so much material to learn today, so much reading that
7 people have to grasp.

8 MR. BERG: I have an interesting letter here from
9 Pfeiffer. Pfeiffer is the leading publisher in the world on
10 human resource training materials.

11 MR. TRUDEAU: Okay.

12 MR. BERG: Every corporate trainer has heard of these
13 people.

14 MR. TRUDEAU: Right.

15 MR. BERG: They hired me to train their editors not
16 only in how to speed read but how to make books easier to
17 comprehend, because my program teaches people how to understand
18 text.

19 MR. TRUDEAU: Right.

20 MR. BERG: Not just blur through it.

21 MR. TRUDEAU: Right.

22 MR. BERG: And the head editor -- the managing editor
23 says here that this program that I gave him gave him a distinct
24 advantage to their publishing program.

25 MR. TRUDEAU: Hmm.

EXHIBIT A

14

1 MR. BERG: That's the managing editor of the world's
2 largest human resource publisher. Here's a letter from the York
3 Prep School. The head master is Ronnie Stewart. He's an Oxford
4 graduate. This man knows education.

5 MR. TRUDEAU: Right.

6 MR. BERG: You don't get better than Oxford. And
7 here's what it says. "Howard, just a note to let you know how
8 positive the feedback was of your lectures to the 11th and 12th
9 grades. So positive in fact, that whenever it's convenient for
10 you, I would love -- I like that word -- I would love for you to
11 come and do the ninth and tenth grades on a similar basis." And
12 we've already booked them.

13 ON SCREEN: For more info call: 1-800-263-9666. This
14 is a paid commercial program for Tru-Vantage International.

15 MR. TRUDEAU: That's great. Folks, if you want more
16 information on Howard's program, Mega Reading program, it's a
17 home study course that you can go through at your leisure and it
18 will virtually release your own super reading speed, mega
19 reading. You'll be able to read almost as fast as Howard.
20 Virtually quadruple, five, ten times your reading speed right
21 now. Call the number on your screen. And I've worked out a
22 special arrangement with Howard. He'll give you an over 50
23 percent discount off the regular price of the program. So, call
24 right now to get some more information on it.

25 Now, let's -- let's continue with the testing here

Complaint

125 F.T.C.

EXHIBIT A

15

1 got another book. How to Win Friends and Influence People by
2 Dale Carnegie. Great book. Everybody should read this book.
3 Now, let's see. I went through this last night and I got chapter
4 six. I want you to read the entire chapter six and give us a
5 quick synopsis of the chapter.

6 Okay. Now, I'm going to time you again. And folks,
7 the important thing is what Howard is saying is every single
8 person -- now, you've taught how many -- what thousands and
9 thousands of people?

10 MR. BERG: Thousands. Can I say something?

11 MR. TRUDEAU: Yeah.

12 MR. BERG: I have a letter here from a girl who has
13 brain damage.

14 MR. TRUDEAU: Right.

15 MR. BERG: Brain damage. She was in a car accident and
16 half her brain stopped functioning. It was electrically dead.

17 MR. TRUDEAU: Right.

18 MR. BERG: And she writes. It says that on a coffee
19 break in my word shop, she went three to 600 words per minute.
20 This is someone with severe brain damage. So yes, it works for
21 anyone. And you can't get worse than that.

22 MR. TRUDEAU: At what age, by the way? How old?

23 MR. BERG: The youngest student I ever had was eight.

24 I was in Toronto. I was doing a live workshop and the vice
25 principle of a school was there with his wife. His name was Ted.

EXHIBIT A

16

1 Ted said, "Howard, we would really love for you to come to our
2 elementary school. My wife and I just quadrupled."

3 MR. TRUDEAU: Right.

4 MR. BERG: And we think you can do this for our kids.
5 I said, how old are they? He said third, fourth grade. I said,
6 it's kind of young. Normally, in that age group I teach the
7 memory and learning skills. And I've done that all over the
8 country because a lot of kids aren't reading yet at that age.

9 MR. TRUDEAU: Right.

10 MR. BERG: He said, our students are reading and
11 reading well. Let's try it. I said, fine. And the parents
12 came. How many things did parents do today with their families?

13 MR. TRUDEAU: Right, right, right.

14 MR. BERG: Okay. At the end of the workshop, every
15 child and parent had at least doubled except for one.

16 MR. TRUDEAU: Uh-huh.

17 MR. BERG: That child was reading at five seconds a
18 page and I quizzed her.

19 MR. TRUDEAU: Five seconds.

20 MR. BERG: Five seconds a page. And the vice principal
21 was there.

22 MR. TRUDEAU: And they're reading it?

23 MR. BERG: Comprehending it and retaining it.

24 MR. TRUDEAU: All right. Well, we're going to test you
25 right now. Okay, this is chapter six.

EXHIBIT A

17

1 MR. BERG: Okay.

2 MR. TRUDEAU: Dale Carnegie's How to Win Friends.

3 Ready?

4 MR. BERG: Yes.

5 MR. TRUDEAU: Go.

6 (Whereupon, there was a brief pause while Mr. Berg was

7 reading the book.)

8 MR. TRUDEAU: This is amazing. You're reading it?

9 Okay, give it back. That was about 16 seconds.

10 MR. BERG: Right.

11 MR. TRUDEAU: Okay. Now, tell us -- just give me a

12 quick synopsis of that chapter.

13 MR. BERG: Well, the concept was make people feel

14 important and do it sincerely. And by the way, Kevin, you're

15 doing an excellent job with this show and I really mean that.

16 MR. TRUDEAU: Thank you very much. Okay, wait --

17 you're -- the name of that chapter by the way was, How To Get

18 People To Like You.

19 MR. BERG: By the way, one of my favorite uses of speed

20 reading is learning new skills such as I just showed you.

21 MR. TRUDEAU: Right.

22 MR. BERG: Learning how to use a computer or do better

23 with relationships. So, this -- (inaudible) -- anything.

24 MR. TRUDEAU: To learning anything. Tell us a little

25 about that chapter.

EXHIBIT A

f8

1 MR. BERG: Okay, it starts off he's in a post office
2 and he see's a postal employee that he's familiar with and the
3 guy looks very very depressed and down. And he starts talking to
4 the guy and finds out the guy feels that nobody really
5 appreciates what he's doing.

6 MR. TRUDEAU: Uh-huh.

7 MR. BERG: And so, he starts telling the guy how
8 important he is and how much he appreciates him. And the guy
9 just perks up and he says that's what it's all about. You want
10 people to like you. Let them know how important they are and it
11 improves their self esteem. And they relate that to you as the
12 cause.

13 MR. TRUDEAU: Uh-huh. Now, what -- there was a
14 principle discussed in this.

15 MR. BERG: Yes, the principle was make people feel
16 important and be sincere.

17 MR. TRUDEAU: Make people feel important and -- now,
18 you just said almost verbatim. It says make people feel
19 important and do it sincerely.

20 MR. BERG: Well, you may not get every word. You know,
21 when you're going a page and a half a second, you might miss an L
22 Y. Okay.

23 MR. TRUDEAU: And actually, -- wait a minute. Wait, we
24 got to do another book now.

25 MR. BERG: Okay.

EXHIBIT A

19

1 MR. TRUDEAU: This book by the way, this is my book.
2 This is my book, Kevin Trudeau's, Mega Memory. Everybody should
3 read this book. Everybody go out and get this book. It's my
4 book Mega Memory. Now, it's the first -- you know we sold three
5 and a half million copies of my Mega Memory program.

6 MR. BERG: That's a lot.

7 MR. TRUDEAU: Yeah, and this is a great book. Just
8 says published by William Morrow. It's in all the Book stores.
9 Call, you can get it.

10 MR. BERG: Now, make the call.

11 MR. TRUDEAU: Now, make the call now. Now, I want you
12 to read just chapter one.

13 MR. BERG: Okay.

14 MR. TRUDEAU: On how to use this book, and then give us
15 a quick synopsis on this. Not that we don't trust you. Go.

16 (Whereupon, there was a brief pause while Mr. Berg was
17 reading the book.)

18 MR. BERG: Okay, that's 11 pages.

19 MR. TRUDEAU: About 16 seconds.

20 MR. BERG: Okay. And I'm getting closer to my speed.

21 MR. TRUDEAU: And you read this? You read this?

22 MR. BERG: Yes. It's first -- it sets the ground
23 rules.

24 MR. TRUDEAU: And anybody who gets this course from us
25 can do what you just did?

EXHIBIT A

20

1 MR. BERG: Thousands of people are doing what I just
2 did.

3 MR. TRUDEAU: All right, tell me about the book. I
4 know all about it because I just wrote it.

5 MR. BERG: Okay. I guess you would know. This is like
6 Regis and Kathy Lee all over.

7 MR. TRUDEAU: Yeah, the author. Exactly. Okay.

8 MR. BERG: Well, it starts off talking about what you
9 should do to develop your mega memory, about setting up a
10 specific time and place to do it, avoiding certain foods, how

11 much time you should be doing, how to prepare yourself. And
12 that's essentially what the first chapter is about. Getting set.

13 MR. TRUDEAU: Now, there was four things I mentioned.
14 The four steps you go through.

15 MR. BERG: Yes, there were. Let me think. First there
16 was unconscious incompetence, where you don't know what you're
17 doing.

18 MR. TRUDEAU: Right.

19 MR. BERG: You don't even know you don't know what
20 you're doing.

21 MR. TRUDEAU: Right.

22 MR. BERG: The second one was conscious incompetence,
23 where you know you don't know what you're doing.

24 MR. TRUDEAU: Right, right.

25 MR. BERG: Okay. And the third one -- the third one

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EXHIBIT A

21

1 was conscious competence, where you know what you're doing
2 but you have to think about it. Sort of like when you're riding
3 a bike and you know you have to think how to stay on the bike.

4 MR. TRUDEAU: Right.

5 MR. BERG: And the fourth step was unconscious
6 competence, where it's at released skill and you're doing
7 instinctively. You don't have to think about it.

8 MR. TRUDEAU: That's the point I want to talk about.
9 Because your course gets people very quickly to that unconscious
10 competence level where it happens automatically.

11 MR. BERG: In hours. In hours.

12 MR. TRUDEAU: So, it's like learning how to ride a bike
13 or learning how to swim. You don't have to practice and practice
14 and practice. You're just releasing the skill.

15 MR. BERG: No. I have a story about that.

16 MR. TRUDEAU: Hold on for one second because I want to
17 tell people how to get this program.

18 MR. BERG: Okay. Okay.

19 MR. TRUDEAU: If people do want more information on
20 Howard's program The Mega Reading Home Study Course -- folks,
21 this works for everybody. Thousands of people have gone through
22 it. I highly endorse and recommend this program. Howard is the
23 world's fastest reader. There is nothing out there like it
24 anywhere in the world. It'll work for anyone about eight to ten
25 years and up. If you have a student in your life, you need to

EXHIBIT A

22

1 get it for them. If you're in business, if you read papers, if
2 you like to read novels --

3 MR. BERG: The Sunday paper.

4 MR. TRUDEAU: You'll learn this information, you'll
5 read it quickly and you'll be able to recall it. Call the number
6 on your screen. And again, we worked out a special arrangement
7 with Howard. You will get a 50 percent discount while we're on
8 the show. You can call right now and get more information on
9 this program. So, call the number.

10 MR. BERG: You mentioned how you don't have to
11 practice.

12 MR. TRUDEAU: Right.

13 MR. BERG: I have an interesting story. One of my
14 students called me and was really excited. A grandmother and she
15 learned how to do this at my live program and then she didn't use
16 for like six weeks.

17 MR. TRUDEAU: Right.

18 MR. BERG: And with any speed reading program if you
19 don't use it for six weeks, you can kiss it goodbye. It's over.

20 MR. TRUDEAU: Right.

21 MR. BERG: Her grandson came to her. He had a book
22 report and he needed her to help him. She read the book in 15
23 minutes. He got an A. She said, Howard, I don't know he did it.
24 I haven't use the program in six weeks. I opened the book and
25 like that it came right back to me. I said that's what it's

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EXHIBIT A

23

1 about. You already have the ability. I'm just showing you how
2 to release it.

3 MR. TRUDEAU: Well, we're going -- we're going to test
4 you again. I keep testing you because this is really impressive
5 to me. All right, I got another book here. And I went to the
6 book store and picked these up. Rush Limbaugh, See I Told You
7 So. I like Rush by the way. We advertise a lot on his show.
8 Rush is a great guy.

9 MR. BERG: Um-hum.

10 MR. TRUDEAU: I have a personally autographed copy of
11 this book by the way.

12 MR. BERG: Do you?

13 MR. TRUDEAU: Yes, Rush sent to me. Okay. I want you
14 to read a chapter here. Let me see if I can find the chapter
15 about Rush. We went to Rush. Okay.

16 MR. BERG: Don't rush.

17 MR. TRUDEAU: Don't rush, don't rush. Now, by the way,
18 when I'm finding this chapter -- because I read things last
19 night. Okay?

20 MR. BERG: Yeah.

21 MR. TRUDEAU: Anybody can do this I mentioned?

22 MR. BERG: Anybody.

23 MR. TRUDEAU: And the age -- how old was the oldest
24 person that went through this?

25 MR. BERG: I had a woman at 88 years old and she's in

EXHIBIT A

24

1 Pasadena. And she took the program and I told them where I was
2 staying. The next day in my hotel I get a phone call and I say
3 oh, what's wrong. I said nobody calls me. Everybody learns it.

4 MR. TRUDEAU: Right.

5 MR. BERG: I say what's the problem. She says no
6 problem. I just called to tell you -- her name was Ruth. She
7 says, Howard, I went home after taking your program. I'm 83
8 years old and I read two 300 page books in under three hours.
9 I'm 83 years old.

10 MR. TRUDEAU: Wow.

11 MR. BERG: Do you know how happy I am? She says, I
12 don't know how much more time I have left, but there's so many
13 things I want to do and learn and you've just given me the tools
14 for doing it.

15 MR. TRUDEAU: You know, there are so many books out
16 there with so much material that -- newspapers, publications for
17 business people, you know, magazines, publications they have to
18 read, books and all these manuals. Learning computers. Thick
19 manuals.

20 MR. BERG: Thick manuals.

21 MR. TRUDEAU: You know, you were telling me that you
22 learned computers in one night.

23 MR. BERG: That's absolutely true. I bought at K-Pro
24 II (phonetic). Never saw or used a computer before. The first
25 night I hooked up everything.

EXHIBIT A

25

1 MR. TRUDEAU: Right.

2 MR. BERG: I learned Wordstar, DataStar, and Formstar
3 and published an article the next day. And that's the truth.
4 And I'll tell you a little funny story.

5 MR. TRUDEAU: And anybody can do this, right?

6 MR. BERG: Anybody can do it. And what happened was
7 the margins weren't perfect and I thought something was wrong.
8 And then someone said, do you know it takes 80 hours normally to
9 do what you did in three. And I said I guess I should feel a
10 little bit better then.

11 MR. TRUDEAU: Now, by the way, before -- well, I want
12 to do this test. I am going to have one more test. Okay. We
13 got one more. This is the chapter. Put your finger in there.
14 I'm going to get my little trusty -- this is for amazing on the
15 time. Ready?

16 MR. BERG: Yep.

17 MR. TRUDEAU: Go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: The pages are sticking. Okay. Well, that
21 slowed me down a bit.

22 MR. TRUDEAU: Okay, yeah. Still about 17 seconds.

23 MR. BERG: Okay, I apologize for that.

24 MR. TRUDEAU: Okay. All right. It's Rush's book.

25 Now, what was the gist of that book?

EXHIBIT A

26

1 MR. BERG: The gist was that government's too big.
2 We've got to make it smaller and vote conservative republican.
3 Okay. But he really has a lot of points. He talks about welfare
4 and how about 27 or 28 cents out of every dollar gets to the
5 reciprocate because the rest of that is being spent on
6 administration. And that's an example how government waste is
7 not helping us.

8 MR. TRUDEAU: And that's -- when you were on Regis and
9 Kathy Lee, you had the author come in. You read the book.

10 MR. BERG: (Inaudible).

11 MR. TRUDEAU: And he gave you very tough questions.

12 MR. BERG: I still remember one of them. He asked me
13 what did he say about -- let's see. He asked me several
14 questions. He asked me what did he say about the Pirates of
15 Penzance. It was a trick question. The book was called Going to
16 Movies and it was a vignette. Every two pages was another movie.
17 So, it wasn't a story. It was hundreds of little movie
18 vignettes.

19 MR. TRUDEAU: Right.

20 MR. BERG: And I said, Craig, that's a trick question.
21 Because it wasn't -- there was chapter in there about a different
22 movie and the Pirates of Penzance was used as an example of how
23 if the director had used the techniques of Pirates of Penzance
24 intent instead of the techniques he had chosen, his movie would
25 have been a better picture. I said, so you're actually trying to

EXHIBIT A

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1 trick me because that wasn't even what the chapter was about.

2 MR. TRUDEAU: So, anybody can do this?

3 MR. BERG: Anybody. In fact, I had a blind student in
4 Huntsville, Alabama.

5 MR. TRUDEAU: Yeah.

6 MR. BERG: I swear to you it's true.

7 MR. TRUDEAU: Wait a minute. You can't read if you
8 can't see.

9 MR. BERG: She was reading in Braille.

10 MR. TRUDEAU: Oh, okay.

11 MR. BERG: And she took the program to learn the memcry
12 skills. Because a lot of people when they hear speed reading,
13 they think fast reading. With Mega Reading it's not just fast
14 reading, it's fast learning. Remember what Tommy said, it's a
15 complete accelerated learning program. And what I teach them is
16 storing, retrieving, recalling, focusing.

17 Here's an important skill. Knowing what to look for.
18 How many times have you studied for a test -- people at home.
19 You study for a test, you take the test and none of the questions
20 you studied are asked. Everything else they ask. You go to an
21 important meeting and everything you thought was important was
22 not asked.

23 Well, if you don't know what to look for, you're going
24 to miss it. And I teach how to figure out what to look for.

25 MR. TRUDEAU: Now, you're not -- I was just --

EXHIBIT A

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1 interesting to note because obviously there are so many books out
2 there, like Wealth Without Risk by Charles Givens (phonetic)
3 which is a phenomenal book, How to Attract Anyone Anytime by
4 Susan Raven (phonetic), Les Brown (phonetic), Live Your Dreams.
5 There are so many phenomenals out -- Mary K. Ash (phonetic) and
6 we can't do all of these.

7 MR. BERG: No.

8 MR. TRUDEAU: (Inaudible).

9 MR. BERG: I could.

10 MR. TRUDEAU: Yeah.

11 Well that's -- this is the amazing thing. How about
12 learning David Letterman's top ten list.

13 MR. BERG: I did a show America's Talking about a year
14 ago. They had me read 18 700 page books in an hour and a half
15 and they quizzed me on them and I got every question right.

16 MR. TRUDEAU: Well, like -- I got Larry King's book. I
17 got Bill Gates' book. I got Colin Powell. I got -- now, the
18 Internet for Dummies, if people want to learn how to run the
19 Internet. I got -- here's magazines.

20 MR. BERG: By the way, Forbes Magazine just did an
21 article on this.

22 MR. TRUDEAU: No kidding.

23 MR. BERG: Forbes said this is a wonderful program for
24 business people.

25 MR. TRUDEAU: I got the New York Times. I got all this

EXHIBIT A

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1 -- now, how about biology. I mean look at -- folks, look at
2 these books. And I'm putting these all in front me just to show
3 you the point here. Calculus. Now, you're telling me -- this is
4 what kids have to go through in school.

5 MR. BERG: Right.

6 MR. TRUDEAU: Look at this book. They have read this.
7 You're telling me -- I know this is a mess here. But if a person
8 calls and gets your program, they'll be able to go through these
9 books. Now, let's be honest here. I got all these books here.
10 See if you can get a wide shot of this. I got Howard Stern's
11 book. I was invited to Howard Stern's birthday party.

12 MR. BERG: I read his book Private Parts in six minutes
13 on Comedy Central and then he tested me on the book and I got it
14 right.

15 MR. TRUDEAU: Howard did?

16 MR. BERG: Right.

17 MR. TRUDEAU: Howard did?

18 MR. BERG: I was on John Stewart's (phonetic) show and
19 Howard was the guest. He had just written Private Parts. It's
20 as thick as this book.

21 MR. TRUDEAU: Right.

22 MR. BERG: It took me I think six and a half minutes to
23 read and then he quizzed me and I got all the questions right.

24 MR. TRUDEAU: Okay. If somebody buys your program and
25 goes through like everything that's on the desk right here, the

EXHIBIT A

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1 New York Times, all these books, how long would it take them to
2 do that? First it takes them a few hours to learn the technique.
3 Right?

4 MR. BERG: I would -- it just takes about three --
5 three, four hours to learn the technique.

6 MR. TRUDEAU: Normally it would take, what, a week?
7 Two, three weeks? A hundred hours to learn all this stuff -- to
8 go through all this stuff?

9 MR. BERG: I would say for the average person that
10 would be being kind.

11 MR. TRUDEAU: So, maybe 150 to 200 hours?

12 MR. BERG: I'd say several months for some of the
13 science books for certain people.

14 MR. TRUDEAU: That's right because that's all
15 scientific.

16 MR. BERG: It's not just light reading there.

17 MR. TRUDEAU: A person calls and gets your program, how
18 long?

19 MR. BERG: I'd say you could do that easily in at least
20 a month tops. Two weeks to a month depending upon your
21 background.

22 MR. TRUDEAU: Folks, you heard this. You can call
23 right now, get Howard's program. It takes just a few short
24 hours. It's easy. It's fun. Anybody can do it. You'll be the
25 greatest conversationalist. Kids get straight As with less study

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EXHIBIT A

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1 time. You'll make more money in business because you'll be able
2 to remember all the information. Call the number on your screen.
3 You'll get a 50 percent discount to boot. This is Kevin Trudeau,
4 thanks for watching. This has been another edition of Vantage
5 Point.

6 ON SCREEN: For more information or to order Howard
7 Berg's Mega Reading call: 1-800-283-9666.
8 Tru-Vantage International, 7300 Lehigh Avenue, Niles, IL 60714
9 (847)647-0300.

10 The proceeding has been a paid advertisement for Tru-
11 Vantage International.

12 (Whereupon, the taping was concluded.)
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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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

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

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

1. Respondent Howard S. Berg resides at 1001 Greenbriar Lane, McKinney, TX.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
2. Unless otherwise specified, "*respondent*" shall mean Howard S. Berg, individually and his agents, representatives and employees.
3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Howard Berg's Mega Reading or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product is successful in teaching anyone, including adults, children and disabled individuals, to increase their reading speed above 800 words per minute while substantially comprehending and retaining the material. For purposes of this Part, "substantially similar product" shall mean any product that is substantially similar in components, techniques, composition and properties.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program purported to significantly increase one's reading speed in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy 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 Howard S. Berg 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.

IV.

It is further ordered, That respondent Howard S. Berg, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

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

VI.

This order will terminate on June 8, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this Decision & Order.

IN THE MATTER OF

DEGUSSA AKTIENGESELLSCHAFT, 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-3813. Complaint, June 10, 1998--Decision, June 10, 1998*

This consent order allows, among other things, the New Jersey-based subsidiary of Degussa Aktiengesellschaft to acquire E.I. du Pont de Nemours & Co.'s Gibbons Plant in Alberta, Canada, and prohibits the respondents from acquiring more than one percent of the stock, equity or other interest in DuPont's plants in Tennessee and Ontario, Canada, without the Commission's prior approval. In addition, the consent order requires the respondents to limit to one percent their acquisition of the stock, equity or interest in any assets used in the manufacture, distribution or sale of hydrogen peroxide in North America, without prior notification to the Commission.

Appearances

For the Commission: *Robert Tovsky, Joseph Krauss and William Baer.*

For the respondents: *Richard Steuer, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Degussa Aktiengesellschaft ("Degussa A.G."), through its wholly-owned subsidiary, Degussa Corporation ("Degussa"), entered into a letter of intent to acquire hydrogen peroxide production assets of E. I. du Pont de Nemours & Co. ("DuPont"), and that the acquisition, if consummated, would have resulted in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, 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:

A. THE RESPONDENTS

1. Respondent Degussa A.G. is a corporation organized, existing, and doing business under and by virtue of the laws of

Germany with its principal executive offices located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

2. Degussa A.G. had worldwide sales exceeding \$8.7 billion in 1997. Degussa A.G. engages in the development and manufacture of chemicals, pharmaceutical specialties, and precious metals.

3. Respondent Degussa is a wholly-owned subsidiary of Degussa A.G. with its principal executive offices located at 65 Challenger Road, Ridgefield Park, New Jersey.

4. Degussa has manufacturing and distribution facilities situated throughout the United States, Canada, and Mexico, and produces widely diverse products in the markets for chemicals, pigments, metals, and dental materials. One of its major products is hydrogen peroxide. In 1996, Degussa had sales in excess of \$2.3 billion, to which sales of hydrogen peroxide contributed \$65 million.

5. DuPont is a publicly-traded corporation with reported revenues in 1996 of \$43.8 billion and net income of \$3.6 billion. DuPont is one of the largest chemical companies in the world, operating about 175 manufacturing and processing facilities in approximately 70 countries. DuPont is engaged in diverse businesses including chemicals, fibers, films, polymers, petroleum, agricultural products, biotechnology, and pharmaceuticals. In 1996, DuPont posted sales of hydrogen peroxide of \$156 million in North America.

6. At all times relevant herein, respondents Degussa A.G. and Degussa have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITIONS

7. On July 30, 1997, Degussa A.G., through its wholly-owned subsidiary, Degussa, and DuPont signed a Letter of Intent setting out the principal elements of a proposed transaction, whereby Degussa would acquire the assets of DuPont's worldwide hydrogen peroxide business, including its North American production facilities in Memphis, Tennessee; Maitland, Ontario; and Gibbons, Alberta, in exchange for \$325 million.

8. After being advised by Commission staff of potential competitive issues and concerns in connection with the proposed acquisition of all of DuPont's North American hydrogen peroxide

production, Degussa and DuPont modified their original proposal, to an acquisition by Degussa only of DuPont's Gibbons, Alberta hydrogen peroxide plant, in exchange for approximately \$147 million.

C. RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is the manufacture, marketing and sale of hydrogen peroxide.

10. Hydrogen peroxide is an inorganic chemical that is used in disparate applications as an oxidizing agent to encourage different chemical reactions. The paper and pulp industry is by far the most significant consumer of hydrogen peroxide in North America, where hydrogen peroxide is used in the pulp bleaching process. Other significant users include textile manufacturers, which also use hydrogen peroxide as a bleach; chemical manufacturers, which use hydrogen peroxide to initiate reactions that yield organic peroxides; and mining companies, which use hydrogen peroxide to detoxify waste by-products from mining operations.

11. A small but significant and non-transitory price increase would not affect the current level of consumption in any of the significant end-use applications.

12. The relevant geographic market in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is North America. Hydrogen peroxide is a volatile substance that must be transported in an aqueous solution. As a result, between thirty and seventy percent of all volumes shipped are composed of water. Thus, transportation costs make transoceanic shipment commercially impractical and impede imports from rising above a *de minimis* level.

D. MARKET STRUCTURE

13. The North American market for hydrogen peroxide is highly concentrated. Seven manufacturers currently possess all of the North American production capacity. Moreover, the North American manufacturers are also the major hydrogen peroxide manufacturers in the world. The proposed acquisition, as originally proposed, would rest control over approximately eighty-one percent of production capacity with the three largest manufacturers, Degussa, Solvay

Interox and FMC Corporation, and increase the Herfindahl-Hirschmann Index by 575 points, from 1969 to 2544. The proposed acquisition, as modified, would result in virtually no change in market concentration.

14. Degussa has a single hydrogen peroxide manufacturing facility in Mobile, Alabama, and distribution centers located throughout the United States and Canada. Degussa's Mobile facility affords Degussa a North American capacity share in excess of eleven percent.

15. DuPont has one hydrogen peroxide production facility in the United States and two facilities in Canada, in the provinces of Ontario and Alberta, which together constitute nearly twenty-six percent of the North American hydrogen peroxide production capacity.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale of a hydrogen peroxide production facility, which is necessary to ensure a reasonable rate of return and to deter or counteract potential anticompetitive effects, likely precludes new entry. The prevailing hydrogen peroxide technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- *i.e.*, the production of hydrogen peroxide. It can not economically be shifted toward another use. Therefore, all returns on investment must be derived from hydrogen peroxide sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky. Furthermore, current overcapacity, as well as announced expansions by existing producers, serve as additional deterrents to new entry.

18. Small-scale on-site production technology may at some indeterminate time facilitate small-scale production by large consumers of hydrogen peroxide. However, today such technology remains higher cost than large-scale hydrogen peroxide production and commercially suspect. Most consumers, moreover, view hydrogen peroxide production as a business separate and apart from

their own and are resistant to incurring either the risk or the costs associated with on-site production. For these reasons, the price of hydrogen peroxide would need to rise substantially from existing levels before on-site production would become economical. In any event, few customers have sufficient demand to support efficiently even a small-scale on-site production facility. This technology, therefore, fails to provide an adequate deterrent against potential anticompetitive behavior.

F. EFFECTS OF THE PROPOSED ACQUISITION

19. The proposed acquisition, as originally proposed and if consummated, would likely have led to a substantial lessening of competition in the North American hydrogen peroxide market by enabling the firms remaining in the market after the acquisition to engage more successfully and more completely in coordinated interaction, in the following ways, among others:

- a. The original proposed acquisition would increase concentration substantially in a market that already is highly concentrated;
- b. Hydrogen peroxide is a highly homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available due to the use of delivered pricing, the practice of advance announcement of price increases, and customer arrangements including meet-or-release clauses;
- d. There is a past history of express collusion among hydrogen peroxide producers in Europe from the early 1960s through the late 1970s, including producers that after the acquisition would be the leading producers in North America;
- e. Industry practices may serve to facilitate interdependence and coordination in a concentrated market, including sales of hydrogen peroxide between producers that may have the effect of avoiding competitive conflict;
- f. Over several years, producers have maintained large differentials in pricing among different end-uses for a product that is essentially indistinguishable in its performance characteristics;
- g. Partly as a result of the originally proposed DuPont acquisition, Degussa would have been unlikely to pursue or proceed as quickly with planned internal expansions; and

- h. Documents project higher hydrogen peroxide prices as a result of the originally proposed acquisition.

G. VIOLATIONS CHARGED

20. The acquisition of DuPont's hydrogen peroxide production assets by Degussa, if consummated as originally proposed, would have violated 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Degussa Corporation, a wholly-owned subsidiary of Degussa Aktiengesellschaft (collectively "Degussa") of the North American hydrogen peroxide assets of E.I. duPont de Nemours & Co. ("DuPont"), and respondents having been furnished with a copy of a draft of complaint which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; 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 the 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 Degussa Corporation 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 located at 65 Challenger Road, Ridgefield Park, New Jersey.

2. Respondent Degussa Aktiengesellschaft is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

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:

1. "*Respondents*" or "*Degussa*" means Degussa Corporation and Degussa Aktiengesellschaft, their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Degussa Corporation and Degussa Aktiengesellschaft, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*DuPont*" means E.I. DuPont de Nemours & Co., 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 1007 Market Street, Wilmington, Delaware.

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

D. "*Retained Plants*" means the DuPont hydrogen peroxide plants in Memphis, Tennessee, and Maitland, Ontario, Canada, which Degussa does not propose to acquire from DuPont.

E. "*Gibbons Plant*" means the DuPont Hydrogen Peroxide plant in Gibbons, Alberta, Canada which Degussa proposes to acquire from DuPont.

II.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Degussa shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the Retained Plants; or

B. Acquire the Retained Plants or any assets of the Retained Plants (excluding the non-exclusive technology licenses that Degussa proposes to acquire in connection with the acquisition of the Gibbons Plant from DuPont).

III.

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

A. Acquire more than 1% (or, for investment purposes, 5%), of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in any assets used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; or

B. Acquire, in any calendar year, assets, valued at over \$15 million, used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; provided, however, that nothing herein shall prohibit Degussa, without prior notification to the Commission, from building new or expanding existing hydrogen peroxide manufacturing capacity.

Said prior notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the

Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents 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, respondents 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.

Provided, however, that prior notification shall not be required by paragraph III of 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.

IV.

It is further ordered, That one (1) year 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 a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect any facilities and 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 (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, employees,

agents or independent contractors of the respondents, who may have counsel present.

VI.

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

VII.

It is further ordered, That this order shall terminate on June 10, 2008.

IN THE MATTER OF

ETHYL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3814. Complaint, June 16, 1998--Decision, June 16, 1998*

This consent order requires, among other things, the Virginia-based manufacturer of lead anti-knock gasoline additives to modify its supply agreement with The Associated Octel Company. In addition, the consent order prohibits the respondent from disclosing to competitors historical, current, or future prices. The consent order also requires the respondent to notify the Commission prior to acquiring the assets of any firm engaged in the distribution of lead anti-knock compounds in the United States, or the manufacturing of lead anti-knock compounds worldwide.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *Jonathan Rich, Morgan, Lewis & Bockius, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Associated Octel Company Ltd., Great Lakes Chemical Corporation, and Ethyl Corporation, corporations, hereinafter sometimes collectively referred to as "respondents," have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purpose of this complaint, "lead antiknock compounds" means gasoline additives that contain tetraethyl or tetramethyl lead, and that increase the octane rating of gasoline. Currently in the United States, lead antiknock compounds are added to aviation gasoline for piston engine aircraft and to certain motor gasoline for racing cars.

PAR. 2. Respondent Great Lakes Chemical Corporation ("Great Lakes") 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 One Great Lakes Boulevard, West Lafayette, Indiana.

PAR. 3. Respondent The Associated Octel Company Ltd. ("Octel") is a corporation organized and existing under and by virtue of the laws of the United Kingdom with its office and principal place of business located at Oil Sites Road, Ellesmere Port, South Wirral, England, United Kingdom. Octel is a wholly-owned subsidiary of Great Lakes.

PAR. 4. Octel is now, and has for several years been, the world's largest manufacturer and seller of lead antiknock compounds. As of 1993, Octel operated production facilities in Ellesmere Port, England, Bussi, Italy and Paimboeuf, France. Its sales of lead antiknock compounds in 1993 were in excess of \$540 million, representing approximately 60 percent of worldwide sales of lead antiknock compounds.

PAR. 5. For several years up to and including 1993, Octel sold lead antiknock compounds to independent distributors for resale to refineries and gasoline blenders located throughout the United States. In 1994, Octel began to sell directly to U.S. customers.

PAR. 6. Respondent Ethyl Corporation ("Ethyl") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 330 South Fourth Street, Richmond, Virginia.

PAR. 7. Ethyl was for several years the second largest manufacturer of lead antiknock compounds in the world. As of 1993, Ethyl operated one production facility located in Sarnia, Ontario. Its sales of lead antiknock compounds in 1993 were in excess of \$245 million, representing approximately 30 percent of worldwide sales of lead antiknock compounds.

PAR. 8. During the relevant time period, Ethyl has sold lead antiknock compounds to refineries and gasoline blenders located throughout the United States.

PAR. 9. The acts and practices of Octel and Ethyl, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 10. The relevant line of commerce in which to evaluate the competitive effects of respondents' acts and practices is the manufacture and sale of lead antiknock compounds.

PAR. 11. The relevant geographic market is the world.

PAR. 12. The relevant market set forth above is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or two-firm and four-firm concentration ratios.

PAR. 13. Entry into the relevant market is difficult or unlikely.

PAR. 14. Between October 1993 and March 1994, Octel and Ethyl entered into a series of contracts, agreements, and understandings -- written and unwritten -- regarding the manufacture, distribution, and sale of lead antiknock compounds. Among the important undertakings are the following:

- (a) Ethyl agreed to cease manufacturing lead antiknock compounds.
- (b) Octel agreed to supply to Ethyl each year, for re-sale, a limited volume of lead antiknock compounds at a discount price.
- (c) Octel and Ethyl agreed that the maximum volume of lead antiknock compounds supplied to Ethyl each year through 1998 would be thirty five thousand metric tons. Octel and Ethyl agreed that the maximum volume of lead antiknock compounds supplied to Ethyl during each subsequent year would be a fixed portion of Octel's annual capacity to manufacture compounds. Under the contract, Octel is free to reduce its productive capacity, but must notify Ethyl one year in advance of such action.
- (d) Octel and Ethyl agreed that the price of lead antiknock compounds purchased by Ethyl for re-sale to customers in the United States and certain other countries would be adjusted each year, depending upon the change in the average sale price charged by Octel to retail customers located in the United States and certain other countries.
- (e) Octel agreed to notify Ethyl each year of the change in the average sale price charged by Octel to retail customers located in the United States and certain other countries, and to make its books and records, including sales contracts and invoices, available for inspection by an independent auditor reporting to Ethyl.
- (f) Octel agreed to cease the bulk shipping of lead antiknock compounds, and to transfer to Ethyl certain ocean going vessels dedicated to transporting lead antiknock compounds.

- (g) Ethyl agreed to provide to Octel all bulk shipping services required by Octel for the distribution of lead antiknock compounds.

PAR. 15. In March 1994, Ethyl closed its facility for the production of lead antiknock compounds located in Sarnia, Ontario.

PAR. 16. The acts and practices of respondents, as alleged herein, had the effect, or the tendency and capacity, to increase the likelihood of coordinated interaction among sellers of lead antiknock compounds, to restrain competition unreasonably, to increase prices and to injure consumers.

PAR. 17. The acts and practices of respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. These acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission ("the Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge 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 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 has 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 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 Ethyl Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 330 South Fourth Street, Richmond, Virginia.
2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

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

A. "*Respondent*" means Ethyl Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Ethyl Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

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

C. "*Great Lakes*" means Great Lakes Chemical Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Great Lakes Chemical Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

D. "*Octel*" means The Associated Octel Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by The Associated

Octel Company Limited, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

E. "*Supply Contract*" means the Agreement for Supply of Lead Antiknock Compounds dated as of the 22nd day of December 1993 between The Associated Octel Company Limited and Ethyl Corporation, and includes all schedules thereto.

F. "*Compounds*" means lead antiknock compounds of the types described in Schedule B to the Supply Contract, and includes tetraethyl lead and tetramethyl lead.

G. "*Force Majeure Event*" means an event or circumstance beyond the reasonable control of the manufacturer of Compounds affected thereby, including fire, storm, flood, act of God, war, or explosion. No event or circumstance shall constitute a Force Majeure Event if such event or circumstance could have been prevented through the exercise of reasonable diligence.

H. "*United States*" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

It is ordered, That within thirty (30) days from the date this order becomes final, respondent shall amend the Quantities Term of the Supply Contract to provide that, during each calendar year:

A. With respect to supplies of Compounds for Ethyl customers located in the United States, Octel shall make available for sale to Ethyl all such quantities of Compounds as Ethyl may order from time to time for supply to such customers; and

B. With respect to supplies of Compounds for Ethyl customers located outside of the United States, the maximum quantity of Compounds available for sale from Octel to Ethyl shall not be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States.

III.

It is further ordered, That within thirty (30) days from the date this order becomes final, respondent shall amend the Price Term of the Supply Contract to provide that:

A. With respect to supplies of Compounds purchased by Ethyl from Octel for resale in the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any other customer or group of customers; and

B. With respect to supplies of Compounds purchased by Ethyl from Octel for resale outside the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any customer or group of customers located in the United States.

IV.

It is further ordered, That respondent shall not enter into any contract modification, contract, agreement, or understanding with Great Lakes or Octel relating to the supply of Compounds: (A) that directly or indirectly limits the quantity of Compounds available to Ethyl from Octel for resale in the United States; (B) that provides that the maximum quantity of Compounds available from Octel to Ethyl for resale outside of the United States shall be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States; (C) that provides that the price of Compounds purchased by Ethyl for resale within the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any other customer or group of customers, and/or (ii) the quantity of Compounds purchased by Ethyl; or (D) that provides that the price of Compounds purchased by Ethyl for resale outside of the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any customer or group of customers located in the United States, and/or (ii) the quantity of Compounds purchased by Ethyl for resale within the United States.

V.

It is further ordered, That respondent shall not provide, disclose, or otherwise make available to Great Lakes or Octel, directly or through an intermediary, information regarding respondent's historical, current, or future prices for Compounds sold to customers located in the United States. Provided, however, that this paragraph

shall not apply to the disclosure of historical price information for transactions consummated in full more than twenty four (24) months prior to the time of disclosure.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final:

A. Except as provided in paragraph VI.B below, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the three years preceding such acquisition engaged in, the distribution of Compounds in or to the United States, or the manufacture of Compounds anywhere in the world; or
2. Acquire any assets used or previously used (and still suitable for use) in the distribution of Compounds in the United States, or the manufacture of Compounds anywhere in the world; or
3. Sell or transfer Compounds to any person or concern engaged in at the time of such sale or transfer, or within the three years preceding such sale or transfer engaged in, the manufacture of Compounds anywhere in the world.

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

additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

B. The conditions set forth in paragraph VI.A shall not be applicable to any acquisition 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. The conditions set forth in paragraph VI.A.2 shall not be applicable to the acquisition from any person during any calendar year of assets having an aggregate fair market value of less than \$2 million. The conditions set forth in paragraph VI.A.3 shall not be applicable to the sale or transfer of Compounds from respondent to Great Lakes or Octel. The conditions set forth in paragraph VI.A.3 also shall not be applicable to the sale or transfer of Compounds from respondent to any person where the aggregate volume of Compounds sold or transferred to such person during the calendar year does not exceed the greatest of: (i) one million pounds, (ii) 20 percent of such person's production of Compounds during the preceding calendar year, or (iii) the shortfall in the annual production of Compounds by such person, relative to such person's historical production levels, where such shortfall is caused by a Force Majeure Event.

C. The conditions set forth in paragraphs VI.A.1 and VI.A.3 shall not be applicable to the acquisition of any interest in, or the sale of Compounds to, any person who, at the time of such transaction or within the preceding three years, owned less than 20 percent of the equity stock of Octel, and was not otherwise engaged in the distribution of Compounds in or to the United States or the manufacture of Compounds anywhere in the world.

D. In any action by the Commission alleging violations of this order, respondent shall bear the burden of proof with regard to demonstrating that the aggregate volume of Compounds sold or transferred by respondent to any person does not exceed: (i) 20 percent of such person's production of Compounds during the preceding calendar year, and/or (ii) the shortfall in the annual production of Compounds by such person, relative to such person's historical production levels, and that such shortfall is caused by a Force Majeure Event.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order. Such report shall include a copy of the revised Supply Contract, executed by Ethyl and Octel, and incorporating the contract amendments specified in paragraphs II and III of this order.

B. One (1) year 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, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, 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 days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

X.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, send by first class mail a copy of this order to: (i) all of the directors of Ethyl Corp. and of each corporation within respondent that is engaged in the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Directors"); (ii) all of the officers of Ethyl Corp. and of each corporation within respondent that is engaged in the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Officers"); and (iii) all of respondent's management employees with responsibility for the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a Director, Officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondent; and

C. For a period of three (3) years after the date on which this order becomes final, require each of its Directors, Officers, and Management Employees to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Ethyl Corporation to penalties for violation of the order.

XI.

It is further ordered, That this order shall terminate on June 16, 2018.

IN THE MATTER OF

THE ASSOCIATED OCTEL COMPANY LTD., ET AL.

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

*Docket C-3815. Complaint, *1 June 16, 1998--Decision, June 16, 1998*

This consent order requires, among other things, The Associated Octel Company and the Great Lakes Chemical Corporation to modify its supply agreement with Ethyl Corporation. In addition, the consent order prohibits the respondent from disclosing to competitors historical, current, or future prices. The consent order also requires the respondents to notify the Commission prior to acquiring the assets of any firm engaged in the distribution of lead anti-knock compounds in the United States, or the manufacturing of lead anti-knock compounds worldwide.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondents: *Sam Haubold, Kirkland & Ellis and Kevin Arquit, Rogers & Wells, Washington, D.C.*

DECISION AND ORDER

The Federal Trade Commission ("the 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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the 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 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 has 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 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 The Associated Octel Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at Oil Sites Road, Ellsemere Port, South Wirral, England, United Kingdom.

2. Respondent Great Lakes Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Great Lakes Boulevard, West Lafayette, Indiana.

3. 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

I.

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

A. "*Octel*" means The Associated Octel Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by The Associated Octel Company Limited, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Great Lakes*" means Great Lakes Chemical Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups,

and affiliates controlled, directly or indirectly, by Great Lakes Chemical Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

C. "*Respondents*" means Octel and Great Lakes.

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

E. "*Ethyl*" means Ethyl Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Ethyl Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

F. "*Supply Contract*" means the Agreement for Supply of Lead Antiknock Compounds dated as of the 22nd day of December 1993 between The Associated Octel Company Limited and Ethyl Corporation, and includes all schedules thereto.

G. "*Compounds*" means lead antiknock compounds of the types described in Schedule B to the Supply Contract, and includes tetraethyl lead and tetramethyl lead.

H. "*Compound Manufacturing Facilities*" means the Great Lakes and/or Octel facilities currently or formerly used for the manufacture of Compounds and located in Ellesmere Port, England, Bussi, Italy, Paimboeuf, France, and Biebesheim, Germany.

I. "*Force Majeure Event*" means an event or circumstance beyond the reasonable control of the manufacturer of Compounds affected thereby, including fire, storm, flood, act of God, war, or explosion. No event or circumstance shall constitute a Force Majeure Event if such event or circumstance could have been prevented through the exercise of reasonable diligence.

J. "*United States*" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

It is ordered, That within thirty (30) days from the date this order becomes final, respondents shall amend the Quantities Term of the Supply Contract to provide that, during each calendar year:

A. With respect to supplies of Compounds for Ethyl customers located in the United States, Octel shall make available for sale to

Ethyl all such quantities of Compounds as Ethyl may order from time to time for supply to such customers; and

B. With respect to supplies of Compounds for Ethyl customers located outside of the United States, the maximum quantity of Compounds available for sale from Octel to Ethyl shall not be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States.

III.

It is further ordered, That within thirty (30) days from the date this order becomes final, respondents shall amend the Price Term of the Supply Contract to provide that:

A. With respect to supplies of Compounds purchased by Ethyl from Octel for resale in the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any other customer or group of customers; and

B. With respect to supplies of Compounds purchased by Ethyl from Octel for resale outside the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any customer or group of customers located in the United States.

IV.

It is further ordered, That respondents shall not enter into any contract modification, contract, agreement, or understanding with Ethyl relating to the supply of Compounds: (A) that directly or indirectly limits the quantity of Compounds available to Ethyl from Octel for resale in the United States; (B) that provides that the maximum quantity of Compounds available from Octel to Ethyl for resale outside of the United States shall be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States; (C) that provides that the price of Compounds purchased by Ethyl for resale within the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any other customer or group of customers, and/or (ii) the quantity of Compounds purchased by Ethyl; or (D) that

provides that the price of Compounds purchased by Ethyl for resale outside of the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any customer or group of customers located in the United States, and/or (ii) the quantity of Compounds purchased by Ethyl for resale within the United States.

V.

It is further ordered, That respondents shall not provide, disclose, or otherwise make available to Ethyl, directly or through an intermediary, information regarding respondents' historical, current, or future prices for Compounds sold to customers located in the United States. Provided, however, that this paragraph shall not apply to the disclosure of historical price information for transactions consummated in full more than twenty four (24) months prior to the time of disclosure.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final:

A. Except as provided in paragraph VI.B below, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the three years preceding such acquisition engaged in, the distribution of Compounds in or to the United States, or the manufacture of Compounds anywhere in the world; provided, however, that individual employees or directors of respondents and each pension, benefit, or welfare plan or trust controlled by respondents may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or concern; or

2. Acquire any assets used or previously used (and still suitable for use) in the distribution of Compounds in the United States, or the manufacture of Compounds anywhere in the world; or

3. Sell or transfer Compounds to any person or concern engaged in at the time of such sale or transfer, or within the three years preceding such sale or transfer engaged in, the manufacture of Compounds anywhere in the world.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

B. The conditions set forth in paragraph VI.A shall not be applicable to any acquisition 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. The conditions set forth in paragraph VI.A.2 shall not be applicable to the acquisition from any person during any calendar year of assets having an aggregate fair market value of less than \$2 million. The conditions set forth in paragraph VI.A.3 shall not be applicable to the sale or transfer of Compounds from respondents to Ethyl. The conditions set forth in paragraph VI.A.3 also shall not be applicable to the sale or transfer of Compounds from respondents to any person where the aggregate volume of Compounds sold or transferred to such person during the calendar year does not exceed the greatest of: (i) one million pounds, (ii) 20 percent of such person's production of Compounds during the preceding calendar year, or (iii) the shortfall in the annual production of Compounds by

such person, relative to such person's historical production levels, where such shortfall is caused by a Force Majeure Event.

C. The conditions set forth in paragraphs VI.A.1 and VI.A.3 shall not be applicable to the acquisition of any interest in, or the sale of Compounds to, any person who, at the time of such transaction or within the preceding three years, owned less than 20 percent of the equity stock of Octel, and was not otherwise engaged in the distribution of Compounds in or to the United States or the manufacture of Compounds anywhere in the world.

D. In any action by the Commission alleging violations of paragraph VI.A.3 and/or paragraph VI.B of this order, respondents shall bear the burden of proof with regard to demonstrating that the conditions set forth in paragraph VI.B have been satisfied.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that respondent has complied and is complying with this order. Such report shall include a copy of the revised Supply Contract, executed by Ethyl and Octel, and incorporating the contract amendments specified in paragraphs II and III of this order.

B. One (1) year 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 a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents 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 respondents relating to any matters contained in this order; and

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

X.

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date on which this order becomes final, send by first class mail a copy of this order, to all of their directors, officers, and management employees with responsibility for the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondents; and

C. For a period of three (3) years after the date on which this order becomes final, require each of their directors, officers, and Management Employees to sign and submit to respondents within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject The Associated Octel Company Limited and/or Great Lakes Chemical Corporation to penalties for violation of the order.

XI.

It is further ordered, That the obligations of Great Lakes Chemical Corporation under this order shall terminate on July 1, 1998 if, prior to that date, (A) Great Lakes Chemical Corporation divests or otherwise disposes of all of its Compounds business, including the Compound Manufacturing Facilities, thereby creating a new, independent publicly traded company ("Newco"); (B) in advance of such divestiture or disposition referenced above, Great Lakes Chemical Corporation causes its then subsidiary Newco to commit, formally and in writing, that Newco shall be bound by the terms of this Consent Order and considered as a respondent thereto; and (C) Great Lakes Chemical Corporation submits to the Commission documents sufficient to show that requirements (A) and (B) have been accomplished in a timely manner. This paragraph shall not be construed so as to terminate the obligations under this order of Octel or Newco under any circumstances.

XII.

It is further ordered, That this order shall terminate on June 16, 2018.

IN THE MATTER OF

ALTMeyer HOME STORES, INC.

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

Docket C-3816. Complaint, June 16, 1998--Decision, June 16, 1998

This consent order requires, among other things, the Pennsylvania-based retailer of draperies and curtains to comply with the notification provisions of the Fair Credit Reporting Act when job applicants are denied employment and information in the applicants' credit records played a role in the denials.

Appearances

For the Commission: *John Hallerud* and *C. Steven Baker*.

For the respondent: *Thomas Farnan, Robb, Leonard & Mulvihill*,
Pittsburgh, PA.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Altmeyer Home Stores, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, 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:

DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Altmeyer Home Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and

principal place of business located at Central City Plaza, New Kensington, Pennsylvania.

PAR. 2. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the consideration, acceptance, and denial of applicants for employment with respondent.

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

PAR. 4. Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that the information so supplied contributed to the adverse action taken on their applications or offers for employment, and has failed to advise consumers of the name and address of the consumer reporting agency that supplied the information.

PAR. 5. By and through the practices described in paragraph four, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. By its aforesaid failure to comply with Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

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

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

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

1. Respondent Altmeyer Homes Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Central City Plaza, New Kensington, Pennsylvania.

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

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

ORDER

For the purpose of this order, the terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d), and 1681a(f).

I.

It is ordered, That respondent Altmeyer Home Stores, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device do forthwith cease and desist from failing to comply with Section 615 of the Fair Credit Reporting Act, as it existed on October 1, 1995, as it has been amended, effective September 30, 1997, and as it may be amended in the future.

As provided by Section 615(c) of the Fair Credit Reporting Act, respondent shall not be held liable for any violation of Section 615 of the Fair Credit Reporting Act if it shows by a preponderance of the evidence that at the time of the alleged violation it maintained reasonable procedures to assure compliance with Section 615 of the Fair Credit Reporting Act.

II.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all notices or a written or electronically stored notation of the description of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, deliver a copy of this order at least once per year to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed 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 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.

V.

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

VI.

It is further ordered, That this order will terminate on June 16, 2018, 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.

Complaint

125 F.T.C.

IN THE MATTER OF

THE WILLIAMS COMPANIES, INC.

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-3817. Complaint, June 17, 1998--Decision, June 17, 1998

This consent order allows, among other things, the merger between The Williams Companies, Inc., ("Williams") and MAPCO Inc., both based in Oklahoma, and requires Williams to provide Midwest pipeline capacity to Kinder Morgan Energy Partners, an operator of propane terminals, and to allow any new competing pipeline to connect to its Wyoming gas processing plants.

Appearances

For the Commission: *Frank Lipson, Phillip Broyles & William Baer.*

For the respondent: *Tom Smith, Jones, Day, Reavis & Pogue, Washington, D.C.*

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 ("FTC" or "Commission"), having reason to believe that respondent The Williams Companies, Inc. ("Williams"), a corporation, and MAPCO Inc. ("MAPCO"), a corporation, have entered into an agreement and plan of merger for Williams to acquire all of the voting securities of MAPCO, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement and merger, 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, 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 Williams 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 One Williams Center, Tulsa, Oklahoma.

2. Respondent Williams is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation and sale of natural gas and related activities; natural gas gathering, processing, and treating activities; the transportation and terminaling of petroleum products and natural gas liquids, including propane; hydrocarbon exploration and production activities; the production and marketing of ethanol; and the provision of a variety of other products and services to the energy industry.

3. Respondent Williams 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.

II. MAPCO AND THE PROPOSED ACQUISITION

4. MAPCO 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 1800 South Baltimore Avenue, Tulsa, Oklahoma.

5. MAPCO is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation by pipeline of natural gas liquids ("NGLs"), anhydrous ammonia, crude oil and refined petroleum products; the transportation by truck and rail of NGLs and refined petroleum products; the refining of crude oil; the marketing of NGLs, refined petroleum products and crude oil; and NGL processing and storage.

6. MAPCO 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.

7. On or about November 23, 1997, Williams and MAPCO entered into an agreement and plan of merger whereby Williams would acquire all of the outstanding voting securities of MAPCO, and MAPCO would become a wholly-owned subsidiary of Williams. Under the agreement, each share of MAPCO common stock will be exchanged for shares of Williams common stock and preferred stock

purchase rights. Based on relative valuations at the time of the agreement, the transaction is valued at approximately \$2.7 billion.

III. TRADE AND COMMERCE

A. *Midwest Propane*

8. A relevant line of commerce in which to evaluate the effects of this acquisition is the transportation by pipeline and terminaling of propane.

9. Relevant sections of the country in which to evaluate the effects of this acquisition on the relevant line of commerce are: (a) central Iowa, including Des Moines and Ogden; (b) northern Iowa and southern Minnesota, including Clear Lake and Sanborn, Iowa, and Mankato, Minnesota; (c) eastern Iowa, including Iowa City; (d) southern Wisconsin and northern Illinois, including Janesville, Wisconsin and Rockford, Illinois; and (e) north central Illinois, including Tampico and Farmington.

10. MAPCO owns and operates pipelines that transport propane to terminals owned and operated by MAPCO that service the relevant sections of the country.

11. Williams owns and operates pipelines that transport propane to terminals owned and operated by Kinder Morgan Operating L.P. "A" ("Kinder Morgan"), a Delaware limited partnership, that service the relevant sections of the country. Williams has agreements with Kinder Morgan pursuant to which customers of Kinder Morgan ship propane on pipelines owned by Williams to terminals owned by Kinder Morgan in the relevant sections of the country. Because it owns and operates said pipelines, Williams effectively controls the delivery of propane to the Kinder Morgan terminals under such agreements.

12. Respondent Williams, through its ownership and operation of the pipelines and through its agreements with Kinder Morgan, competes with MAPCO in the transportation and terminaling of propane in each relevant section of the country.

13. The markets for the transportation by pipeline and terminaling of propane in the relevant sections of the country are highly concentrated and would become substantially more highly concentrated as a result of the acquisition.

14. Entry into the transportation by pipeline and terminaling of propane in the relevant sections of the country is difficult.

B. Pipeline Transportation of Raw Mix from Southern Wyoming

15. Raw mix is a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus. Raw mix is processed into these individual component products at fractionation facilities.

16. MAPCO owns the only pipeline for the transportation of raw mix from gas processing plants in southern Wyoming to Hobbs, New Mexico, where it connects with other pipelines for transportation to major fractionation facilities in Texas, Oklahoma, and Kansas.

17. Williams owns and operates two large gas processing plants in southern Wyoming. At these plants, Williams extracts raw mix from natural gas produced from gas wells, for itself and for other well owners.

18. A relevant line of commerce and section of the country in which to evaluate the effects of this acquisition is the transportation by pipeline of raw mix from southern Wyoming to New Mexico, Texas, Oklahoma, and Kansas.

19. Prior to the acquisition agreement, MAPCO believed that its monopoly over the pipeline transportation of raw mix from southern Wyoming was in jeopardy. It was concerned that a new pipeline would be built to transport raw mix from southern Wyoming to fractionation facilities in Texas, Kansas and Oklahoma, and that such a pipeline would capture a significant portion of MAPCO's volume. MAPCO perceived that Williams was an important participant in any such new pipeline, because of the location of Williams' gas processing plants and the volume of raw mix extracted at these plants.

20. Because of its concern about the possible construction of a competing pipeline, MAPCO planned to expand the capacity of its pipeline and to offer a discounted tariff in exchange for long-term volume commitments.

21. Williams in fact had discussions with other interested parties concerning the construction of a pipeline to by-pass the MAPCO pipeline. Williams terminated these discussions when it entered into the agreement and plan of merger with MAPCO.

22. Entry into the pipeline transportation of raw mix from southern Wyoming is difficult.

23. After the acquisition Williams will no longer have an incentive to participate in, or cooperate with, a competing pipeline.

Without Williams' participation or cooperation, the prospects for such a competing pipeline are substantially reduced. Owners of raw mix extracted at Williams' gas processing plants will continue to have no choice other than MAPCO for transporting their raw mix to major fractionation centers. Without the threat of a competing pipeline, MAPCO will have less of an incentive to expand its pipeline or to offer a reduced tariff.

IV. EFFECT OF THE PROPOSED TRANSACTION

24. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly 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 FTC Act, as amended, 15 U.S.C. 45. In particular, the proposed acquisition will:

A. Eliminate actual, direct and substantial competition between Williams and MAPCO in the pipeline transportation and terminaling of propane in the relevant sections of the country;

B. Increase concentration in the pipeline transportation and terminaling of propane in the relevant sections of the country;

C. Increase the ability of the combined Williams and MAPCO, unilaterally and through coordinated interaction, to exercise market power in the pipeline transportation and terminaling of propane in the relevant sections of the country;

D. Insure the ability of the combined Williams and MAPCO to exercise market power in the transportation of raw mix from southern Wyoming; and

E. Increase barriers to entry into the relevant markets.

V. VIOLATIONS CHARGED

25. The agreement and plan of merger between Williams and MAPCO constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

26. The proposed acquisition, if consummated, would constitute a 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of MAPCO Inc. ("MAPCO") by The Williams Companies, Inc. ("Williams"), and it now appearing that Williams, hereinafter sometimes referred to as "respondent," 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 respondent 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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, 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 Williams 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 One Williams Center, Tulsa, OK.
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. “*Williams*” means The Williams Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Williams Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “*MAPCO*” means MAPCO Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by MAPCO Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “*Commission*” means the Federal Trade Commission.
- D. “*Competing Pipeline*” means any existing, planned or proposed pipeline owned or operated by anyone other than Williams or MAPCO that transports, or is intended to transport, Raw Mix from Gas Processing Plants in Wyoming, directly or indirectly, to any Fractionation Plant located in Kansas, Oklahoma, New Mexico or Texas.
- E. “*Connection Agreement*” means an agreement between Williams or MAPCO and a Competing Pipeline that provides for, among other things, the connection of a pipeline and the associated installation of valves, measurement apparatus, flanges and other devices necessary to deliver Raw Mix from a Williams Wyoming Gas Processing Plant to a Competing Pipeline and to measure the volume of such Raw Mix.
- F. “*Fractionation Plant*” means a facility that separates Raw Mix into its individual components.
- G. “*Gas Processing Plant*” means any facility that separates Raw Mix from methane.
- H. “*Kinder Morgan*” means Kinder Morgan Operating L.P., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Kinder Morgan,

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

- I. "*KM Agreement*" means the Pipeline Lease and Operating Agreement between Kinder Morgan and Williams, dated March 3, 1998, and attached hereto as Confidential Exhibit A.
- J. "*KM Terminals*" means the propane terminals owned or operated by Kinder Morgan at Des Moines, Clear Lake and Iowa City, Iowa and Tampico and Rockford, Illinois, and all tangible and intangible assets used in operating said terminals, that receive, or that can receive, propane in whole or in part from the Williams NGL System.
- K. "*Propane*" means a colorless paraffinic hydrocarbon product with a chemical formula of C_3H_8 that is derived either as a by-product of petroleum refining or from natural gas processing, and that can be used for heating, cooking, agricultural crop drying, as a petrochemical feedstock, and for other applications.
- L. "*Proposed Acquisition*" means the proposed acquisition of the voting securities of MAPCO by Williams.
- M. "*Raw Mix*" means a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus.
- N. "*Respondent*" means "Williams."
- O. "*Terminaling*" means all services performed by a facility that provides temporary storage of propane received from a pipeline and the redelivery of propane from storage facilities into transport or tanker trucks.
- P. "*Williams NGL System*" means the assets owned by Williams comprising the following pipeline segments: Plattsburg, Missouri to Des Moines, Iowa; Des Moines, Iowa to Clear Lake, Iowa; Des Moines, Iowa to Iowa City, Iowa; and Iowa City to Clinton, Iowa/Middlebury Junction, Illinois.
- Q. "*Williams Wyoming Gas Processing Plant*" means any Gas Processing Plant owned or operated, in whole or in part, by Williams or MAPCO in the State of Wyoming, including plants located at or near Opal and Echo Springs, Wyoming.

II.

It is further ordered, That:

- A. Respondent shall comply with the KM Agreement, including, but not limited to, the provision of pipeline capacity to Kinder Morgan to service the KM Terminals pursuant to the terms and conditions of the KM Agreement.
- B. Respondent shall not cancel the KM Agreement for any reason except pursuant to the provisions of paragraph 4.5 thereof. If respondent determines to cancel the KM Agreement pursuant to such provisions, respondent shall provide the Commission with at least ninety (90) days' prior written notice of such cancellation. At the time of such notice, respondent shall designate, subject to the approval of the Commission, a proposed successor to Kinder Morgan's rights and interests under the KM Agreement. If no successor in interest has been approved by the time of such cancellation, the Commission may appoint a trustee pursuant to paragraph V of this order.
- C. Notwithstanding Section 16.1 of the KM Agreement, if Kinder Morgan sells any of the KM Terminals, respondent shall, not later than thirty (30) days after such sale, enter into a pipeline capacity lease and operating agreement with the acquirer of such KM Terminals that is substantially identical to the KM Agreement with respect to such terminals, and consistent with the purpose of this order. Respondent shall provide a copy of such agreement to the Commission not less than ten (10) days prior to its execution.
- D. Until the date at which all of respondent's obligations under the KM Agreement expire, respondent shall not, without prior approval of the Commission, make or agree to any modifications with respect to any term or terms of the KM Agreement.
- E. Respondent shall provide to the Commission, no later than thirty (30) days after their receipt or transmittal, copies of all communications between Kinder Morgan, or its successor in interest, and respondent regarding changes in or alleged breaches of the KM Agreement.
- F. The purpose of this paragraph II of this order is to ensure Kinder Morgan's access to pipeline capacity, as set forth in the KM Agreement, to prevent the elimination of Kinder Morgan as a competitor in the transportation and terminaling of propane at the KM Terminals, and to remedy the lessening of competition in the

transportation and terminaling of propane in Illinois, Iowa, Wisconsin, and Minnesota resulting from the acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

- A. Within thirty (30) days of receipt of a written request from a Competing Pipeline, respondent shall enter into a Connection Agreement for the connection of such Competing Pipeline to each Williams Wyoming Gas Processing Plant. The terms and conditions of such Connection Agreement shall be the terms customarily used by such Competing Pipeline to connect to other Gas Processing Plants. If the respondent and a Competing Pipeline are unable to agree on the terms and conditions of a Connection Agreement, the Competing Pipeline may elect to cause the issue to be submitted to outside, independent, binding arbitration in accordance with the procedures in Exhibit B hereto. Respondent shall provide the Commission with a copy of each written request from a Competing Pipeline within ten (10) days after respondent receives such request.
- B. Respondent shall connect each Williams Wyoming Gas Processing Plant that is the subject of a Connection Agreement to a Competing Pipeline under the terms and conditions established by such Connection Agreement. All steps necessary to effectuate such connection shall be accomplished by respondent within 180 days after the execution of such Connection Agreement.
- C. From the date on which the agreement is signed until the earlier of (a) three days after the Commission rejects this agreement or (b) 120 days after the date this order becomes final, respondent shall not enter into any new or renewed agreement to process natural gas at any Williams Wyoming Gas Processing Plant pursuant to which the producer or seller of natural gas gives up its right, for a term of more than one year, to sell or otherwise dispose of its Raw Mix.
- D. The purpose of this paragraph III of this order is to ensure that the acquisition does not reduce the likelihood that a Competing Pipeline may be constructed to service Gas Processing Plants in Southwestern Wyoming.

IV.

It is further ordered, That:

- A. Respondent shall immediately notify the Commission of the initiation of any arbitration proceedings, agreements, or changes in agreements, involving any of the matters in this order.
- B. Judgment upon the decision rendered by any arbitrator(s) pursuant to this order or pursuant to any agreements entered into pursuant to this order may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to the Federal Arbitration Act, 9 U.S.C. 1, *et seq.*, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of respondent thereafter to abide by the arbitrator's decision shall be a violation of this order.

V.

It is further ordered, That:

- A. If respondent has not selected a successor to Kinder Morgan's rights and interests under the KM Agreement as required by paragraph II.B of the order, the Commission may appoint a trustee (or trustees) to select a successor and to lease the Williams NGL System, subject to the prior approval of the Commission. If the trustee does not select a successor to Kinder Morgan's rights and interests under the KM Agreement, then the trustee may divest the Williams NGL System. Such divestiture shall be at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph 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.

- C. If a trustee is appointed by the Commission or a court pursuant to the terms of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall appoint a trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in leasing, acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of the proposed trustee, within ten (10) days after notice by the staff of the Commission to respondent of the identity of the proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to lease or divest the assets as described in paragraph V.A of this order. Such sale or lease, if it occurs prior to January 1, 2001, shall require that the lessee or buyer shall, for each year for five (5) years from the date of lease or sale, dedicate to the transportation of propane an amount of capacity equivalent to the average annual throughput of propane during the previous five-year period on that portion of the pipeline extending from Plattsburg Junction, Missouri, to Des Moines, Iowa.
 3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to lease or divest the assets as described in paragraph V.A of this order.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.C.3 to effectuate paragraph V.A of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of how the trustee intends to effectuate paragraph V.A of this order or believes that compliance can be achieved within a reasonable time, this period may be extended by the Commission,

or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets involved or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the lease or divestiture. Any delays in the lease or divestiture caused by respondent shall extend the time for leasing or divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to lease or divest expeditiously at no minimum price. The transactions shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order, provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall lease or divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.
7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the leases or divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at

least in significant part on a commission arrangement contingent on the trustee's leasing or divesting the assets to be leased or divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph V.A of this order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this order.
11. Except as otherwise provided in this order, the trustee shall have no obligation or authority to operate or maintain the assets to be leased or divested.
12. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the leases or divestitures.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

- A. Acquire any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in providing terminaling or pipeline transportation for propane located in Iowa or in any contiguous states within seventy (70) miles of the Iowa border; or
- B. Acquire any assets used or previously used (and still suitable for use) for terminaling or pipeline transportation of propane in Iowa

or in any contiguous states within seventy (70) miles of the Iowa border.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VII.

It is further ordered, That:

- A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraph III.C of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph III.C of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph III.C of this order, including a description

of all substantive contacts or negotiations for the leases or divestitures and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning leases or divestitures.

- B. One (1) year 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, 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 each provision of this order.

VIII.

It is further ordered, That:

- A. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.
- B. Upon consummation of the acquisition, respondent shall cause the merged entity to be bound by the terms of this order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access 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 days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

X.

It is further ordered, That this order shall terminate on June 17, 2018.

[Confidential Exhibits A and B redacted from public record version.]

**Re: Postal Careers Institute, Incorporated, Petition
to Quash Civil Investigative Demand.
File No. 972-3282.**

February 25, 1998

Dear Mr. Venzara:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. As also set forth below, the new deadline for Postal Careers Institute, Incorporated ("PCI" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demand ("CID") is Friday, March 13, 1998.

PCI has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- March 13, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

The CID was issued to Petitioner on December 22, 1997, pursuant to the Commission's omnibus resolution of December 8, 1997. The resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services have engaged or are engaging in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. The CID specified a return date of January 16, 1998.

Commissioner Anthony has carefully reviewed the Petition. The procedural defects in the Petition and each of Petitioner's objections are discussed separately below.

II. PROCEDURAL DEFECTS

Commission Rule 2.7, 16 CFR 2.7, provides succinct and clear guidance regarding the requirements for submitting a petition to limit or quash compulsory process. Petitioner ignored virtually every one of the dictates of this rule.

A. The Petition Was Not Timely Filed

Subsection (d)(1) of Rule 2.7 provides that petitions to quash must be filed with the Secretary "within twenty days after service ... or, if the return date is less than twenty days after service, prior to the return date." 16 CFR 2.7(d)(1). Thus, at the least, PCI was required to file its petition on or before the return date, January 16, 1998. Although Petitioner dated the document January 15, 1998, the notary block reflects that it was not signed until January 16th. Moreover, the Petition was not received by the Secretary until January 20, 1998, four days after the return date.¹

While, in this instance, the Secretary did not reject this untimely filing outright, Petitioner should consider itself on notice that the Commission expects strict adherence to all procedural rules.

B. Petitioner Failed to Comply With Rule 2.7(d)(2)

Even more serious than the fact that the Petition was filed late and without the required number of copies is the fact that Petitioner failed to comply with Rule 2.7(d)(2), which provides, in relevant part:

Each Petition shall be accompanied by a signed statement representing that counsel for petitioner has conferred with counsel for the Commission in a good faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.... The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

16 CFR 2.7(d)(2). PCI failed to provide the required statement.

The conferral requirement is mandatory. Orderly process and judicial economy considerations dictate that efforts to resolve compulsory process disputes be exhausted at the staff level before being brought before the Commission. Those served with compulsory

¹ Even when it was ultimately received by the Secretary's office, the Petition was not accompanied by the correct number of copies (twenty) as required by Rule 4.2(c), 16 CFR 4.2(c).

process do not have a choice, but rather, *must* engage in good faith negotiations with the Commission staff regarding their objections to a given request. Furthermore, these negotiations must be documented in the statement required by Rule 2.7(d)(2).

The Commission understands from the staff attorneys conducting this investigation that they have repeatedly invited PCI to engage in discussions regarding PCI's objections and concerns relating to the CID, but that Petitioner has failed to make a good faith attempt to resolve these issues. Nevertheless, the staff remains willing to engage in such discussions. The Commission strongly urges PCI to take advantage of the staff's offer and to do so immediately.

C. Petitioner Failed to Comply With Rule 2.7(d)(1)

Rule 2.7(d)(1) provides, in relevant part, that petitions "shall set forth all assertions of privilege or other factual and legal objections to the ... civil investigative demand, *including all appropriate arguments, affidavits and other supporting documentation.*" 16 CFR 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement. It consists of five extremely short double-spaced paragraphs, each asserting a distinct objection. These paragraphs make broad assertions without offering any support, explanation, or reasoned argument. In addition, no supporting affidavits or documents are included. Petitioner's conclusory and unsupported assertions fall far short of the standard set forth in Rule 2.7(d)(1).

III. SPECIFIC OBJECTIONS

In addition to its procedural deficiencies, the Petition is substantively without merit. None of Petitioner's objections justify quashing or limiting the CID.

A. Confidentiality

PCI first complains that "[t]he FTC has not kept the investigation of Postal Careers Institute confidential...." Petition ¶ 1. PCI provides absolutely no explanation, example, or support for this assertion. Lacking any mention whatsoever of any specific instance where a confidentiality obligation was breached, this unsupported assertion must be rejected.

B. Burden

PCI next complains that the requests are "broad and undefined" and adds that compliance would impose an "undue financial burden" upon PCI. Petition ¶ 2. Again PCI fails to elaborate or give examples. This conclusory argument must be rejected for at least three reasons.

First, breadth and ambiguity issues are precisely the types of issues that are supposed to be negotiated between petitioner and the Commission staff pursuant to Rule 2.7(d)(2). Given that Petitioner failed to engage in these mandatory negotiations, its complaints in this regard ring particularly hollow. As stated above, the staff attorneys continue to stand ready to discuss these matters.

Second, Petitioner has failed to specify which requests it considers unclear or too broad and in what respect. The Commission cannot be expected to guess which requests PCI finds objectionable and why.

Third, Petitioner has failed to offer any explanation of why it would be financially burdensome to comply with the CID. Likewise, it has failed to offer any documents or affidavits evidencing the expected financial impact of compliance.

C. Release of Information to United States Postal Service

PCI next claims that it and its students might suffer irreparable harm if the FTC released information gathered during the investigation to the United States Postal Service ("USPS"). Petition ¶ 3. As with all the rest of its allegations, PCI fails to elaborate or provide any support for this contention.

PCI adds the unsupported assertion that "[t]he FTC has already released information from the investigation to the [USPS]." *Id.* However, PCI fails to supply any specific details or any evidence showing that a release actually occurred, identifying what information was released, or demonstrating that such release was improper or unlawful.

Moreover, the Commission's rules anticipate and authorize sharing information with other government agencies and law enforcement authorities. For example, Section 15.7.1 of the Commission's Operating Manual provides that "staff may advise federal, state, and local law enforcement agencies of the existence of an investigation, the identity of the target, and the general nature of the information in the agency's files." Likewise, Section 4.11(c) of

the Commission's Rules, 16 CFR 4.11(c) sets forth the procedures for making more detailed disclosures to law enforcement agencies. In short, the lawful sharing of information between government agencies is not a valid ground upon which to resist compulsory process.

D. Alleged Failure to Specify Applicable Laws

PCI next contends that the FTC has failed to inform PCI "of any alleged violation or the provisions of law that are applicable." Petition ¶ 4. This contention is untrue. The resolution authorizing the use of compulsory process in this investigation, which is incorporated in the CID by reference as well as attached thereto, spells out the nature and scope of the investigation.

To investigate the advertising, marketing, promotion, offering for sale, and sale of enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services, for the purpose of determining whether unnamed persons, partnerships or corporations, or others that are engaged in the advertising, marketing, promotion, offering for sale or sale of such services, or that assist such persons or entities, have engaged or are engaging in unfair or deceptive practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Thus, the CIDs do, in fact, adequately notify PCI of the purpose and scope of the investigation, the nature of the conduct under investigation, and the applicable provisions of law, as required by Section 2.6 of the Commission's Rules, 16 CFR 2.6.

E. Issuance of CIDs to PCI Employees

Finally, PCI claims that CIDs served by the FTC upon current PCI employees somehow "limit [PCI's] ability to properly and timely respond...." Petition ¶ 5. PCI again fails to elaborate on or otherwise provide any support for its assertion. The only individual upon whom the FTC has served a CID in this matter is Alice V. Lanoie, a New Hampshire resident who has served as a bookkeeper for PCI. In its Petition, PCI failed to identify Ms. Lanoie as a PCI employee or indicate how service upon her has interfered with the company's ability to respond to the CID directed to it. Moreover, the Commission would further suggest that to the extent any such interference has any basis in fact, it would be yet another issue best dealt with in negotiations with the Commission staff.

In sum, the Petition is nothing more than a series of unsubstantiated and meritless assertions. Both its last-minute timing and then its lack of substance strongly suggest that the Petition was submitted by PCI merely as a delaying tactic.

IV. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with Civil Investigative Demand on or before Friday, March 13, 1998.

**Re: Postal Careers Institute, Incorporated, Petition
for Full Commission Review. File No. 972-3282.**

March 13, 1998

Dear Mr. Exposito:

The Commission has considered (1) the Petition to Quash filed on behalf of Postal Careers Institute, Incorporated ("PCI") by Anthony Venzara; (2) the underlying Civil Investigative Demands; (3) the February 25, 1998, letter ruling by Commissioner Anthony denying the Petition to Quash; (4) PCI's request for full Commission review of the letter ruling; and (5) PCI's motion for an extension of time to file the request for full Commission review. For the reasons set forth below, the Commission denies PCI's motion for an extension of time as moot and affirms the February 25, 1998 letter ruling denying PCI's Petition to Quash.

Turning first to PCI's motion for an extension of time to file its request for full Commission review, the Commission denies the motion as moot. PCI's request was timely filed on March 3, 1998, one day before the deadline, and therefore, no extension is needed.¹

Turning next to PCI's motion for review of Commissioner Anthony's ruling, the Commission has determined that the motion raises no issues that were not fully considered and addressed in the earlier ruling. Indeed PCI's request for review adds nothing to its Petition to Quash. Rather, PCI merely emphasizes the fact that the Petition was prepared by a non-attorney -- a fact that was known to Commissioner Anthony when preparing her ruling. Based solely upon this fact, PCI asks the Commission to construe the Petition to Quash liberally and reverse the prior ruling. However, no matter who prepares a petition to quash, certain basic elements are required; a petitioner must at a minimum (1) confer with staff in a good faith effort to resolve its objections before filing the petition, (2) state specific objections and explain them, and (3) present whatever

¹ Rule 2.7(f) allows a petitioner to seek review "within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition." 16 CFR 2.7(f). Service was accomplished on Friday, February 27, 1998, when PCI received the ruling by mail. *See* 16 CFR 4.4 (service). While the Secretary's office also transmitted the ruling to PCI by facsimile on or about February 26, 1998, the facsimile copy was merely provided as a courtesy and was not intended to constitute service. Therefore, PCI's right to seek review did not expire until Wednesday, March 4th. *See* 16 CFR 4.3 (computation of time).

evidence it can muster to support its contentions. PCI did none of these things. Instead, it failed to confer with staff² and presented only unsupported, general, and vague objections. The fact that a layperson prepared the Petition to Quash neither justifies these fundamental failures and omissions nor transforms the otherwise insufficient Petition into one that should be granted.

Accordingly, the full Commission concurs with, and hereby adopts, the February 25, 1998 letter ruling by Commissioner Anthony in this matter. As set forth in the letter ruling, Petitioner must comply with the Civil Investigative Demands on or before Friday, March 13, 1998.

² PCI's motion for review includes a certification attesting to PCI's efforts to "agree on or to narrow the issues involved in this motion " by contacting Gregory Ashe, a staff attorney responsible for the investigation, on February 26, 1998. Mr. Ashe, however, sent PCI's counsel a letter, dated March 5, 1998, acknowledging that a telephone conversation between the two did take place on the date in question, but adding:

I do not recall having any substantive discussions as to PCI's problems with the CIDs. Neither do I recall any discussions as to narrowing the scope of the CIDs. In fact, I do not recall having any conversations regarding any of the issues raised in either PCI's motion to extend time or PCI's motion to review.

PCI's counsel has yet to respond.

While the intended meaning of PCI's certification is somewhat unclear, what is clear is that it does not appear to meet the requirements imposed by Rule 2.7(d)(2), 16 CFR 2.7(d)(2), that a petitioner confer with the staff in a good faith attempt to resolve or narrow its objections to the subpoena or civil investigative demand.

**Re: National Claims Service, Inc., Petition to Limit
Civil Investigative Demands. File No. 952-3169.**

June 2, 1998

Dear Mr. Hodgson:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The petition is denied for the reasons stated below. As also set forth below, the new deadline for National Claims Service, Inc. ("NCS" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demands ("CID") is Tuesday, June 16, 1998.

NCS has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹ The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- June 16, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

NCS markets a medical billing business opportunity. As part of its marketing efforts, NCS provides prospective purchasers with the names of "successful" NCS customers as references. NCS also makes various express and implied earnings claims about its billing center opportunities to prospective purchasers. Over the past several years, the Commission has routinely investigated companies offering business opportunities in order to determine, among other things, whether the representations made by these companies during their sales efforts are fair and accurate.

On March 18, 1997, pursuant to its omnibus resolution, dated July 10, 1980, the Commission issued two CIDs to the Petitioner, one requesting written responses and the other seeking documents. The July 10, 1980 resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed persons,

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

partnerships, or corporations engaged in the sale of franchises, business opportunities, distributorships and other forms of businesses to consumers have been or are engaged in unfair or deceptive acts or practices in violation of 16 CFR Part 436 and/or Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. Both CIDs specified a return date of April 3, 1998. Petitioner subsequently requested, and the staff granted, two extensions which resulted in a new return date of April 24, 1998.

On or about April 24, 1998, NCS produced objections and partial responses to the CIDs and simultaneously served its Petition to Limit. Among the information the CIDs requested and NCS failed to produce is: (1) the identity of its billing center purchasers or licensees (*i.e.*, customers); (2) the identity of the individuals whose names or initials appear in the testimonials widely used by NCS in its sales solicitations; (3) complete copies of consumer complaints received by NCS; and (4) documents showing the amount of revenues NCS has generated through its sales. The Commission staff maintains that without this basic information, they cannot complete their investigation.

By its Petition, NCS seeks to be excused from providing any further responses to the CIDs. It presents four arguments in support of its Petition: (1) production of the omitted information would be unduly burdensome and oppressive; (2) some of the information requested is not available to NCS, namely, the success or failure rates of its customers; (3) the demands violate contractual, statutory, and constitutional privacy rights of NCS and its customers; and (4) the Commission is unfairly pursuing case-by-case investigations rather than commencing a rulemaking proceeding.

Commissioner Anthony has carefully reviewed the Petition to Limit, Petitioner's "Supplement to Petition to Limit Re: Privacy Rights," dated May 15, 1998 ("Supplement"), and Petitioner's "Second Supplement to Petition to Limit Re: Privacy Rights and Re: Cooperation" ("Second Supplement"). None of Petitioner's arguments, which are addressed separately below, provide a basis for excusing Petitioner from providing the additional information specified in the CIDs.

II. ANALYSIS

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* 15 U.S.C. 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 57b-1. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission, asking only whether (i) the information sought is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not too indefinite or unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). While this matter is, of course, not presently before a federal court, it is worth noting that the CIDs issued to NCS plainly meet all three of these criteria. It cannot reasonably be contested that this investigation is authorized by the Commission's statutory mandate and that the CIDs seek information relevant to the investigation at hand. Petitioner has not even argued that the CIDs are too indefinite, and, as detailed below, has failed to make any showing that the CIDs are unduly burdensome.

A. Burden

Petitioner complains that the CIDs are oppressive and burdensome because they "will require petitioner to search thousands of pieces of paper and to segregate and transport the same." Petition at 2. Petitioner adds that as a small company with a small profit margin, it cannot afford what it claims would be a "significant diversion of

personnel and financial resources." This is a legally deficient objection.

First, *all* compulsory process specifications require the recipient to expend some effort to respond. If the mere fact that documents would have to be examined and that resources would have to be expended provided a basis for resisting production, compulsory process would be rendered useless.

Second, an examination of the CIDs themselves reveals that the specifications are narrow and focused in scope. The principal outstanding specifications require NCS to identify its purchasers/licensees, the testimonialists, and its employees, and to provide information regarding its revenues. This basic information is very important to the staff's investigation. The specifications requesting this information are essentially standardized and cannot accurately be characterized as overbroad or unreasonable.

Third, Petitioner offers no details regarding the nature of the burden it alleges and absolutely no evidence that such a burden exists. Rather, the Petition to Limit contains only a single paragraph (numbered lines 15 to 28 on page 2) regarding burden, and that paragraph contains nothing but vague generalizations and conclusory statements. Petitioner does not refer to any particular specifications contained in the CIDs and does not explain what aspects of its record-keeping system make compliance burdensome.² In addition, Petitioner has not provided a single affidavit or shred of documentary evidence supporting the existence of this alleged burden. *See United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome).

In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost

² While the form (paper or electronic) of the records at issue does not change the analysis, given that the business opportunity offered by Petitioner involves electronic processing of massive amounts of information, the Commission would be surprised if most of the records being sought by the Commission were not maintained by NCS in computer files. These computer files could be printed or downloaded to a storage device with the touch of a button.

of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

B. Information Requested Is Unavailable

Petitioner next objects that the CIDs seek information that is not available to it. Specifically, Petitioner argues that it "does not possess sufficient data to accurately specify the typical success or failure rates of its licensees." Petition at 3. Petitioner does not cite to the particular specifications that it contends seek this information.

First, even assuming that the CIDs request this information, which they do not, Petitioner's statement that it has no such information is a *response*, not an objection, and, therefore, is misplaced in the context of a petition to limit.

Second, and even more importantly, the CIDs do not include a specification requiring Petitioner to specify the typical success or failure rate of its licensees. Indeed, it is precisely to investigate the experiences of NCS billing center purchasers that the Commission has requested the identity of those purchasers and the testimonialists. Petitioner's argument amounts to a *non sequitur* and must be rejected.

C. Privacy Claims

In support of its refusal to provide information identifying its customers/licensees as well as information regarding its employees, Petitioner asserts privileges based upon privacy rights it contends arise from, among other sources, California state law, the U.S. Constitution, and confidentiality provisions contained in its contracts with its customers. All of these arguments are without merit.

As a general matter, the fact that a respondent considers information confidential is not grounds for resisting compulsory process. *See, e.g., FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1978); *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957). This is true even if a subpoena or CID requests personal information about third parties. *See FTC v. Shaffner*, 626 F.2d 32, 37-38 (7th Cir. 1980) (information about debtors); *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 993 (D.C. Cir. 1975) (consumer credit reports). As the court in *FTC v. Invention Submission Corp.*, so succinctly explained:

Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So

long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993).³

The main thrust of Petitioner's privacy argument is founded on an assertion of California state law privacy rights applicable to discovery disputes arising in civil litigation. Relying on these California precedents, Petitioner contends that the Commission is obligated to show that the information sought is "directly relevant" to a cause of action, the Commission has a "particularized need" for the information, and the information is "essential" to determining the truth of the matter in dispute. These state law discovery standards are completely misplaced in the context of a statutorily authorized investigation undertaken by a federal agency.

First, Petitioner's assertion of California law is fundamentally flawed because this is a federal, and not a state, matter. This is a federal investigation of potential violations of Section 5 of the Federal Trade Commission Act. "Investigations for federal purposes may not be prevented by matters depending on state law." *United States v. Cortese*, 410 F. Supp. 1380, 1381-82 (E.D. Pa. 1976), *aff'd* 540 F.2d 640 (3rd Cir. 1976). In short, state law privileges do not apply here.⁴

³ While Petitioner objects to providing the requested information to the FTC in the first instance and is not merely concerned about maintaining its non-public status, it is worth noting that this investigation is non-public. Under the Commission's own rules any confidential information provided to the Commission will be used only for law enforcement purposes in determining whether the law has been violated, and will not be made publicly available without recourse to proper procedures. *See* 16 CFR 4.10. Indeed, pursuant to Section 10 of the FTC Act and Rule 4.10(c), 16 CFR 4.10(c), it is a crime for an FTC employee to improperly reveal confidential information gathered in the course of a non-public investigation.

⁴ Petitioner's assertion that federal courts will honor state law privileges (Petition at 3-4) overstates, and as such, misstates, the law. State privileges will be applied by federal courts only when the federal court will be applying state law to determine the outcome of the case, such as when a state law claim is brought to a federal court based upon its diversity jurisdiction. *See* Fed.R.Evid. 501. In either an enforcement proceeding or a Section 5 suit brought in a federal district court, federal law and, therefore, the federal law of privilege would apply. *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("The nature of a subpoena enforcement proceeding . . . rests soundly on federal law, and federal law of privilege governs any restrictions on the subpoena's scope"). Petitioner has not articulated any applicable federal privilege. Indeed, the only support Petitioner offers for its vague assertion of a federal privilege is a passing reference to the U.S. Constitution generally and a citation to *Griswold v. Connecticut*, 381 U.S. 479 (1965), a reproductive rights privacy case that has no bearing on the instant matter.

Second, Petitioner fails to appreciate the distinction between an investigation undertaken by the Commission pursuant to its statutory authority and discovery undertaken by a private litigant involved in a lawsuit. While both of these activities are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them. As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

Id. at 906; *see also Linde*, 5 F.3d at 1513 ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *EPA v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate"(internal citations omitted)). Thus, Petitioner's privacy arguments begin from the mistaken premise that California or federal discovery rules apply here; they do not. As such, all of Petitioner's arguments that the Commission cannot meet California's "particularized need" and related standards are inapposite.

Moreover, the "particularized need" standards urged by petitioner are simply relevancy thresholds that must be met before a California court will compel the production of certain private information. The relevancy inquiry applicable to administrative compulsory process is much different than the inquiry applicable to civil litigation discovery:

Unlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy...Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., 1991-1 Trade Cas. (CCH) at 65,351. In the seminal case of *FTC v. Texaco*, the court explained that "an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case" and that "the agency's subpoena requests may be measured only against the general purposes of its investigation." 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) (emphasis original). Here, the disputed specifications plainly seek information that is directly relevant to the general purpose of this investigation, namely, to determine whether NCS has engaged in any deceptive acts or practices in marketing its business opportunity. In order to determine the scope of the representations NCS made to its customers, and whether or not those representations were borne out by the consumers' experiences, the Commission must contact at least a sampling of the consumers. Likewise, in order to determine whether the testimonialists are telling the truth about their experiences, the Commission must contact them. The representations made by NCS orally and in its advertisements cannot be judged true or false on their face; such representations can only be judged in light of empirical data.⁵ That data can only come from Petitioner's licensees.

Petitioner also relies upon confidentiality provisions contained in its contracts with its customers whereby NCS promises not to reveal any information about the customers to third-parties without prior approval. These provisions have no effect on Petitioner's obligation to respond to the CIDs. This very same argument was rejected by the court in the *Invention Submission* case. The court enforced the subpoenas reasoning that "any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny

⁵ In its Supplement, Petitioner, starting again from California discovery law, argues that contacting consumers is not "essential" here based upon Commission precedent standing for the proposition that the Commission does not need to present testimony from actual consumers in order to make out a deception claim and instead may apply a "reasonable consumer" standard. Even ignoring the fact that the California requirement is inapplicable, Petitioner's reliance on the reasonable consumer standard is misguided. The Commission will find deception in cases where "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Deception Statement*, 103 FTC 174, 176 (1983), published as an appendix to *Cliffdale Associates, Inc.*, 103 FTC 110 (1984). The reasonable consumer standard, therefore, goes to the issue of whether the target consumers are likely to be deceived by the advertiser's misrepresentation. That is, the standard does not even come into play until a misrepresentation -- "an express or implied statement contrary to fact" -- has already been found. *Id.* at 175 n.4. Here, investigation is necessary to determine this threshold issue of whether Petitioner's representations were "contrary to fact."

simply by protecting all information under confidentiality agreements." 1991-1 Trade Cas. (CCH) at 65,353.

With regard to its employees, Petitioner argues that it would violate their privacy rights if it were to provide their home addresses and telephone numbers. The Invention Submission court also considered and rejected this very argument, holding: "Agencies have discretion to fashion how investigations are conducted. Since employees will not speak freely if they are under the watchful eye of management, the agency's desire to conduct interviews away from the workplace is neither arbitrary nor an abuse of discretion." *Id.* at 65,352 n.23.

At the end of its initial argument on the privacy issue (Petition at 9-10), Petitioner is perhaps the most forthright about the actual reason that it opposes providing the names of its customers to the FTC. Petitioner admits that it is concerned that consumers contacted by the staff may be inspired to register complaints that they would not otherwise have made. Petitioner contends that the staff might "create or manufacture consumer dissatisfaction against Petitioner where none has heretofore been expressed." Petition at 9. This is yet another argument considered and rejected by the court in Invention Submission:

Although respondent envisions a doomsday scenario in which overzealous investigators ask leading questions and plant seeds of distrust and suspicion in the minds of interviewees, the court is convinced that plaintiff's apprehensions are unfounded and insufficient to overcome the FTC's presumptive right to access to individuals and records. . . . If this court were to acknowledge [respondent's] highly speculative fears of damage to corporate reputations adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.

1991-1 Trade Cas. (CCH) at 65,352. For these same reasons, Petitioner's objection here is rejected.⁶

In an effort to reach a compromise and in response to Petitioner's concern that by merely contacting its customers, the FTC might somehow raise concerns in the customers' minds that NCS has

⁶ This conclusion is not changed by Petitioner's vague reference to a consumer that it believes was contacted by the FTC who later sought a refund and its speculative assertion that there is an improper cause and effect relationship between the two events. While contact with the FTC might alert a consumer to his or her rights or embolden the consumer to act if the consumer believes he or she suffered a wrong, such contact does not create the wrong.

engaged in deceptive practices, staff contacted Petitioner's counsel and offered to tell interviewees that it is investigating the industry generally, and not just NCS. The idea for this offer came directly from the Invention Submission opinion where the court commented favorably on this practice:

[T]he agency has stipulated that in conversations with customers and databank participants, it will state that the Commission is investigating the idea promotions industry generally and that no specific allegations of wrongdoing have been made. These prefatory remarks recharacterizing the nature of the investigation should allay [respondent's] fears of false incrimination.

Id. In its Second Supplement, Petitioner rejected this offer suggesting both that it was misleading and that it ignored the privacy rights of the interviewees themselves. Petitioner's assertion that the representation would be misleading and improper is baseless. Indeed, the representation is true; the marketing practices of the business opportunity industry are a topic of widespread and longstanding investigation by the Commission as evidenced by, among other things, the 1980 Resolution authorizing such investigations. As for the privacy rights of the third-parties, those arguments have been addressed and rejected above. *See Shaffner*, 626 F.2d at 37-38 (information about debtors); *Manager, Retail Credit Co.*, 515 F.2d at 993 (consumer credit reports).

D. Rulemaking Versus Litigation

Petitioner's final argument amounts to an allegation that it is unfair for the Commission to proceed against medical billing business opportunity providers on a case-by-case enforcement basis and that the Commission should instead proceed through a rulemaking. This argument has absolutely no basis in law. The fact that the Commission has exercised its prerogative to proceed by investigation and, where appropriate, administrative adjudication or federal court litigation has absolutely no effect on Petitioner's obligation to respond to the CIDs at issue here.

First, and most importantly, no rulemaking is needed. This series of investigations is aimed at uncovering deceptive trade practices under Section 5 of the FTC Act and violations of the Commission's Franchise Rule, 16 CFR Part 436. No special rules tailored to the

medical billing business opportunity industry are required.⁷ The main issues under investigation with respect to NCS are basic: whether Petitioner has made false representations regarding income potential and whether Petitioner has used phony or exaggerated testimonials to market its product. In short, this is not a situation where guidance as to required behavior is inadequate or lacking; instead it is a situation where investigation is necessary in order to root out potential violations of existing and well-established rules and laws.⁸

Second, Petitioner has not filed a petition to commence a rulemaking proceeding as required pursuant to Section 1.9 of the Commission's Rules, 16 CFR 1.9. Even if such a petition were filed, its filing would not affect the ongoing investigation. Indeed, even if NCS filed a rulemaking petition that was denied, NCS would have to wait until the Commission brought an action against it before it could appeal the rulemaking versus adjudication issue to a federal court. *Weight Watchers International v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995).

Finally, it is nothing short of a bedrock principle of administrative law that agencies have broad discretion in determining whether to proceed by rulemaking or adjudication. *See, e.g., Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328-29 (9th Cir. 1982) ("It is well settled that the decision whether to proceed by adjudication or rule-making lies in the first instance within the agency's discretion." (citations and internal quotations omitted)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (Chenery II), *reh'g denied*, 332 U.S. 783 (1947). The fact that it might be more convenient for Petitioner if the Commission proceeded by rulemaking imposes absolutely no limits on the Commission's discretion here.

⁷ Indeed, in addition to Section 5, itself, and the Franchise Rule, the Commission has already adopted guides concerning the use of testimonials and endorsements in advertising, *see* 16 CFR Part 255.

⁸ Petitioner's arguments that it should not have to bear the expenses associated with an investigation because it believes that many of its competitors are not being investigated are untenable. Without addressing the accuracy of that belief, the Commission necessarily has prosecutorial discretion in identifying the targets of its investigations. Without the discretion to proceed against whom it sees fit, when it sees fit, the Commission's investigative and prosecutorial powers would be rendered useless. Petitioner has not even suggested, much less offered any evidence, that the Commission improperly chose NCS for investigation.

E. Request for Oral Argument

In both its Petition and again in its Supplement, Petitioner requested an oral argument. These requests are denied. Petitioner submitted three briefs in this matter totaling twenty-six pages. No oral argument is necessary to further illuminate the points presented in these extensive briefs.

III. CONCLUSION

This is an absolutely proper and statutorily authorized investigation. These CIDs seek information that is plainly relevant to that investigation and have been crafted to avoid placing an undue burden on NCS. Moreover, as noted above, NCS has failed to make any evidentiary showing whatsoever as to burden.

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with the Civil Investigative Demands on or before Tuesday, June 16, 1998.

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