

Complaint

116 F.T.C.

IN THE MATTER OF

UNITED REAL ESTATE BROKERS OF ROCKLAND, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3461. Complaint, Sept. 27, 1993--Decision, Sept. 27, 1993*

This consent order prohibits, among other things, the New York provider of real estate brokerage services from restricting exclusive-agency listings; restricting brokers from soliciting homeowners with current listings for future business; interfering with the cancellation of a listing; and excluding from membership brokers who do not operate a full-time office, or maintain an office in Rockland County, or who are not residents of New York state.

*Appearances*For the Commission: *Michael J. Bloom and Rhonda McLean.*For the respondent: *David Silverman, Granik, Silverman, Sandberg, Campbell & Nowicki, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent United Real Estate Brokers of Rockland, Ltd., a corporation and successor by merger with its former wholly-owned subsidiary Rockland County Multiple Listing Systems, Inc., has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent United Real Estate Brokers of Rockland, Ltd. (hereafter "Rockland MLS") 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 255 South Middletown Road, Nanuet, New York.

PAR. 2. Rockland MLS is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. In the course and conduct of their businesses, Rockland MLS and its members maintain and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, and through the policies, acts, and practices described below, Rockland MLS and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Rockland MLS is, and for some time has been, a privately-held corporation licensed as a real estate broker by the State of New York. Rockland MLS characterizes itself as a "real estate directory service," providing a multiple listing service to subscribing member real estate brokers, many of whom are also shareholders in the corporation.

PAR. 5. Only subscribing members may participate in the multiple listing service. The member brokers provide, for a commission, the service of bringing together buyers and sellers of residential real estate, as well as other services designed to facilitate sales of such properties. Each member agrees to submit all "exclusive agency listings" and "exclusive right to sell listings" pertaining to resales of 1-4 family residential real estate located within Rockland County for publication to the entire membership of the multiple listing service, and to share commissions with those member brokers that successfully locate purchasers for properties listed. An "exclusive agency listing" is a listing under which the property owner agrees to pay the broker an agreed commission if the property is sold through any real estate broker, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the broker. An "exclusive right to sell listing" is a listing under which a property owner agrees to pay the broker an agreed commission if the property

is sold, whether the purchaser is located by the broker or any other person, including the owner.

PAR. 6. Pursuant to Rockland MLS's Constitution and By-laws, no subscribing member serves as an agent of another with respect to the sale of any property listed with the MLS; rather, all member brokers are equally responsible in the effort to procure buyers for properties listed with Rockland MLS. By the terms of Rockland MLS's listing form, which is signed by the property owner and the broker procuring the listing (the "listing broker"), the owner engages the entire MLS membership in the effort to sell the property.

PAR. 7. Rockland MLS maintains a computerized database of the residential real estate listings submitted to it by its subscribing members. It distributes the listing information to its members primarily through the publication of listing cards and a listing book which is updated on a weekly basis. A substantial number of respondent's members also receive listing information through on-line computer terminals. Rockland MLS charges a fee to members for publishing and servicing listings on its real estate directory service only if the property is sold before the listing's expiration date; the fee is based on a percentage of the brokerage commission on the sale of the property.

PAR. 8. Property owners and their brokers generally consider publication of listings on Rockland MLS to be the fastest and most effective means of obtaining the broadest market exposure for residential property in Rockland County.

PAR. 9. Membership in Rockland MLS provides valuable competitive advantages in the brokering of residential real estate sales in Rockland County. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 10. Sales of Rockland County real estate listings published on Rockland MLS have totaled over \$250 million for each year since 1984. For the period January 1988 through October 1988, about 1500 residential listings (including condominiums and

cooperatives) have been sold through Rockland MLS, valued between \$300 million and \$350 million. Rockland MLS currently has about 200 subscribing member brokers. Its membership represents over 98% of the active, residential real estate brokerage firms in Rockland County. For each year since 1984, over 90% of the total dollar sales volume of residential resales through brokers in Rockland County involved listings published with Rockland MLS.

PAR. 11. Except to the extent that competition has been restrained as described herein, Rockland MLS members are and have been in competition among themselves in the provision of residential real estate brokerage services within Rockland County.

PAR. 12. In adopting the policies and engaging in the practices described in paragraphs thirteen through twenty below, Rockland MLS has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within Rockland County.

PAR. 13. Prior to April 1984, Rockland MLS accepted exclusive agency listings under which owners were free to advertise their properties independently, although they could not advertise below the listed prices during the period of the listings. In 1984, Rockland MLS modified Article IV, Section 1.8 of its Operating Procedure and the terms of its listing forms to refuse exclusive agency listings that permitted any manner of homeowner advertising.

PAR. 14. Rockland MLS, pursuant to Article I, Section 18.3 of its Operating Procedure, has been and is now prohibiting its member brokers from entering into "blue star arrangements" with property owners desiring an exclusive agency listing. A "blue star arrangement" is any listing that is submitted to Rockland MLS in which, pursuant to the property owner's request, all appointments to show the property are made through the listing broker's office.

PAR. 15. Rockland MLS, pursuant to Article I, Section 10.1 of its Operating Procedure and an Addendum to said Procedure, requires that member brokers taking an exclusive agency listing

receive no more than 20% of the commission if another member broker sells the property, whereas member brokers taking an exclusive right to sell listing may receive up to 35% of the commission if another member broker sells the property. Rockland MLS has further disadvantaged and discouraged exclusive agency listings relative to exclusive right to sell listings by publishing these listings through its weekly listing book without the description or photograph that normally accompanies exclusive right to sell listings.

PAR. 16. Rockland MLS, pursuant to Article I, Section 22 of its Operating Procedure, has been and is now prohibiting any member other than the listing broker from directly or indirectly soliciting the listing of any property, the listing of which is filed with the multiple listing service, until after midnight of the expiration date of the filed listing.

PAR. 17. Rockland MLS, pursuant to Article II, Section 3 of its Operating Procedure, has been and is now requiring that members responding to a property owner's request for release from the listing agreement obtain a signed release from the owner stating that in the event the owner sells his property during the balance of the period of the listing, the owner will be liable to the listing member for a commission.

PAR. 18. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws and the Preamble of its Operating Procedure, has been and is now requiring as a condition of membership in Rockland MLS that each member broker or applicant for membership operate a full-time real estate brokerage office.

PAR. 19. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws, has been and is now requiring that each member broker or applicant for membership maintain a real estate brokerage office in Rockland County.

PAR. 20. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws, has been and is now requiring that each member broker or applicant for membership be a domiciled resident of the State of New York. Although Rockland MLS may nevertheless sometimes admit to membership out-of-state brokers,

it requires that such out-of-state brokers pay an initiation fee that is substantially higher than the fee charged to New York State residents.

PAR. 21. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Rockland MLS and its members as described in paragraphs thirteen through twenty above have been and are unreasonably to restrain competition among brokers, and to injure consumers by, *inter alia*:

(1) Restraining brokers from competing with respect to the commissions they charge for their real estate brokerage services;

(2) Unreasonably discriminating against exclusive agency listings relative to exclusive right to sell listings, thereby inhibiting brokers from competing based on their willingness to accept exclusive agency listings and restricting consumers' choices with respect to the way they sell their property;

(3) Substantially limiting the ability of residential property owners to compete with real estate brokers in locating purchasers;

(4) Restricting brokers from competing with the listing broker and with each other to obtain renewal of listings of properties, thereby depriving property owners of information and the advantage of price and service competition that brokers would otherwise offer;

(5) Unreasonably restraining the entry of new brokerage firms in competition with Rockland MLS's multiple listing service;

(6) Substantially limiting consumers' abilities to choose among a variety of brokerage firms competing on the basis of price, contract terms, and services; and

(7) Depriving consumers of information pertinent to selecting a brokerage firm, and of the benefits of competition among brokers.

PAR. 22. The policies, acts, practices, and combinations or conspiracies described in paragraphs thirteen through twenty above constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent United Real Estate Brokers of Rockland, Ltd. (a corporation and successor by merger with its former wholly-owned subsidiary, Rockland County Multiple Listing Systems, Inc.) and the respondent named in the caption hereof 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 respondent with violation of the Federal Trade Commission Act; and

The respondent (sometimes hereafter referred to as "Rockland MLS"), 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

(1) Respondent 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 255 South Middletown Road, Nanuet, New York.

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

ORDER

DEFINITIONS

The following definitions shall apply to this order:

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

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

(3) “*Member*” shall mean any real estate broker or brokerage firm represented by a broker that is entitled to participate in the multiple listing service offered by Rockland MLS.

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

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

(6) “*Selling broker*” shall mean any broker, other than the listing broker, who procures the purchaser for a listed property.

(7) “*Exclusive agency listing*” shall mean any listing under which the property owner agrees to pay the broker an agreed commission if the property is sold through any real estate broker, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at

an agreed reduction in the commission or with no commission owed to the broker.

(8) “*Exclusive right to sell listing*” shall mean any listing under which a property owner agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is procured by the broker or any other person, including the owner.

(9) “*Blue star arrangement*” shall mean any listing that is submitted to Rockland MLS in which, pursuant to the property owner's request, all appointments to show the property are made through the listing broker's office.

I.

It is ordered, That respondent Rockland MLS, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, shall forthwith cease and desist from adopting or maintaining any rule or policy or taking any other action that has the purpose, capacity, tendency, or effect of:

(A) Restricting or interfering with the acceptance or publication of exclusive agency listings by any means, including:

(1) Preventing or discouraging its member brokers from accepting exclusive agency listings in which property owners are free to advertise in newspapers or any other media the sale of their property;

(2) Preventing or discouraging its member brokers from accepting exclusive agency listings accompanied by a blue star arrangement;

(3) Requiring that the listing broker receive a lesser portion of the commission for exclusive agency listings than for exclusive right to sell listings when another member broker sells the property; or

(4) Adopting or enforcing any policy or practice that treats exclusive agency listings in a less advantageous manner than exclusive right to sell listings with respect to the acceptance and publication of photographs and descriptions of the listed property disseminated to its member brokers;

Provided, however, that nothing contained in this subpart shall preclude respondent from (a) prohibiting homeowners with exclusive agency listings from placing their own “for sale” sign on their property or from advertising below the listed price during the term of the listing; (b) requiring designation of the listing as one granting an exclusive agency; (c) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; or (d) imposing terms applicable to all listings accepted for publication by Rockland MLS.

(B) Restricting or interfering with the solicitation of a listing agreement for any property, *provided, however,* that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Rockland MLS that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with Rockland MLS by another member used information provided to it by Rockland MLS in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than Rockland MLS.

(C) Restricting or interfering with any member and property owner cancelling a listing before the listing’s expiration date, *provided, however,* that nothing contained in this subpart shall prohibit respondent from: (1) requiring notice of the cancellation, including a copy of the cancellation agreement; and (2) charging a reasonable and nondiscriminatory fee for any service it provides if

the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs of any service it provides.

(D) Requiring, urging, recommending, or suggesting that any applicant for membership or member:

- (1) Operate an office full-time or engage in real estate brokerage full-time;
- (2) Maintain an office in Rockland County;
- (3) Be a domiciled resident of the State of New York; or
- (4) Pay any additional initiation fees or any other fees based upon the member's or applicant's status as an out-of-state resident;

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

II.

It is further ordered, That respondent Rockland MLS shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of Rockland MLS.

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

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each

new member of Rockland MLS within thirty (30) days of the new member's admission.

III.

It is further ordered, That respondent Rockland MLS shall:

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

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

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

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Rockland MLS, 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 Rockland MLS that may affect compliance obligations arising out of this order.

APPENDIX A

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices that have

been alleged to be unlawful restraints of trade. To avoid litigation, respondent United Real Estate Brokers of Rockland, Ltd., as successor by merger with Rockland County Multiple Listing Systems, Inc. has entered into such a consent agreement. The agreement is not an admission that respondent ("Rockland MLS") or any of its members has violated the law. For your information, Rockland MLS is prohibited from adopting or maintaining any rule or policy or taking any other action that has the purpose, capacity, tendency, or effect of:

(A) Restricting or interfering with the acceptance or publication of exclusive agency listings by any means, including:

(1) Preventing or discouraging its member brokers from accepting exclusive agency listings in which property owners are free to advertise in newspapers or any other media the sale of their property;

(2) Preventing or discouraging its member brokers from accepting exclusive agency listings accompanied by a blue star arrangement;

(3) Requiring that the listing broker receive a lesser portion of the commission for exclusive agency listings than for exclusive right to sell listings when another member broker sells the property; or

(4) Adopting or enforcing any policy or practice that treats exclusive agency listings in a less advantageous manner than exclusive right to sell listings with respect to the acceptance and publication of photographs and descriptions of the listed property disseminated to its member brokers;

Provided, however, that nothing contained in this subpart shall preclude respondent from (a) prohibiting homeowners with exclusive agency listings from placing their own "for sale" sign on their property or from advertising below the listed price during the term of the listing; (b) requiring designation of the listing as one granting an exclusive agency; (c) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; or (d) imposing

terms applicable to all listings accepted for publication by Rockland MLS.

(B) Restricting or interfering with the solicitation of a listing agreement for any property, *provided, however*, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Rockland MLS that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with Rockland MLS by another member used information provided to it by Rockland MLS in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than Rockland MLS.

(C) Restricting or interfering with any member and property owner cancelling a listing before the listing's expiration date, *provided, however*, that nothing contained in this subpart shall prohibit respondent from: (1) requiring notice of the cancellation, including a copy of the cancellation agreement; and (2) charging a reasonable and nondiscriminatory fee for any service it provides if the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs of any service it provides.

(D) Requiring, urging, recommending, or suggesting that any applicant for membership or member:

- (1) Operate an office full-time or engage in real estate brokerage full-time;
- (2) Maintain an office in Rockland County;
- (3) Be a domiciled resident of the State of New York; or

(4) Pay any additional initiation fees or any other fees based upon the member's or applicant's status as an out-of-state resident;

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

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I have voted to accept the consent order. In general, the order is consistent with previous Commission orders in cases involving multiple listing services. I write separately to note my dissent from paragraphs I.A.3 and I.B of the order.

Paragraph I.A.3 of the order provides that Rockland must cease requiring that the listing broker receive a lesser share of the commission for exclusive agency listings, as defined in the order, than for exclusive right to sell listings, as defined, when another broker makes the sale. On its face, the provision appears to require only that Rockland cease discriminating against exclusive agency listings. What is not apparent from the face of the order is that paragraph I.A.3 applies to Rockland's multiple listing service rule that fixes the commission split between listing and selling brokers. To the extent that the order applies only to the discriminatory aspect of the split and not to the fact that the split is fixed, the provision may implicitly approve the fixed split, which appears to be inconsistent with Commission precedent.

In *Multiple Listing Service Mid County, Inc.*, 110 FTC 482 (1988), the Commission's complaint alleges that a multiple listing service rule fixing maximum commission splits for listing brokers "deprive[s] consumers of the advantages of competition among . . . [brokers] to list and to sell residential real estate," *id.* at 485, and the order bars the MLS from "[f]ixing . . . any rate, range or amount of any division or split of commission or other fees between" selling

and listing brokers. *Id.* at 489. Indeed, in two other multiple listing service cases, Puget Sound¹ and Bellingham-Whatcom,² the Commission even prohibited so-called “default” split rules that specified how the commission should be split in the apparently rare situations in which the listing broker failed to specify the split.³ There is no apparent reason to distinguish between the rule implicitly sanctioned in Rockland and the rule prohibited in Mid County, and Rockland's rule mandating the split for all listings appears more likely than the default split rules prohibited in Puget Sound and Bellingham-Whatcom to have anticompetitive effects.

Paragraph I.B of the order requires Rockland to eliminate its restrictions on broker solicitation of listings while a listing agreement with another broker is in effect. This provision of the order is consistent with precedent. As our learning about multiple listing services has increased, however, the efficiency justification for anti-solicitation rules (to prevent brokers from exploiting the efforts of the listing broker) has become more clear and more credible. Because the rule now appears to be justifiable, and in the absence of evidence of anticompetitive effects, I no longer can find reason to believe sufficient to challenge the rule under Section 5 of the Federal Trade Commission Act.

¹ Puget Sound Multiple Listing Service, Docket C-3300 (Aug. 2, 1990).

² Bellingham-Whatcom County Multiple Listing Service, Docket C-3299 (Aug. 2, 1990).

³ I dissented from these prohibitions, on the grounds that the rules did not affect the level of commissions, did not mandate the division of commissions and applied only when the listing broker failed to specify a split. *See* Separate Statement of Commissioner Mary L. Azcuenaga, Concurring in Part and Dissenting in Part in Puget Sound and Bellingham-Whatcom.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order Sept. 28, 1993

ORDER

Counsel for the Ford Motor and Volkswagen respondents have moved that the complaint against three respondents be dismissed and their names be removed from the order of February 22, 1989. The assets of Sterling Motors, Inc. were sold, and the dealership franchise was terminated. The sale was to an unrelated buyer, and the sellers retained no interest in the dealership or assets. One individual respondent, William Hickey, is deceased. McAlister Motors, Inc. operated a Volkswagen and Toyota dealership. The Volkswagen franchise was abandoned and terminated. The Toyota assets and Toyota franchise, however, were sold to Audette Toyota. Complaint counsel do not oppose the motion.

The Commission has considered the motion and determined to grant it as to Mr. Hickey and Sterling Motors, Inc. Accordingly,

It is ordered, That the complaint against Mr. Hickey and Sterling Motors, Inc. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete their names.

It is further ordered, That respondent McAlister Motors, Inc. be and hereby is directed to file further information concerning whether Audette Toyota is a successor or assign within the meaning of the definition of a "Dealership and Individual Respondent" in the order of February 22, 1989.

IN THE MATTER OF
SYNCHRONAL CORPORATION, ET AL.

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

Docket 9251. Complaint, Oct. 28, 1991--Decision, Oct. 1, 1993

This consent order prohibits, among other things, a New York-based infomercial company, two of its former officers, and several other respondents from making any unsubstantiated claims for a number of different types of products; from disseminating the two infomercials for a purported baldness cure and a cellulite treatment; and from misrepresenting the results of any tests or studies used for marketing any product or service. In addition, the consent order requires Synchronal to pay \$3.5 million into a consumer redress fund, and requires Ira Smolev, a former officer, to maintain a \$500,000 escrow account before advertising various consumer products.

Appearances

For the Commission: *Richard Cleland, Michael J. Bloom and Lesley Fair.*

For the respondents: *William Wachtel*, in-house counsel for Synchronal Corporation, New York, N.Y. *Michael Lasky, Davis & Gilbert*, New York, N.Y. and *Helene Jaffe, Weil, Gotshal & Manges*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as an officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and

Omexin Corporation; Thomas L. Fenton, individually and as an officer and director of Synchronal Corporation and Synchronal Group, Inc.; and Ana Blau a/k/a Anushka, and Steven Victor, M.D., individually, hereinafter sometimes referred to as 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 Synchronal Corporation is a Delaware corporation, with its offices and principal place of business at 1515 Broadway, New York, New York. Synchronal produces, distributes, and provides various services for numerous program-length television advertisements, or “infomercials,” on its own behalf or for third-party sellers of products and services. These infomercials include “Cellulite Free: Straight Talk with Erin Gray” for the Anushka Bio-Response Body Contouring Program (“the Anushka products”), a purported cellulite treatment; and “Can You Beat Baldness?” for Omexin, a purported treatment for hair loss. Synchronal has also sold various products through telephone solicitations, including Chae Basics, a purported skin treatment.

Respondent Synchronal Group, Inc. (“Synchronal Group”), is a Delaware corporation, with its offices and principal place of business at 1515 Broadway, New York, New York. Synchronal Group is the holding company for Synchronal Corporation.

Respondent Smoothline Corporation is a Delaware corporation, with its offices and principal place of business at 171 Mariner Drive, Southampton, New York. It has advertised, offered for sale, and sold the Anushka products.

Respondent Omexin Corporation is a Delaware corporation, with its offices and principal place of business at 171 Mariner Drive, Southampton, New York. It has advertised, offered for sale, and sold Omexin.

Respondent Ira Smolev (“Smolev”) is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of

Synchronal Corporation and Synchronal Group. His home address is 120 Meadow Lane, Southampton, New York.

Respondent Richard E. Kaylor (“Kaylor”) is or was at relevant times herein an officer and director of Synchronal Corporation, Synchronal Group, Smoothline Corporation, and Omexin Corporation. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation, Synchronal Group, Smoothline Corporation, and Omexin Corporation. His business address is 1515 Broadway, New York, New York.

Respondent Thomas L. Fenton (“Fenton”) is or was at relevant times herein an officer and director of Synchronal Corporation and Synchronal Group. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of Synchronal Corporation and Synchronal Group. His business address is 1515 Broadway, New York, New York.

Respondent Ana Blau a/k/a Anushka (“Blau”) is or was at relevant times herein the founder and co-owner of the Anushka Institute. Blau’s business address is 241 East 60th Street, New York, New York. Blau aided in the promotion of the Anushka products by providing an expert endorsement of the product on the “Cellulite Free: Straight Talk with Erin Gray” infomercial. In return for her role in marketing the Anushka products, Blau has received remuneration from the manufacturer and/or distributor of the product.

Respondent Steven Victor, M.D. (“Victor”) is or was at relevant times herein a medical doctor licensed to practice by the State of New York, with a specialty in dermatology. Victor’s business address is 30 East 76th Street, New York, New York. Victor aided in the promotion of Omexin by providing an expert endorsement of the product on the “Can You Beat Baldness?” infomercial. In return for his role in marketing Omexin, Victor has received remuneration from the manufacturer and/or distributor of the product.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed the Anushka products, Omexin, and Chae Basics. These products are foods, cosmetics, and/or drugs, as the terms “food,” “cosmetic” and “drug” are defined in Sections 5, 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, 15 U.S.C. 44.

THE ANUSHKA PRODUCTS

PAR. 4. Respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have disseminated or have caused to be disseminated advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A, a transcription of the infomercial entitled “Cellulite Free: Straight Talk with Erin Gray.” The aforesaid advertisement contains the following statements:

1. Narrator: “The skin is massaged with our body contouring gel which has ingredients like our specially processed French seaweed formula with its unique beneficial properties that really penetrates the skin into the cellulite layer. You can actually feel the gel working as it penetrates into the cellulite. And in days our clients are on their way to being cellulite-free, even after years of living with cellulite.” (Exhibit A, p. 8]

2. Vicki: “After the first treatment I was hooked. I really saw a difference immediately. So I did exactly what Anushka told me to do and the cellulite came off rapidly. Each week my hips and thighs looked better. Within six weeks it was all gone. You know, I should also mention that I lost nine pounds and a couple of inches off my hips and thighs.” [Exhibit A, p. 10]

3. Gray: “Many doctors and others in the medical profession are enthusiastic about the Anushka program. . .” [Exhibit A, p. 13]

4. Woman: “Within four weeks I lost inches off my thighs and my thighs looked smoother and firmer. Within six weeks the cellulite was gone.” [Exhibit A, p. 30]

5. Woman: “Well, within three months I had not only lost all of my cellulite but I also lost about four inches from my hips and thighs. I lost fifteen pounds and a full dress size.” (Exhibit A, p. 29]

6. Announcer: "Now, here's how you can order the really proven way to get rid of cellulite. Just pick up your phone, dial this number and order Anushka's five-and-a-half-minute bio-response body contouring program right now. Imagine opening your package from Anushka and realizing you are on your way to ridding your body of ugly cellulite. In only minutes a day a few days a week . . . After the first treatment you'll begin to see a difference. You'll be well on your way to a cellulite-free body." [Exhibit A, pp. 18-19, 30-31]

Announcer: "Step one, you massage the unique body contour and seaweed gel which penetrates the open pores of the skin to start attacking those ugly cellulite pockets from the very first treatment. In minutes you'll feel the seaweed at work. The second step is to take cellulase enzymes to help your body metabolize carbohydrates and help you with your body contouring program. The third step is to apply your Anushka body firming lotion to firm the skin with its deep penetrating action. . . . Call now so you can start the Anushka body contouring program working for you. Get rid of those ugly cellulite pockets once and for all." [Exhibit A, pp. 19-20, 31-32]

7. Marie: "I was very impressed by Anushka's clients because they verified the claims. Also the extensive client charts that showed the proof with numbers, with statistics. And the experts, medical and otherwise that backed up what she was saying. And one thing that is very surprising and I was very, very impressed by it is that one of the key ingredients in her treatment is something as simple as seaweed."

Gray: "Well, tell us, Anushka, is this ordinary seaweed?"

Anushka: "Absolutely not. We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite. . . ."

Gray: "Now tell us, how is it that seaweed effects cellulite?"

Fryda: "Well, I think this diagram will help make it clear. These are cellulite cells with their trapped toxins surrounded by tough connective tissue. Now with cellulite cells the hardened connective tissue won't let these nutrients get to the cells so the trapped toxins cannot be neutralized and taken away There are other effective ingredients in Anushka's anti-cellulite gel. But seaweed is a key to its success. It's one reason why it's the most powerful anti-cellulite program ever developed." [Exhibit A, pp. 25-27]

8. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

9. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York They urged us to develop a program that

could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

10. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

11. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear." [Exhibit A, p. 21]

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will cause the loss of a substantial amount of weight.

E. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 6. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. Users of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not achieve a visible reduction in cellulite after a single or a few treatments.

C. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause a substantial reduction in the size of the hips and thighs.

D. Use of the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream and Cellulean tablets will not cause the loss of a substantial amount of weight.

E. For thousands of women, Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

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

PAR. 7. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondent Blau has made statements as an expert endorser in advertisements and promotional materials for the Anushka products, including but not necessarily limited to the attached Exhibit A. These statements include the following:

1. Anushka: "Well, let me tell you that in the course of my research I finally found the combination which worked to make my cellulite disappear. And I was the happiest woman on earth. Needless to say. So that is what made me decide to start with the Anushka Institute so other women could benefit from our discovery." [Exhibit A, p. 6]

2. Anushka: "Many of our clients wanted to share the treatments with friends who lived outside New York They urged us to develop a program that could be used at home. We insisted it be both easy to use and at the same time completely effective so their friends could get the same results." [Exhibit A, p. 9]

3. Anushka: "I am so certain that my anti-cellulite program will work for you as well as it has for thousands of my clients that I will return to you every penny you spend for the program if you're not completely satisfied." [Exhibit A, pp. 21, 32-33]

4. Anushka: "And remember you did not do anything to make cellulite appear, but now you can make it disappear." [Exhibit A, p. 21]

5. Anushka: "We use a very special seaweed. And one of the people we turned to for this seaweed is a leading researcher in marine biology. And he is here with us today to help explain how seaweed works to help get rid of cellulite." [Exhibit A, p. 26]

6. Anushka: "Remember, it's not your fault you have cellulite. Just say to yourself, I don't have to put up with it anymore because now I know what to do. I did it. You can do it too." [Exhibit A, p. 34]

PAR. 10. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have substantially reduced or eliminated cellulite from the body.

PAR. 11. In truth and in fact:

A. The Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets do not contain ingredients that substantially reduce or eliminate cellulite from the body.

B. For thousands of women, the Anushka Bio-Response Body Contouring Gel, Firming Lotion, Multi-Revitalizing Cream, and Cellulean tablets have not substantially reduced or eliminated cellulite from the body.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading, and respondent Blau knew or should have known that said representations were, and are, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nine, including but not necessarily limited to the advertisement attached as Exhibit A, respondent Blau has represented, directly or by implication, that at the time she made the representations set forth in paragraph ten, she possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of her represented expertise in cellulite reduction, in the form of an examination or testing of the Anushka products at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 13. In truth and in fact, at the time she made the representations set forth in paragraph ten, respondent Blau did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Blau's representation as set forth in paragraph twelve was, and is, false and misleading.

OMEXIN

PAR. 14. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have disseminated or have caused to be disseminated advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B, a transcription of the infomercial entitled "Can You Beat Baldness?". The aforesaid advertisement contains the following statements and depictions:

1. Announcer: "The following program will give you news of a product unlike anything else available anywhere for stopping hair loss and actually reversing balding by growing new hair." [Exhibit B, p. 2]

2. John Hylan: "Well, our research is still going on, but, it has gone far enough to show that Omexin works. We know that Omexin really does stop hair loss and does grow hair back." [Exhibit B, P. 7]

3. Announcer: "Omexin has been scrupulously tested by dermatologists, and clinicians, and by thousands of grateful individuals. The test results and the personal stories speak for themselves." [Exhibit B, p. 14]

4. Announcer: "The answer couldn't have been simpler. The Omexin System is based on the Omexin Active Treatment, a fine white cream which you simply massage into the affected areas daily." [Exhibit B, p. 15]

5. Announcer: "Omexin works for the vast majority of people." [Exhibit B, p. 16]

6. Campanella: "It reportedly has stopped the balding process in a high percentage of test subjects and even re-grown healthy new hair for a large number of men and women of all ages." [Exhibit B, p. 17]

7. Campanella: "What are your initial impressions of Omexin?"

Dr. Victor: "[In] Omexin, we have for men and women a new safe product that they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair." [Exhibit B, p. 9]

8. Campanella: "Dr. Wexler, what about your research?"

Dr. Wexler: "We have patients in both a double-blind study and using what we consider to be a very active ingredient, and what we've seen is that patients are ceasing to lose their hair very quickly within starting Omexin and then within a short time after, they start seeing new hair appear. It's not just a fuzz, we're seeing actual pigmented terminal hair, which is very exciting for the patient as well as the doctor." [Exhibit B, p. 10]

9. Hylan: "Now, we don't know if that's the reason Omexin grows hair, but we sure do know that it does."

Campanella: "And can you prove that?"

Hylan: "Absolutely! To prove that Omexin works, we've done thorough, extensive testing using medically sound methods and applying the highest scientific standards." [Exhibit B, p. 7]

PAR. 15. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

E. Omexin has successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

PAR. 16. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost.

E. Omexin has not successfully curtailed hair loss and promoted new hair growth for thousands of balding men and women.

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

PAR. 17. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented directly or by implication, that at the time they made the representations set forth in paragraph fifteen, they possessed and relied upon a reasonable basis for such representations.

PAR. 18. In truth and in fact, at the time they made the representations set forth in paragraph fifteen, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. Respondent Victor has made statements as an expert endorser in advertisements and promotional materials for Omexin, including but not necessarily limited to the attached Exhibit B. These statements include the following:

1. Dr. Victor: "Then, on the other side of the coin, we have very controlled scientific studies. We have 2 groups. We actually take the men who are bald. We tattoo their scalp and we have them apply the Omexin in the balding area every day, twice a day. Now, every month they come back and we count the number of hairs that grow in the area where we tattooed their scalp. . . So far the studies have shown that these men are growing new hair." [Exhibit B, pp. 8-9]

2. Dr. Victor: “. . . basically, the majority of patients get a good result within 3 weeks.” [Exhibit B, p. 11]

3. Dr. Victor: “Now, Omexin is a product that can stop hair loss and grow hair for a vast majority of people.” [Exhibit B, p. 19]

4. Dr. Victor: “What is particularly good about Omexin, for a man or a woman in their 30’s or 20’s, with just beginning to thin. If they start using the product religiously, they can stop the hair from falling out. And they can retain the hair they have and remain that way for the rest of their lives.” [Exhibit B, p. 20]

5. Dr. Victor: “I think in Omexin, we have for men and women, a new safe product they can apply that will stop the hair from falling out, and in a fair number of patients, probably up to 70%, will start growing some new hair.” [Exhibit B, p. 20]

PAR. 20. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that:

A. Omexin contains an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin contains an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin contains an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin contains an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost in a large majority of balding men and women.

PAR. 21. In truth and in fact:

A. Omexin does not contain an ingredient that curtails hair loss for a large majority of balding men and women.

B. Omexin does not contain an ingredient that promotes the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

C. Omexin does not contain an ingredient that has been scientifically proven to curtail hair loss for a large majority of balding men and women.

D. Omexin does not contain an ingredient that has been scientifically proven to promote the growth of significant numbers of new, pigmented terminal hairs where hair has previously been lost for a large majority of balding men and women.

Therefore, the representations set forth in paragraph twenty were, and are, false and misleading, and respondent Victor knew or should have known that said representations were, and are, false and misleading.

PAR. 22. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph nineteen, including but not necessarily limited to the advertisement attached as Exhibit B, respondent Victor has represented, directly or by implication, that at the time he made the representations set forth in paragraph twenty, he possessed and relied upon a reasonable basis for such representations, consisting of an actual exercise of his represented expertise in the treatment of hair loss, in the form of an examination or testing of Omexin at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the endorsement.

PAR. 23. In truth and in fact, at the time he made the representations set forth in paragraph twenty, respondent Victor did not possess and rely upon a reasonable basis for such representations. Therefore, respondent Victor's representation as set forth in paragraph twenty-two was, and is, false and misleading.

DECEPTIVE FORMAT

PAR. 24. Through the advertising and dissemination of "Cellulite Free: Straight Talk with Erin Gray," respondents Syn-

chronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that “Cellulite Free: Straight Talk with Erin Gray” is an independent television program and is not paid commercial advertising.

PAR. 25. In truth and in fact, “Cellulite Free: Straight Talk with Erin Gray” is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

PAR. 26. Through the advertising and dissemination of “Can You Beat Baldness?” respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have represented, directly or by implication, that “Can You Beat Baldness?” is an independent television program and is not paid commercial advertising.

PAR. 27. In truth and in fact, “Can You Beat Baldness?” is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph twenty-six was, and is, false and misleading.

CONSUMER TESTIMONIALS

PAR. 28. Through the advertising and dissemination of “Cellulite Free: Straight Talk with Erin Gray,” respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Anushka products reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 29. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for the Anushka products do not reflect the typical or ordinary experience of members of the public who have used the products. Therefore, the representation set forth in paragraph twenty-eight was, and is, false and misleading.

PAR. 30. Through the advertising and dissemination of "Can You Beat Baldness?" respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton, in numerous instances have represented, directly or by implication, that testimonials from consumers appearing in advertisements for Omexin reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 31. In truth and in fact, in numerous instances, testimonials from consumers appearing in advertisements for Omexin do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph thirty was, and is, false and misleading.

AUTOMATIC SHIPMENT AND UNORDERED MERCHANDISE

PAR. 32. In the advertising and sale of the Anushka products, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed consumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 33. By and through the acts and practices alleged in paragraph thirty-two, respondents Synchronal Corporation, Synchronal Group, Smoothline Corporation, Smolev, Kaylor, and Fenton have mailed or caused to be mailed supplies of the Anushka products to consumers without the expressed request or consent of

the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 34. In the advertising and sale of Omexin, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have in numerous instances shipped without consumers' express consent additional supplies of these products to consumers who ordered an initial supply, and have billed consumers' credit card accounts for these additional shipments without the consumers' knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts and practices.

PAR. 35. By and through the acts and practices alleged in paragraph thirty-four, respondents Synchronal Corporation, Synchronal Group, Omexin Corporation, Smolev, Kaylor, and Fenton have mailed or caused to be mailed supplies of Omexin to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing

benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 36. Respondents Synchronal Corporation, Synchronal Group, Smolev, Kaylor, and Fenton have promoted, offered for sale, and sold Chae Basics through telephone solicitations of consumers identified from their purchases of other products sold through advertisements produced or disseminated by Synchronal Corporation or Synchronal Group. In numerous instances in the course of these telephone solicitations, respondents' agents have represented, directly or by implication, that consumers would be sent a free supply of Chae Basics.

PAR. 37. In truth and in fact, in numerous instances the supply of Chae Basics sent to consumers as described in paragraph thirty-six was not free, in that consumers' credit card accounts were billed a charge for the product. Therefore, the representations set forth in paragraph thirty-six were, and are, false and misleading.

PAR. 38. In the solicitation of orders by telephone of Chae Basics, respondents Synchronal Corporation, Synchronal Group, Smolev, Kaylor, and Fenton have in numerous instances billed the credit card accounts of consumers who agreed to the receipt of a supply of the product that was represented as free, have automatically shipped additional supplies of the product to consumers without their express consent, and have automatically billed consumers' credit card accounts for these latter shipments without the consumers' express knowledge and authorization. Respondents Synchronal Corporation, Synchronal Group, Smolev, Kaylor, and Fenton did not adequately disclose to those consumers prior to their initial purchase that additional products would be shipped to them and that the consumers would be billed for them. The practices of respondents Synchronal Corporation, Synchronal Group, Smolev, Kaylor, and Fenton as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 39. By and through the acts and practices alleged in paragraph thirty-eight, respondents Synchronal Corporation, Synchronal Group, Smolev, Kaylor, and Fenton have mailed or caused to be mailed supplies of Chae Basics to consumers without the expressed request or consent of the recipient without having attached to the products a clear and conspicuous statement that the recipient may treat the products as a gift and has the right to retain, use, discard, or dispose of them in any manner the recipient sees fit without any obligation to the respondent. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

PAR. 40. By and through the acts and practices alleged in this complaint, respondents have violated Sections 5(a) and 12 of the Federal Trade Commission Act and the provisions of the Postal Reorganization Act, 39 U.S.C. 3009, by directly or indirectly engaging in unfair or deceptive acts or practices, by disseminating false advertisements in or affecting commerce, and by acting in concert with others, or knowingly and substantially assisting others to employ the violations set forth above by providing the means and instrumentalities for the commission of such unfair or deceptive acts or practices.

EXHIBIT A

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(212) 362-1481
FAX 799-3482

FOR: SYNCHRONAL
1515 Broadway
NYC 10036

PROGRAM: INTERNATIONAL PROJECT STATION
ANUSKA: Free From Cellulite

DATE: CITY

WOMAN: This woman has conquered a hidden problem that nine out of ten women suffer from. The problem is Cellulite. Stay with us as we share the secrets, answer the questions and shed new light on this fat condition that distorts the hips and tights of millions of woman across America.

In the next thirty minutes we're going to explore the cellulite controversy. You'll visit a leading cellulite treatment center in New York, the Anuska Institute. And you'll hear from doctors, authors, experts and people who have successfully conquered their cellulite. Now, Straight Talk with Erin Grey.

(MUSIC)

(APPLAUSE)

ERIN GREY: Hi, I'm Erin Grey and welcome to Straight Talk. Before we hear about the Anuska Institute's discovery. And before we hear doctors and experts talking about the Anuska Institute's anti-cellulite program, before we meet Anuska herself, I want to share with you the part that interests me the most. The real inside stories of women who claim to know the secret of how to have cellulite-free bodies.

(APPLAUSE)

WOMAN: I tried anything and everything I could to get rid of my cellulite and nothing every worked. I mean, I thought it was absolutely hopeless. Then I happened to see an article in GLAMOUR about cellulite. It mentioned Anuska's institute. And since I live here in New York I thought I would try it. The first time I did the program I didn't notice anything except the way it made me feel. So I tried it a couple more times. And by the fourth day I really saw a difference in the mirror. My tights looked shaplier and firmer and my skin was much smoother. I feel even better about Anuska's program. But I feel even better about the way I feel about myself and the way I look.

