OPINION OF THE COMMISSION

BY VARNEY, *Commissioner*:

Respondents International Association of Conference Interpreters ("AIIC," as it is known by its French acronym) (IDF 1)[1] and its United States Region ("U.S. Region") are charged with violating Section 5 of the Federal Trade Commission Act ("FTC Act") by adopting and enforcing rules that govern how their members compete. We find that respondents' price-fixing practices and market allocation rules are *per se* unlawful agreements in restraint of trade and a violation of the FTC Act. We further find that the rules governing non-price terms and conditions of employment, business arrangements, and advertising must be analyzed under the rule of reason. Because the record evidence is insufficient to demonstrate a violation of law under the rule of reason, we dismiss the complaint allegations that those rules unlawfully restrain trade. In reaching these conclusions, we also find that AIIC's actions, which form the basis for this lawsuit, affect interstate commerce in the United States and are sufficient to confer specific personal jurisdiction; that respondents do not qualify for the "not-for-profit" exemption to the FTC's jurisdiction; and that respondents do not qualify for either the statutory or non-statutory labor exemption.

The order we enter prohibits respondents for a period of twenty (20) years from imposing any price-related or market allocation restraints in the United States.

I. BACKGROUND

The Commission's complaint in this matter, issued on October 25, 1994, charges the respondents with restraining competition among conference interpreters in the United States in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1994), by conspiring with their members to fix the price and output of interpretation services in the

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[1] The following abbreviations are used in this opinion:

ID	--	Initial Decision of the ALJ
IDF	--	Numbered Findings in the ALJ's Initial Decision
CX	--	Complaint Counsel's Exhibit
CXT	--	Complaint Counsel's Exhibit -- English Translation
RX	--	Respondents' Exhibit
Tr.	--	Transcript of Trial before the ALJ
Stip.	--	ALJ's order setting forth joint stipulations of Fact

United States. After pretrial discovery, 26 days of trial testimony, and pre- and post-trial motions, the record closed on May 16, 1996. Administrative Law Judge ("ALJ") James P. Timony issued a decision and proposed order on July 26, 1996.

The ALJ found that for more than forty years, AIIC regulated the employment of its members by adopting and enforcing an elaborate series of work rules governing, *inter alia*, the minimum daily rates to be charged in the United States, length of the working day, number of interpreters to be hired at a conference, ability of out-of-town and staff interpreters to compete with local freelance interpreters, advertising, and payment for travel expenses, per diem, rest days and non-working days depending on whether the interpreter was away from a "professional address." ID at 95.

The ALJ found that each restraint was part of a scheme to raise the price of conference interpretation services and that these restraints had anticompetitive effects. Although the ALJ found that the "evidence obviates [the need for] extensive inquiry into market power, market definition or market share," ID at 95, he nevertheless went on to determine that some of the restraints are also unlawful under the rule of reason, specifically finding that the respondents have market power. ID at 122-23.

The ALJ concluded that respondents endeavor to improve interpreters' working conditions and income and therefore exist for the profit of their members. ID at 95. The ALJ noted that although some of respondents' actions resemble union activity, they are not exempt from antitrust scrutiny under the statutory or nonstatutory labor exemption because AIIC specifically chose to be a professional association -- not a union. ID at 95-96; IDF 505. The ALJ further found that "respondents waived the [labor exemption] defense by failing to raise it in pleadings or during the presentation of evidence." ID at 96. The ALJ also found that the Commission has specific jurisdiction over AIIC for acts performed, or with effects, in the United States and that the Commission may proceed against the U.S. Region, an unincorporated association, as part of AIIC. ID at 96.

Finally, the ALJ rejected respondents' arguments that they have abandoned all of the rules that were arguably unlawful (ID at 131), finding that respondents continue to maintain rules on fees and working conditions despite their attempts "to conceal price-fixing agreements in 'gentlemen's agreements' and 'market surveys,' 'unpublished' rates and a [draft pamphlet] called a 'Vademecum.'" ID

at 96. The ALJ was unpersuaded that respondents' removal of some offending rules from their Basic Texts after the commencement of this investigation made an order unnecessary. ID at 131-33.

The respondents filed their appeal from the ALJ's Initial Decision on August 28, 1996. The respondents appeal all of the ALJ's jurisdictional findings, including his findings that the Commission has specific *in personam* jurisdiction over AIIC and that neither the statutory nor the nonstatutory labor exemption is available as a defense. Brief for Respondents-Appellants at 77-82. Respondents also appeal from the ALJ's finding that an order is necessary as to the monetary conditions that were contained in respondents' Basic Texts, arguing that the rules governing monetary conditions never applied to the U.S., were not enforced in the U.S., and were abandoned altogether in 1992. *Id.* at 1, 23-27. Finally, the respondents argue on appeal that the rules governing working conditions must be analyzed under the rule of reason and cannot be found unlawful because complaint counsel have not proven that respondents had power in the market for conference interpretation in the U.S. or that the rules had any anticompetitive effect in the U.S. *Id.* at 18-22, 36-61.

II. RESPONDENTS

Respondent AIIC is an association of professional conference interpreters organized under French laws, with its Secretariat located in Geneva, Switzerland. Stips. 6-7. AIIC's rules are in its "Basic Texts," which include AIIC's Statutes, Code of Professional Ethics, and Professional Standards (also referred to as Standards of Professional Practice). Stip. 9; CX-1; CX-2; Brief for Respondents-Appellants at 9.

AIIC's supreme body, the Assembly, consists of all Association members and meets once every three years. IDF 2; Stip. 10. AIIC's Assembly is responsible for setting policy, including voting on Basic Texts and expelling members for rule violations. IDF 37-38. AIIC has a "Council," consisting of the president, three vice presidents, a treasurer, and representatives from each of the Association's regions, each nominated by their regions and elected by the Assembly. IDF 2; Stip. 11. The Council implements Assembly decisions, investigates disciplinary matters, approves the rates and per diems published by AIIC, grants waivers from AIIC rules, and adopts the annual budget. IDF 2, 39-41; *see also* Stip. 12. AIIC also has a "Bureau," consisting of the president, the three vice presidents, and the treasurer, that

exercises the Council's functions between meetings. IDF 2; Stip. 13. AIIC has approximately 2,500 members worldwide and 141 in the United States. Brief for Respondents-Appellants at 6; Stip. 36; *see also* CX-600-K; IDF 2; Luccarelli, Tr. 1626-32.

AIIC publishes a Bulletin for members (IDF 3; Stip. 67), which is sent to the United States to report on the business of AIIC, including matters relating to the rates of remuneration and work rules. IDF 3; Stip. 17. Proposed amendments to AIIC's Basic Texts are published in the Bulletin. IDF 3; Stip. 18.

Organizationally, AIIC is divided into two sections known as sectors. The "Agreement Sector" negotiates agreements for freelance interpreters with international and intergovernmental organizations. These agreements address a variety of issues of importance to AIIC's freelance interpreter members, including issues related to rates and working conditions. CX-2085-E; IDF 492-97; Brief for Respondents-Appellants at 6. The Agreement Sector currently has negotiated agreements with: 1) the United Nations, 2) Interpol, 3) the European Union, 4) Coordonnées, and 5) various international trade secretariats. IDF 492; Stip. 77; Respondents' Post -Trial Brief at 7. The "Non-Agreement Sector," or "NAS," meets twice each year to address "issues of interest to members who have private sector, governmental or intergovernmental clients with which AIIC does not have an agreement." CX-278-Z-2; CX-245-F; CX-242-E; Brief for Respondents-Appellants at 6; IDF 42.

Members of AIIC in any country with 15 or more members may form a "region," the membership of which consists of the AIIC members then having their professional address in that region. Stips. 32-33. AIIC has 22 regions, including the respondent U.S. Region. IDF 5; Stip. 35.

III. JURISDICTION

A. The Commission Has Specific Personal Jurisdiction Over Respondent AIIC

Respondent AIIC contends that the Commission lacks *in personam* jurisdiction over it.[2] As explained below, we conclude otherwise. At the outset it should be noted that counsel for AIIC

[2] Neither the agency's exercise of personal jurisdiction over the U.S. Region, nor the Commission's subject matter jurisdiction under Section 5 with respect to either respondent, has been challenged in respondents' appeal. We adopt the ALJ's conclusions with respect to each of these issues. *See* ID at 134.

stated at oral argument and in a subsequent written submission that it would not appeal any order that the Commission might issue, provided that such order would not constrain respondent's ability to retain four of the challenged restraints (*viz.*, the length of day, team size, professional address, and portable equipment rules). Oral Argument Tr. 7; *see also id.* at 8-10; Supplemental Brief for Respondents-Appellants at 6 (Oct. 26, 1996). Further, during argument and in its supplemental brief, respondent's counsel acknowledged its earlier proffer of a consent order encompassing all but four challenged restraints. *Id.* Such conduct may constitute a waiver of respondent's *in personam* jurisdiction objections in light of the Commission's decision to issue an order that does not enjoin those four rules (albeit for reasons other than respondent's offer). *Cf. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 703-05 (1982) (party can waive its personal jurisdiction defense and "actions of the defendant may amount to a legal submission to . . . jurisdiction . . . whether voluntary or not").[3] Nevertheless, in an abundance of caution, we address the issue of *in personam* jurisdiction.

1. Legal Standard for Exercise of *In Personam* Jurisdiction Over Foreign Respondent

The Supreme Court in *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945), presented a two-pronged test that established and continues to underlie the due process requisites for *in personam* jurisdiction. First, "minimum contacts" must be shown.[4] Second, the

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[3] *See also English v. 21st Phoenix corp.*, 590 F.2d 723, 728 n.5 (8th Cir.) (*in personam* jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver), *cert. denied*, 444 U.S. 832 (1979); *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974) (stipulation and agreement to settle that were filed in federal court constituted a consent to the personal jurisdiction of the court); *Joseph V. Edeskuty & Assocs. v. Jacksonville Kraft Paper Co.*, 702 F. Supp. 741, 745 (D. Minn. 1988) (statements of counsel at hearing deemed tantamount to consent to personal jurisdiction).

[4] Because the claims against respondents are based on federal antitrust laws, as opposed to state law, the inquiry is whether respondent AIIC has sufficient contacts with the United States, rather than with any one state. *See Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Dooley v. United Technologies Corp.*, 786 F. Supp. 65, 71 (D.D.C. 1992); *Consolidated Gold Field, PLC v. Anglo Am. Corp. of So. Africa*, 698 F. Supp. 487, 493 (S.D.N.Y. 1988), *aff'd in part and rev'd in part sub nom. Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). Respondent's reliance on *Friends of Animals, Inc. v. American Veterinary Medical Ass'n*, 310 F. Supp. 620 (S.D.N.Y. 1970), is inapposite in this analysis. Constitutional due process for *in personam* jurisdiction requires only "minimum contacts" with the forum. The Clayton Act venue provision, challenged in Friends of Animals, focused on a requirement of substantiality, which was a component of the "transacting business" test applicable only to analysis of the venue provision. *See* 310 F. Supp. at 624.

court must find that "fair play and substantial justice" would not be offended by the assertion of jurisdiction. *International Shoe*, 326 U.S. at 316, 320. Both prongs of this test must be satisfied. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The "minimum contacts" prong of the analysis focuses on whether the connection between the defendant, the forum, and the litigation is such that "[the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 288, 297 (1980); *see also Burger King*, 471 U.S. at 472 (Due Process Clause requires that individuals have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign sovereign, quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). That requirement is met if, for example, the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen*, 444 U.S. at 297 (a defendant that "purposefully avails itself of the privilege of conducting activities within the forum[,]" quoting *Hanson v. Denckla*, has "clear notice that it is subject to suit there").

If the defendant's conduct satisfies the "minimum contacts" requirement, the courts then consider whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *See, e.g., Burger King*, 471 U.S. at 476. Under this prong of the International Shoe analysis, the courts evaluate the "reasonableness" of asserting personal jurisdiction under the particular circumstances of the case, and may consider not only the defendant's contacts with the forum, but also "other factors" (*e.g.*, the respective interests of the plaintiff and the forum, judicial efficiency). *Id.* at 477; *see also Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) (outlining factors to be considered in reasonableness determination, where personal jurisdiction over foreign entities was at issue).

2. Specific Jurisdiction

As the case law implementing these basic principles of jurisdiction has developed, two species of *in personam* jurisdiction over foreign respondents have emerged: "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction attaches if there is a

sufficiently close relationship between the cause of action and the nonresident's activities within the forum.[5] General jurisdiction requires a higher degree of involvement with the forum than does specific jurisdiction, and allows a plaintiff to sue a defendant on virtually any cause of action, including those that do not arise from the defendant's contacts with the forum. Thus, normally, there would be no reason to determine whether general jurisdiction exists if the cause of action at issue and the forum are sufficiently related to trigger specific jurisdiction.

In determining whether specific jurisdiction exists in this instance, we must ask: (a) whether the conduct was "purposefully directed" to the forum, *Burger King*, 471 U.S. at 471 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); (b) whether the cause of action "arise[s]" from or relates to that conduct, *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)); and (c) whether the assertion of specific jurisdiction is reasonable as a matter of due process, *Burger King*, 471 U.S. at 471; *see also Asahi*, 480 U.S. at 113. As set forth below, we affirm the ALJ's conclusion that the agency may properly exercise specific jurisdiction over respondent AIIC.

a. Conduct Purposefully Directed Toward the United States

With respect to the first aspect of specific jurisdiction analysis, we find that respondent AIIC intentionally engaged in conduct that caused consequences in the United States market for interpretation services. In so finding, we focus primarily on AIIC's conduct, not on that of its members. The conduct of AIIC's U.S. members is relevant only to the extent that the members were acting as agents of AIIC. Specifically, AIIC engaged in four courses of conduct that were intended to affect both the prices charged by AIIC members for conference interpretation and the terms under which they worked.

First, respondent published rates of remuneration for interpretation services performed in the United States and prepared

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[5] *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.*, 587 F. Supp. 1446, 1449 (D.N.J. 1984). In the specific jurisdiction analyisis, the tribunal must inquire whether the relationship between the transaction at issue and the forum justifies the forum's assertion of jurisdiction over the defendant. *Id.* Specific jurisdiction is asserted when the defendant's forum contacts are sporadic, but the cause of action arises out of those contacts. In determining whether there are sufficient minimum contacts to satisfy due process requirements, we focus upon the relationship among the defendant, the forum and the cause of action. *Burger King*, 471 U.S. at 471, 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Shaffer v. Heimer*, 433 U.S. at 204.

schedules of *per diem* charges with entries unique to this country. *See generally* CX-71, 75, 76, 79, 81 to 84; CX-2446-C; CX-301-Z-42 (Bishopp); CX-305-Z-49 to 51 (Sy); CX-55 to -65; CX-247-Z-2, Z-5; CX-124-E; CX-125-E; CX-130; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton). Similarly, AIIC tailored its work and monetary rules, and waivers for such rules, for application in the United States. *See generally* CX-71 to -73, 75 to 77, 79, 81 to 84 (rates); CX 55 to 65 (rates); CX-124-E (per diem); CX-125-E (per diem); CX-130 (per diem); CX-247-Z-2, Z-5 (per diem); CX-301-Z-152.41 to Z-152.42 (Bishopp) (per diem); CX-268-E (per diem); CX-300-Z-72 to Z-76, Z-128 to Z-129 (Motton) (per diem); CX-245-I, F (indivisible day waiver); CX-405-C (team size); CX-407-F to G (team size); CX-50 (team size); CX-56 (team size); CX-1384-A (solo interpreter waiver applicable to U.S.); CX-268-F (solo waiver); CX-301-Z-152.43 (Bishopp) (solo waiver); CX-300-Z-33 to Z-36, Z-128 to Z-129 (Motton) (solo waiver); CX-432-G to H (solo waiver). AIIC also adopted its workload and other rules with the expectation that those rules would be followed in the United States. *See generally* Stips. 9, 83-87; Silberman, Tr. 3132-33.

Second, respondent AIIC sought, in conjunction with efforts of the U.S. Region, to ensure the uniform application of the AIIC Code and its Annexes in the United States. For example, the U.S. Region discussed and sent to AIIC in Geneva a document called "AIIC Working Conditions for Interpreters in USA (Provisional Paper)." *See* CX-439-A, D to F; CX-1408-A, C to E. In addition, AIIC investigated complaints against U.S. Region members for violations of its rules. *See generally* CX-1693-A to C; CXT-1693-A to C; CX-1300-A; CXT-1320-A to C; CXT-239-I; CX-304-Z-128 to Z-131 (Motton); CX-1066-A to E; CX-1086; CX-1090; CX-1100; CX-1138-A to B; CX-1256-B; CX-236-C. AIIC also solicited complaints from the U.S. Region concerning members who violated AIIC's moonlighting rules, including the names of such members and copies of contracts demonstrating such violations. *See* CX-432-G to H, M. The U.S. Region representative to the AIIC Council also advised U.S. members how to comply with AIIC rules and issued warnings to members regarding noncompliance with association rules. *See* CX-1471; CX-1470-A. U.S. Region members also serve as agents of AIIC when serving on the bodies responsible for creating and enforcing AIIC rules. *See* CX-300-O to Q (Motton); CX-2490-A to

G; CX-1-G to H (1994 AIIC Statutes Article 24(6)); CX-2-G to H (1991 AIIC Statutes Article 24(6)).[6]

Third, AIIC cooperated with The American Association of Language Specialists ("TAALS") with respect to conduct in the United States challenged in the complaint. *See generally* CX-409-A; CX-218-J; CX-266-Z-6 (coordination of AIIC and TAALS activities); CX-405-C (in 1975 AIIC agreed to work with TAALS to examine issue of U.S. antitrust laws); CX-1728-B (appointment of official liaison from TAALS to AIIC, with eight-year term). In particular, AIIC and TAALS worked together to enforce their overlapping rules in the U.S. *See generally* CX-1066-A; CX-1090; CX-1138-A to B; CX-237-H; CX-239-B; CXT-1731-B. Further, TAALS and AIIC shared information on enforcement and on their mutual efforts to effect changes in the terms of the contracts for interpretation services at the 1984 Olympic Games. *See* CX-1248; CX-1266-B; CX-1310; CX-1696; CX-1708; CX-1714-A; CX-1728-B; CX-1733; CX-1735.

Fourth, respondent AIIC held its General Assembly in New York City in 1979 and voted there to adopt several of the provisions challenged in the complaint, including rules prescribing equal remuneration for all members of an interpretation team and limiting the length of the working day. *See* CX-6-A to M; CXT-6-E to M; CX-219-P to R; CXT-221-A-Z-20, pp. 18-19; CX-221-D. In addition, AIIC mailed draft proposals of its Codes of Ethics and Standards of Practice to the United States for review and comment before other General Assembly meetings. *See* CX-1406-B to C; CX-266-Z-5; CX-260-A to B.

b. Claims Against Respondent AIIC Arising From U.S. Activities

With respect to the second aspect of specific jurisdiction analysis, it is settled that "[a]n action will be deemed not to have arisen from

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[6] We find unpersuasive respondent's reliance on cases in which an association failed to exercise substantial influence over the members' activities in the forum. *See* Brief for Respondents-Appellants at 77-78. Two of the cited cases involved general jurisdiction analysis, which calls for a heightened degree of contact with the forum. *See Donatelli v. National Hockey League,* 893 F.2d 459, 468-72 (1st Cir. 1990); *Rhodes v. Tallarico,* 751 F. Supp. 277, 279 (D. Mass. 1990) (citing "minimum contacts" test applied in Donatelli). Further, the court in Rhodes concluded that the defendant organization lacked minimum contacts with the forum because there was no evidence that the organization lacked minimum contacts with the forum because there was no evidence that the organization exercised any influence over its members' decision to perform services in the forum. In contrast, AIIC's professional address rule required its members to remain at a professional address for a minimum of six months. In addition, AIIC's conduct described above in the text had a substantial influence over its members' conduct in providing interpretation services in this country.

the defendant's contacts with the forum state only when they are unrelated to the operative facts of the controversy." *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). In this case, the cause of action arose from the very same conduct conferring jurisdiction. The Commission's complaint alleges that respondent AIIC and its United States affiliate members conspired to fix the fees that they could charge for interpretation services performed in the United States, and that they imposed a variety of restrictions that illegally restrained competition among U.S. interpreters. Specifically, AIIC and its U.S. Region allegedly enforced fee schedules, work rules and other restrictions on members operating in the United States.

The alleged price-fixing herein includes minimum rates that members must charge within the United States: for performance of interpretation services; for cancellations; for recording of interpretations; as compensation for travel time, rest, and conference recesses; for performing whispered interpretation or working alone; and as reimbursement for travel, lodging and other expenses. The complaint also challenges the respondents' work rules in the U.S. requiring that all interpreters on the same job obtain the same pay regardless of skill level or experience; that interpretation fees be paid on a full-day basis; and that member interpreters must pay their own subsistence and travel when they do volunteer work. The following additional restrictions imposed on U.S. interpreters by AIIC and its U.S. Region were also challenged in the complaint: specified minimums as to the number of interpreters per job; limitations on the number of hours members may work per day; limits on member use of portable equipment; a requirement that interpreters declare a single professional address that they can change only once every six months with three months' notice; a prohibition against accepting non-interpreter duties at a conference where members are performing interpretation services; a prohibition on comparative advertising; restrictions against certain exclusive employment arrangements; a prohibition on offering package deals of interpretation and other services; a ban on commissions; a requirement that members selecting an interpretation team give preference to freelance interpreters over interpreters with permanent positions; limits on accepting multiple assignments within a period of time; and prohibitions on the use of trade names by members who coordinate interpreters.

We therefore find that the claims in the Commission's complaint arise from, or are related to, the foregoing AIIC contacts with the United States.

c. Reasonableness

The third aspect of specific jurisdiction analysis is to determine whether, under the particular circumstances of the case, the exercise of jurisdiction is reasonable as a matter of constitutional due process. We conclude that the Commission's exercise of personal jurisdiction here would satisfy that standard.

Asahi Metal Industry Co. is the Supreme Court's most recent pronouncement on *in personam* jurisdiction over foreign defendants. The Court explained that determining "reasonableness" of the exercise of jurisdiction in a given case depends on an evaluation of several factors, which the Court had previously articulated in World-Wide Volkswagen (a case involving personal jurisdiction over domestic defendants):

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

As to "the burden on the defendant," we recognize that AIIC is a foreign association, organized under French law and having its only office in Geneva, Switzerland. Nonetheless, the Commission does not believe that requiring AIIC to appear through counsel in the present action imposes on AIIC an unusually severe or unreasonable burden.[7] In any event, "when minimum contacts have been established," as they have been here, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even . . . serious burdens placed on the alien defendant." *Asahi*, 480 U.S. at 114.

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[7] In Asahi, the Court found that litigation in California would severely burden the Japanese defendant (and that there was no showing that litigation in California, rather than Japan or Taiwan, would be more convenient for the Taiwanese plaintiff). In the present case, by contrast, litigation in the United States offers some convenience due to AIIC's relationship with the U.S. Region. Indeed, the interests of AIIC and its U.S. Region are sufficiently parallel that they are represented by the same counsel. The feasibility of common representation substantially mitigates the severity of the burdens imposed on AIIC by litigation in a foreign forum.

As to the "interests of the forum" and the "plaintiff's interest in obtaining relief," we find that the interests of the forum and the plaintiff in the assertion of jurisdiction over AIIC are substantial. The objective of the present action is to ensure that respondents' anticompetitive restraints in this country will cease. Although much of respondent AIIC's conduct occurred outside this country, the intended effect of its actions in establishing work rules, including rules having unique application to this country, was to restrain competition in the United States. *See supra* at 6-8. This agency was established to enforce federal antitrust laws to protect competition in this country, and we therefore assert a strong interest in challenging respondents' alleged anticompetitive conduct.[8]

Finally, the "interest in obtaining the most efficient resolution of controversies" also strongly favors the resolution in the United States of questions respecting AIIC's conduct. The Commission is exercising jurisdiction over AIIC's United States Region, and, in any event, the challenged conduct by AIIC is closely related to that region.[9]

On balance, in this case, we conclude that the Commission's interest in protecting competition within the United States, and considerations of efficiency, are sufficient to outweigh the burdens

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[8] A Plaintiff's interest in relief may sometimes be satisfied by the availability of redress in a foreign tribunal. Here, there is no reason to believe that a foreign sovereign will act to protect the market for interpretation services in the United States, and the Commission is unaware of any pending action by a foreign sovereign to remedy the competitive injury alleged in this case. Further, even were it shown that a foreign sovereign had some enforcement interest in this matter, that consideration, while relevant, *see infra* note 9 (discussing Asahi), is only one of several factors to be weighed in determining whether personal jurisdiction would be "reasonable." *See, e.g., Caruth v. International Psychoanalytical Ass'n,* 59 F.3d 126, 129 (9th Cir. 1995) (declining to find that personal jurisdiction over membership association organized under Swiss law and based in Argentina was unreasonable, even though plaintiff failed to demonstrate that effective remedy was unavailable in alternative forum); *Roth v. Garcia Marquez,* 942 F.2d 617, 624-25 (9th Cir. 1991) (declining to find that personal jurisdiction over Spanish defendants was unreasonable, even though interests of foreign sovereignty weighed slightly in favor of defendants, and plaintiff did not show that he could not litigate in alternative forum); *Sinatra v. National Enquirer,* 854 F.2d 1191, 1199-1201 (9th Cir. 1988) (finding personal jurisdiction over Swiss clinic to be reasonable, even though plaintiff failed to show that alternative forum was unavailable); *Taubler v. Giraud,* 655 F.2d 991, 994-96 (9th Cir. 1981) (finding personal jurisdiction over French wine maker to be reasonable, citing as factors but not specifically discussing foreign authorities' interests or availability of alternative forum, instead noting that "[s]tate and federal antitrust violations should not go without a domestic remedy").

[9] Nor would assertion of personal jurisdiction here impinge adversely upon the values reflected in the last Asahi "reasonableness" element relating to "the shared interest of the several States in furthering fundamental substantive social policies." *See Asahi,* 480 U.S. at 115 (acknowledging the need to weigh procedural and substantive policies of other nations whose interests are affected by the U.S. court's assertion of jurisdiction). To the extent that concerns about efficiency and substantive social policies are relevant here, our analysis considers other national interests, as discussed *supra* note 8.

that may be placed on AIIC to defend itself in this forum. Thus, we conclude that the assertion of personal jurisdiction over AIIC here is reasonable under the Due Process Clause.

Accordingly, because AIIC's unlawful conduct was purposefully directed towards the United States, because the claims alleged in this case arose from such activities, and because the assertion of jurisdiction here would be reasonable under the Due Process Clause, we hold that the Commission may lawfully exercise *in personam* jurisdiction over AIIC in this case.

B. The Not-for-Profit Exemption Is Inapplicable

We disagree with respondents' claim that they are entitled to the not-for-profit exemption. Respondents claim that "[n]either AIIC nor the U.S. Region is 'organized to carry on business for its own profit or that of its members' under Section 4" of the FTC Act, 15 U.S.C. 44 (1994), as interpreted by the Commission in its opinion in College Football Ass'n, D. 9242 (July 8, 1994), 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"). Respondents' Post Trial Brief at 126-27. In *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form alone places it beyond the Commission's jurisdiction. The Eighth Circuit explained that the FTC Act's Section 4 nonprofit exemption extends only to corporations that are "in law and in fact charitable." *Id.* at 1019. We applied this standard in *American Medical Ass'n*, 94 FTC 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"), and have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations, most recently in our opinion in California Dental Ass'n, D. 9259 (Mar. 25, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,007 ("CDA"). *See also Michigan State Med. Soc'y*, 101 FTC 191, 283-84 (1983).

Nonetheless, AIIC argues that it is "a *bona-fide* tax-exempt, non-profit association under French law" and that this case is even stronger than in CFA because, "[u]nlike in CFA, AIIC does not obtain revenues or profits on behalf of its members and distribute those profits to them." Respondents' Post-Trial Brief at 126-27. Our decision in CFA does not afford immunity to respondents in this case. CFA addressed whether a nonprofit organization, all of whose members are not-for-profit entities, is subject to the Commission's

jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. Our jurisdictional analysis in CFA did not call the holding in AMA into question. *See* CFA, slip op. at 20-26, 5 Trade Reg. Rep. (CCH) at 23,361-64; CDA, slip op. at 6, 5 Trade Reg. Rep. (CCH) at 23,782.

AIIC falls within our jurisdiction for many of the same reasons the AMA and CDA did. *See generally* CDA, slip op. at 6-7, 5 Trade Reg. Rep. (CCH) at 23,782-83; *AMA*, 94 FTC at 986-88. AIIC and the U.S. Region exist and engage in activities to improve members' incomes and working conditions. AIIC and the U.S. Region adopted minimum daily rates for use in the U.S. and adopted other rules governing the working conditions for interpreters. AIIC publishes a directory of AIIC members, which AIIC sends to AIIC members and purchasers of interpretation services to facilitate the hiring of AIIC members. IDF 467, 468; Stips. 61-62. AIIC also negotiates member discounts for such items as airfare, hotels, and publications. IDF 483. AIIC also provides its members with insurance plans for health, loss of earnings, and retirement, and manages two retirement plans for members. IDF 484, 485. AIIC has contacted various governmental entities, including a U.S. Senator, to improve the financial situation of its members. IDF 487, 488. The ALJ found numerous other examples of how AIIC serves the pecuniary benefits of its members, and we agree with his findings in this regard. *See generally* IDF 453-97. Finally, because AIIC and U.S. Region members are themselves profit seekers, this case is more akin to CDA and AMA and unlike CFA, where the members were not-for-profit educational institutions.

C. AIIC Does Not Qualify for the Labor Exemption

Respondents argue that "the statutory labor exemption immunizes all challenged Basic Texts provisions from antitrust liability [and] the nonstatutory labor exemption so immunizes AIIC's agreements." Brief for Respondents-Appellants at 82 n.84. The statutory labor exemption is designed to protect union conduct, and the Supreme Court has said that "a party seeking refuge in the statutory exemption must be a *bona fide* labor organization, and not an independent contractor or entrepreneur." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981) (citing *Meat Drivers v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)). The nonstatutory labor exemption

protects from antitrust liability certain labor agreements that are part of, or result from, the collective bargaining process. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2121 (1996).

AIIC is an association of professional interpreters who have, through the association, promulgated a series of rules and regulations governing competition among themselves concerning the provision of conference interpretation services. As the ALJ found, the association members have expressly declined to organize AIIC as a labor organization (IDF 504-05), and we find that the weight of the evidence shows that the freelance AIIC members, for whom the pay and working conditions have the most relevance, are self-employed entrepreneurs and not employees. For example, AIIC members individually arrange their jobs and have complete discretion as to which jobs they will take and which they will decline. IDF 503. Moreover, the respondents, who carry the burden of proof with respect to establishing the applicability of this exemption, have offered no evidence to support the position that freelance AIIC members are employees. In fact, respondents have stipulated that 68 percent of "AIIC members in the United States are self-employed (*i.e.*, freelance) interpreters." Stips. 57, 60. Moreover, Mr. Luccarelli, one of respondents' key witnesses, testified that outside of the permanent employees of various international organizations, interpreters are generally not considered employees. Luccarelli, Tr. 1694; *see also* IDF 504.

We therefore find that AIIC is an organization of competing self-employed professionals and not a *bona fide* labor organization. Accordingly, we reject AIIC's argument that its Basic Texts are shielded by the statutory labor exemption. *See H.A. Artists & Assocs.*, 451 U.S. at 717 n.20. *See generally* 1 Phillip E. Areeda & Donald F. Turner, Antitrust Law ¶ 229c (1978); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 229'c (Supp. 1996).

Respondents also argue that they have negotiated several collective bargaining agreements on behalf of AIIC members with institutions that employ freelance AIIC members alongside their regular employees. Stips. 75, 78, 81. AIIC asserts that its agreements are immunized from antitrust challenge by the nonstatutory labor exemption. Because we are not challenging the agreements that AIIC relies upon for the nonstatutory exemption, we do not have to reach the question whether those agreements are in fact the product of a

collective bargaining process or are something else, such as employment contracts or contracts for the provision of services.[10]

IV. LEGALITY OF RESTRAINTS OF TRADE

Restraints of trade are unlawful under Section 5 of the Federal Trade Commission Act, as well as Section 1 of the Sherman Act, 15 U.S.C. 1 (1994), when they are *per se* illegal or when they are unreasonable under the rule of reason. The law does not condemn some practices that restrain trade in a literal sense -- as, for instance, all contracts do to varying degrees -- when those practices have no significant anticompetitive effect or even promote competition. In each case "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition." CDA, slip op. at 14, 5 Trade Reg. Rep. (CCH) at 23,786; *see also National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("NCAA"); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978). Recent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ("SCTLA").[11]

Although respondents do not specifically appeal from the ALJ's finding that their rules resulted from a conspiracy, before examining respondents' restraints and the analysis to be accorded each, we address this element of a Section 5 case. As we noted recently in CDA, it is well-established that "professional associations are 'routinely treated as continuing conspiracies of their members.'" CDA, slip op. at 9, 5 Trade Reg. Rep. (CCH) at 23,783 (quoting 7 Areeda, Antitrust Law, *supra* note 11, ¶ 1477, at 343, and citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). *See also National Soc'y of Prof'l Engineers*, 435 U.S. at 692

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[10] While the ALJ incorrectly said that the nonstatutory labor exemption "is available only for union-employer agreements" (ID at 131), *cf., e.g., Brown v. Pro Football, Inc.*, 116 S. Ct. at 2123-24, we think it clear that the only agreements that the nonstatutory labor exemption reaches are those that grew out of the collective bargaining process, *see id.*

[11] We note that some earlier Supreme Court cases had suggexted the merging of the *per se* and rule of reason analyses. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("BMI"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 (1986) ("IFD"). Areeda also has suggested that there may have been some convergence of the *per se* category (*see, e.g.*, the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (*see, e.g.*, the "quick look" approach of IFD) so that at times the two antitrust approaches do not differ significantly. *See* 7 Phillip E. Areeda, Antitrust Law ¶ 1508c, at 408 (1986).

(Court noted, in declaring a professional association's ethics rule a violation of Sherman Act Section 1, that "[i]n this case we are presented with an agreement among competitors"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455 (1986) ("IFD") (members of IFD had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies); *NCAA*, 468 U.S. at 99.

Respondents herein, as in CDA, clearly promulgated their Basic Texts, which "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." CDA, slip op. at 10, 5 Trade Reg. Rep. (CCH) at 23,784 (citing *AMA*, 94 FTC at 998 n.33). Moreover, as in CDA, respondents herein require both members and candidates for membership to expressly pledge to abide by AIIC's Basic Texts. IDF 43-45; CX-1-Z-30; CX-2-Z-30; CX-300-Z-8 to Z-10 (Motton). AIIC's Council also interprets and enforces AIIC's Basic Texts. *See* IDF 39-41.

We therefore affirm the ALJ's finding that the restraints at issue in this case are the result of an agreement among competitors -- namely, the members of AIIC, acting through their Assembly and other representative entities. *See* ID at 101-04. We turn to the specific restraints imposed by respondents and analyze each under the appropriate antitrust standard to determine whether it is an unreasonable restraint of trade.[12]

A. Restraints on Price Competition -- Per Se Unlawful

Per se categories of unlawful conduct consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial procompetitive justifications. The law accords *per se* treatment to certain kinds of behavior that longstanding experience has shown to be beyond justification, and courts generally will not consider arguments that such conduct is harmless or procompetitive. Thus, the courts have concluded that such agreements are illegal without further examination of the particular circumstances under which they arise or the effects thereof -- "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is

[12] Because AIIC made numerous changes to its rules between 1991 and 1994, we discuss both versions where necessary to provide a complete understanding of the practices challenged in this proceeding. In general, we discuss the 1991 version of the rules in the text and the 1994 version in footnotes, noting whether we have concerns with the revised rules.

unreasonable." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982) (footnote omitted). *See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). As we recently made clear in CDA, "[e]xamples of such practices are horizontal price fixing," citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and SCTLA; "territorial divisions among competitors," citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972); "and certain group boycotts," citing Northwest Wholesale Stationers. CDA, slip op. at 15, 5 Trade Reg. Rep. (CCH) at 23,786 (also citing *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

It is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws. *See, e.g., Maricopa*, 457 U.S. at 344-48; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).[13] Thus, any alleged "reasonableness" of an agreement to fix prices will not justify the resulting interference with competition. *See Trenton Potteries Co.*, 273 U.S. at 397-98; *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified*, 175 U.S. 211 (1899). Lack of market power to effect the agreement is not a defense to the *per se* illegality of the agreement. *SCTLA*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224-25 & n.59.

1. Facts

AIIC and the U.S. Region adopted a wide variety of rules that affected and eliminated price competition among AIIC members in the United States. Since AIIC was founded in 1953, it has established binding rules governing its conference interpreter members, including rules concerning the remuneration charged. AIIC rules are found in its Basic Texts, which include Governing Statutes (CX-2-A (1991); CX-1-A to M(1994)), a Code of Professional Ethics (CX-2-Z-37 to 39(1991); CX-1-Z-37 to 39(1994)), Standards of Professional Practice (CX-2-Z-40 to 49 (1991); CX-1-Z-40 to 46 (1994)), a Staff Interpreters' Charter (CX-2-Z-54) (1991)), and various Annexes to the Basic Texts, including the Guidelines for Recruiting Interpreters.

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[13] But *see* BMI (price agreement that was essential to the market availability of the product reivewed under the rule of reason); U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (Aug. 28, 1996) (Statements 8 & 9), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153 (price agreements that are ancillary to the formation of an integrated joint venture analyzed under the rule of reason).

CX-2-Z-50 to 53 (1991); CX-1-Z-47 to 52 (1994). For the reasons discussed *infra* at 25-29, we find that the following rules are individually and collectively part of an overall price-fixing scheme and we declare each of them *per se* unlawful under Section 5.

a. Minimum Daily Rates

From 1953 until 1973, AIIC published universal minimum daily rates applicable world-wide, with certain exceptions for particular countries where the mandatory minimum rate was higher. In 1973, when the U.S. dollar and other currencies were no longer traded at fixed exchange rates, AIIC began a program to establish individual rates for each country on the basis of recommendations from AIIC members in those countries. IDF 99; Weber, Tr. 1142-44, 1147. However, in 1983 AIIC became aware that certain countries were applying their antitrust laws to rules adopted by professional associations and began to send out lists of minimum daily rates under the title "Market Survey," which was widely understood to reflect a "gentleman's agreement" on the minimum rate to be charged.[14] IDF 516. In 1982 the U.S. Region became particularly concerned about the application of U.S. antitrust laws and asked AIIC to stop publishing a minimum daily rate for the United States. *See* CX-1226-A ("gentleman's agreement not to ask for less than" $250 per day; antitrust lawyers advised U.S. Region not to have fixed rate appear on the rate sheet). From approximately 1982 until 1988, there was a tacit "gentleman's agreement" to abide by minimum daily rates for the U.S. Region. IDF 77; ID at 106. However, in 1988 AIIC again began publishing, at the U.S. Region's request, minimum daily rates for the U.S. *See* IDF 78.

Article 8 of the 1991 AIIC Basic Texts, Standards of Professional Practice, stated:

> The rate of daily remuneration shall be the standard rate applicable in the region concerned and, more precisely in the appropriate cases, in the country concerned. All the standard rates must be approved by the Council, which shall inform all members. In those countries where it is impossible to apply a standard rate, the Council shall adopt whichever alternative provisions it deems necessary and shall also inform all members.

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[14] In 1977, in order to standardize rates for the U.S., AIIC's U.S. Region decided to adopt the minimum daily rate established and voted on by TAALS and transmit that rate to AIIC's headquarters for publication as the official rate applicable in the United States. *See* ID at 106; IDF 308, 100. The Commission issued a consent order against TAALS on August 31, 1994. Docket No. C-3524, 5 Trade Reg. Rep. (CCH) ¶ 23,537.

The base rate, which shall equal two-thirds of the standard rate, shall be applied in the cases provided for in Articles 12 and 14 below.[15]

AIIC became aware of the FTC investigation of interpreter associations in June 1991, when two U.S. Region members responded to a Commission document request sent to TAALS. IDF 538; CX-608-Z-77; CX-935-B. At its General Assembly meeting in 1991, AIIC's membership voted on whether to remove the monetary conditions from its Basic Texts, but the vote failed to achieve the required two-thirds majority. IDF 520-21; CX-270-K. AIIC then decided to hold an Extraordinary Assembly in 1992 to reconsider eliminating the monetary rules. One day before its 1992 Extraordinary Assembly, the Non-Agreement Sector held an off-the-record meeting to examine how, in light of the antitrust laws, it was possible to "operate in another way."[16] IDF 510; CX-271-C, F; CX-273-U. The next day the Assembly voted on the following resolution:

DEEPLY ATTACHED to the principles of universality and solidarity upon which AIIC, since its inception, has based its action in organizing the profession, for the benefit of both the interpreters and the users of interpretation, FULLY AWARE of the gradual implementation of anti-trust legislation in the various parts of the world, DECIDES on the following principles:

1. To remove all mention of monetary conditions (*e.g.* rates, subsistence and travel allowances, payment of non-working days) from our basic texts. . . .

CX-273-G; IDF 509. The Council subsequently decided that "[a]ll provisions of the Basic Texts that refer to financial conditions are immediately withdrawn. . . .The Basic Texts shall be amended consequently at the next ordinary Assembly." CX-279-I (March 1994 Bulletin); *see also* CX-273-O; CXT-273-O, p.1. Subsequently, at the 1994 Assembly, necessary changes to remove the monetary conditions were incorporated into the Basic Texts. IDF 97; CX-970-A.

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[15] CX-2-Z-43. Article 4 of the 1994 version of the Professional Standards states: "Except for those cases where the Association has signed an Agreement, members are free to set their level of remuneration." We have no objection to this formulation of the rule.

[16] The June 1992 AIIC Bulletin set forth the agenda for the Extraordinary Assembly. It contained this message from AIIC's president:

> We urge as many members as possible to attend this meeting on cartels which has been proposed by the NAS and will be attended in the morning by a lawyer. Colleagues from Canada and Germany will explain how, in practice, it is possible to "operate in another way." Since there will be neither minutes nor recording of the proceedings, your presence is essential if you wish to fully informed. . . . On the basis of this information, you will be able to take the relevant decisions which will enable the Assembly to achieve its aims.

CX-271-F.

b. Indivisible Daily Rates

Article 6(a) of the 1991 AIIC Standards provided that "[r]emuneration shall be on an indivisible daily basis." CX-2-Z-42.[17] AIIC's rules meant that "you charge per day no matter how long you work." CX-303-Z-109 (Moggio-Ortiz); *see also* CX-886-D; Saxon-Forti, Tr. 2696; CX-305-Z-89, Z-97, Z-110 (Sy).

Even where interpreters received a waiver from AIIC allowing them to work alone for meetings lasting 40 minutes or less in the U.S., they were nonetheless required to charge the full daily rate. CX-301-Z-152.1 (Bishopp); CX-432-G. The June 1993 Bulletin presented sales arguments interpreters could use in light of the deregulation of AIIC's Basic Texts, noting that they should argue that with respect to "conferences of short duration . . . one cannot take other assignments in the course of a free half-day." CXT-276-E-G, pp.1-2.

U.S. Region interpreters charge indivisible daily fees, regardless of the number of hours worked. IDF 126; Swetye, Tr. 2826-28, 2830-31; CX-300-Z-143 (Motton); Weber, Tr. 1264. Intermediaries understood the AIIC rate to mean an indivisible daily rate, which they paid. IDF 127, 126; Neubacher, Tr. 763, 765-66; Citrano, Tr. 552-53.

c. Fees for Non-Working Days

Article 12 of the 1991 Standards of Professional Practice stated:

> a) When an interpreter is recruited to work in a place other than that of her or his professional address she or he shall receive a remuneration for each day required for travel and rest as well as for Sundays, public holidays and non-working days in the course of a conference or between conferences. This remuneration shall be at least equal to the base rate.
>
> b) When an interpreter is recruited to work in the place of her or his professional address she or he shall receive a remuneration for each non-working day in the course of the conference (up to a maximum of two). This remuneration shall be at least equal to the base rate.

CX-2-Z-46. As noted above, the "base rate" was defined in Article 8 of the 1991 Basic Texts as being at least two-thirds of the standard minimum daily rate. CX-2-Z-43 (Article 8). Article 14 specified, *inter alia*, that for journeys of more than nine hours, the interpreter was "entitled to" rest days, which "equated to non-working days and

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[17] There is no provision specifying that remuneration shall be for an indivisible day in the 1994 Basic Texts.

remunerated at the same rate." In lieu of rest days, the interpreter could accept first class airfare. CX-2-Z-47.[18]

d. Same Team, Same Rate

Article 6(c) of the 1991 AIIC Standards of Professional Practice provided that "[a]ny member of the Association asked to work in a team of interpreters shall only accept the assignment if all the freelance members of that team are contracted to receive the same rate of remuneration." CX-2-Z-42.[19] The rule further stated that "[a]ny interpreters recruited separately for a language which is not one of the normal working languages of the organization concerned may be regarded as not being members of the teams." *Id.* Thus, the rule did not apply when interpreters were recruited for an "exotic" language, such as Russian, Japanese, or German, or another language for which "there is difficulty finding interpreters." IDF 151; CX-301-Z-33, Z-35 to Z-36 (Bishopp); CX-300-Z-82 (Motton).

e. Travel Arrangements

Article 15(a) of the 1991 Standards provided:

> Every contract signed with a member of the Association for a conference, or a number of immediately consecutive conferences, away from the place of her or his professional address must include payment for travel by the shortest possible return (or circular) route between the place of her or his professional address and the conference venue (or venues).

CX- 2-Z-48. The rule further specified that payment for travel by air shall be for first class, business class, or club class and that tickets are not to be restricted to a particular carrier nor can an interpreter be forced to travel by charter flight. *Id.* Article 15(b) further required

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[18] Article 8 of the 1994 Standards provides: "The remuneration for non-working days occurring during a conference as well as travel days, days permitted for adaptation following a long journey and briefing days that may be compared to normal working days shall be negotiated by the parties." Article 10 of the 1994 Standards further provides: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey. This means that journeys lasting a long time or involving a major shift in time zone call for the scheduling of rest days (generally one rest day for journeys of between nine and sixteen hours, and two rest days for journeys of 16-21 hours and three for journey[s] in excess of 21 hours)." CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to set remuneration for non-working days and to specify the forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

[19] There is no provision specifying that remuneration shall be the same for all members of a team in the 1994 Basic Texts.

that for successive conferences away from the interpreter's professional address, unless there is "full and separate payment of the return travel from each [conference], the interpreter shall receive a fee and a subsistence allowance for every day" between conferences. *Id.*

AIIC's rules governing travel arrangements were binding in the U.S. IDF 239. In fact, the 1991 paper, "Working conditions for interpreters in USA," the purpose of which was to ensure the uniform application in the U.S. of the AIIC rules, states that "[i]n addition to professional fees, each interpreter shall be entitled to: . . . return economy air fare for trips under 8 hrs. Restricted tickets are not acceptable. For trips longer than 8 hrs. interpreters are entitled to business class or first class tickets. When train service is more convenient, first class tickets." CX-439-E, ¶ 6; IDF 239.[20]

f. Per Diem

Article 13 of the 1991 Standards of Practice provided:

a) For the whole of the period spent away from the place of her or his professional address the interpreter shall receive a subsistence allowance, calculated per night of absence.

b) The Association shall regularly publish a list of subsistence allowances for the various countries. They shall reflect the prices charged by first-class hotels.

c) The interpreter may agree to the conference organizers paying up to half the subsistence allowance in kind by providing a hotel room, including breakfast, or up to eighty percent by providing full-board.

d) One half of the subsistence allowance shall be due when the interpreter's absence from the place of her or his professional address is less than twelve hours between 8:00 and 20:00 hours (which may vary slightly as a function of local custom) and when it is not necessary for the interpreter to spend the night away from the place of her or his professional address.[21]

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[20] In the 1994 Standards, Article 10 states: "Travel conditions should be such that they do not impair either the interpreter's health or the quality of her/his work following a journey." Article 9 further provides: "Except where the parties agree otherwise, members of the Association shall be reimbursed their travel expenses." CX-1-Z-45; IDF 238. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify forms of travel, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

[21] Article 11(a) of the 1994 Professional Standards revised this provision to state:

> Unless the parties agree otherwise, the interpreter required to travel to the conference shall receive a subsistence allowance, calculated per night of absence. As a general rule, this allowance shall be paid on the first day of the conference and in the currency of the country where it is being held.

CX-1-Z-45. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify the payment of *per diems* and formulas for calculating such *per diems,* we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to payments and travel arrangements, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

CX-2-Z-46. The record establishes that: AIIC rules required members to charge a per diem when they worked away from their professional address (IDF 110; CX-300-Z-71 to Z-72 (Motton); CX-301-Z-67 (Bishopp));[22] AIIC's Council approved the rates (IDF 113; CX-301-Z-152.41 to Z-152.42 (Bishopp); CX-268-E; CX-300-Z-72/3 to Z-74/22 (Motton)); and AIIC published a per diem rate for the United States (CX-247-Z-2, Z-5, CX-124-E, CX-125-E). In addition, the U.S. Region adopted a formula whereby the organizer pays the interpreter's hotel room, as well as a fixed percentage of the hotel rate for meals and incidentals. IDF 116; CX-301-Z-65, Z-150 to Z-152.1 (Bishopp); CX-432-F (50% of hotel rate in 1988); CX-439-F (40% of hotel rate in 1991).

g. Cancellation Fees

Article 2(c) of the 1991 Standards of Professional Practice provided:

> Any contract for the recruitment of a member of the Association must specify that in the event of the organizer cancelling [sic] all or part thereof, whatever the reason for and the date of cancellation, the interpreter shall be entitled to the payment of all fees contracted therein (working and non-working days, briefing days as well as days allowed for rest and travel) in addition to the reimbursement of any expenditure already incurred.

CX-2-Z-41; *see* IDF 241. Article 2(d) of the 1991 Standards further stated that the interpreter cannot be forced to accept an alternative job to mitigate the organizers' liability. *Id.*[23]

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[22] According to one intermediary, Berlitz, "there has always been a standard rate that all interpreters charge for per diems." Clark, Tr. 614; *see also* Neubacher, Tr. 771.

[23] Article 3.2 of the 1994 Professional Standards states:

> At the time the contract is being negotiated, the interpreter may ask for the inclusion of a clause whereby, in the event of all or part of the contract being canceled by the conference organizer, the remuneration envisaged would remain payable to the interpreter and she or he would, if applicable, be refunded any out-of-pocket expenses. A specimen cancellation clause that may be used for this purpose shall be included in the general conditions appearing on the back of the standard contract for individual interpreters.

CX-1-Z-41. Although the rule as revised in 1994 is not *per se* illegal, in light of the previous agreements to specify a standard cancellation clause that provides for the payment in full of all remuneration contemplated to be paid under the contract, we are requiring that for a period of five years AIIC eliminate from its Basic Texts all references to such payments in the event of cancellation, even if expressed in non-mandatory language. *See* discussion in Section VI, *infra* at 48-49.

h. Recording

Article 2(b) of both the 1991 and 1994 Standards of Professional Practice provides:

> Any contract for the employment of a member of the Association must stipulate that the interpretation is intended solely for immediate audition in the conference room. No one, including conference participants, shall make any tape recording without the prior consent of the interpreters involved, who may request appropriate remuneration for it, depending on the purpose for which it is made and in accordance with the provisions of international copyright agreements.

CX-2-Z-41 and CX-1-Z-40. The ALJ found that "AIIC's rule on recordings is binding in the United States." IDF 244; Weber, Tr. 1251. Moreover, members at a NAS meeting held in Dublin in January 1989 voted that recordings not for resale should be charged at 25% of the daily rate, and recordings for resale at 100% the daily rate. The results of the vote were published in AIIC's Bulletin. CX-253-D (Apr. 5, 1989 AIIC Bulletin); CXT-251-W at 2-3; IDF 245.[24]

i. Pro Bono Work

Article 7 of the 1991 Basic Texts, Standards of Professional Practice, titled "Non-Remunerated Work," stated:

> Members of the Association may provide their services free of charge, especially for conferences of a charitable or humanitarian nature, provided they pay their own travel expenses and subsistence (subject to the granting of a waiver by the Council beforehand). All the other conditions laid down in the Code of Professional Ethics and in these Standards of Professional Practice must be observed.

CX-2-Z-42. *See also* CX-9-F; CXT-6-E to M, p. 4 (1979 Code); Weber, Tr. 1232.[25]

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[24] The only testimonial evidence regarding the actions taken at the Dublin meeting was provided by Claudia Bishopp in her investigational hearing testimony. CX-301-Z-152.7 - 152.11. Ms. Bishopp stated with respect to the rates for recordings: "I don't think this was ever agreed. It has certainly never been put into practice. There is no agreement among members of what would be acceptable to each one." *Id.* at 152.8. Thus, there is no additional evidence as to whether this agreement was ever adhered to, or whether it is still in place or was disavowed as a result of the 1992 Assembly vote to eliminate all monetary conditions from AIIC's rules.

[25] Article 5 of the 1994 Professional Standards states that "[w]henever members of the Association provide thier service free-of-charge for conferences of a charitable or humanitarian nature, they shall respect the conditions laid down in the Code of Professional Ethics and in these Professional Standards." CX-1-Z-41 (1994). We have no objection to this rule as currently written.

j. Commissions

Paragraph (c)4 of the AIIC Guidelines for Recruiting Interpreters (appended to the 1991 and 1994 Basic Texts),[26] under "Duties Towards the Profession," provides that "Members of the Association shall not accept or give commissions or any other rewards in connection with team recruitment or the provision of equipment." Article 6(d) of the 1991 Standards of Professional Practice further stated: "Remuneration shall be net of any commission." CX-2-Z-42 (1991).[27]

AIIC members discussed the issue of commissions at a meeting in the early 1980s. An AIIC Bulletin subsequently reported: "There is no reason why an intermediary, AIIC member or otherwise, should not request a fee from the organizers for expenses incurred in recruiting a team, but this must be charged to the organizer and clearly shown as distinct from the interpreters fees and never deducted from the interpreters fees." CX-227-J (March 1981 Bulletin); IDF 253.

2. Legal Analysis

Based on the extensive history and publication of minimum daily rates, the record evidence of the price-fixing agreement, and the expert testimony, we conclude that there was an unlawful agreement among AIIC members as to the minimum price to be charged for conference interpretation in the U.S. We further find that respondents engaged in restraints that prevented price competition on virtually all aspects of conference interpreting, including minimum daily rates; an "indivisible day" that prevented lower remuneration for shorter meetings; specified payment for travel, rest, briefing, and nonworking days; a mandate that all interpreters at a conference be paid the same; standardized payments for full fare travel expenses; uniform per diem

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[26] There is some contradictory information in the record as to whether the Recruiting Guidelines continued as an Annex to the 1994 Basic Texts. The Guidelines are appended to CX-1-Z, which is the full set of 1994 Basic Texts. However, according to a letter dated October 21, 1994 from respondents' counsel to complaint counsel transmitting the then-current Basic Texts, the respondents had not yet completed revised Guidelines for Recruiting Interpreters, and the draft that was included eliminated all mention of commissions. The testimony is also contradictory: Mr. Luccarelli testified that the Guidelines were no longer in existence (Luccarelli, Tr. 1676-77) and Mr. Weber testified that as far as he knew, AIIC never announced to the membership that the Guidelines were repealed. Weber, Tr. 1156.

[27] The 1994 Professional Standards contain no similar provision mentioning that remuneration shall be net of commissions or any other references to commissions.

allowances; cancellation and recording fees; and restrictions on *pro bono* work and the payment of commissions. These restraints constitute a comprehensive price-fixing scheme and, individually and collectively, are *per se* unlawful.

The reason for condemning price fixing categorically was articulated by Professor Areeda in language quoted by the Supreme Court:

> In sum, price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public.

7 Areeda, Antitrust Law, *supra* note 11, ¶ 1509, at 412, quoted in *SCTLA*, 493 U.S. at 434 n.16.

Agreements between AIIC and its U.S. members to promulgate and follow AIIC's rates constitute illegal agreements on price and are classic *per se* antitrust violations. It is irrelevant whether AIIC's rates are reasonable or unreasonable. *SCTLA*, 493 U.S. at 421 (although "[w]e may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants[,]" the boycott and price fix are illegal *per se*); *Trenton Potteries Co.*, 273 U.S. at 396. The *per se* rule against price fixing applies fully to professionals. *SCTLA*, 493 U.S. at 422, 427, 434; CDA, slip op. at 21-23, 5 Trade Reg. Rep. (CCH) at 23,789-90.

Although the core agreement is the one among AIIC's members not to charge less than an agreed-upon daily rate, the *per se* rule against price fixing is far broader. The *per se* rule embraces any agreement that has a substantial impact upon price, whether or not the agreement directly specifies prices to be charged. The conduct condemned in Socony-Vacuum was a concerted effort by oil companies to increase prices by buying up surplus gasoline. As the Supreme Court stated in Socony-Vacuum, "the machinery employed by a combination for price-fixing is immaterial." 310 U.S. at 223.

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), the Supreme Court held that an agreement to terminate the availability of free credit in connection with the purchase of goods is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price-fixing." *Id.* at 648. Even if the price of the underlying product is not fixed (as it was not in Catalano, but is here), an agreement substantially impacting the

price to be charged is unlawful. *Id.* at 647; *Sugar Institute v. United States*, 297 U.S. 553, 600-02 (1936) (agreement to adhere to announced prices and terms of sale unlawful, even though the specific prices and terms were not agreed upon). Similarly, the courts have held *per se* unlawful other methods of affecting price competition that fall short of fixing the actual price of the product. *See, e.g., Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 134 (9th Cir. 1960) (uniform trade-in allowances and standard requirements for cash down payments); *cf. United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 185-88 (3d Cir. 1970) (sufficient evidence to support jury finding that defendants illegally agreed to limit discounts), *cert. denied,* 401 U.S. 948 (1971).

The AIIC rule providing that remuneration be on an indivisible daily basis required interpreters to charge the full rate regardless of the amount of time worked. This rule prevented interpreters from discounting by charging an hourly rate or a discounted or *pro rata* fee for a meeting lasting less than a full day. This rule is a *per se* unlawful price-fixing restraint under *Catalano*, 446 U.S. at 645.

The provisions related to "same team, same rate" set the rate of compensation for every team member at or above the AIIC rate, regardless of the interpreters' varying levels of skill, experience, or specialized knowledge of the subject matter of a particular conference. Although a showing of adherence is not necessary to establish the antitrust illegality of the type of horizontal agreement that courts have uniformly condemned *per se*, several witnesses in this case testified about interpreters' general adherence to this rule. Swetye, Tr. 2819-20; CX-303-Z-110-11 (Moggio-Ortiz); Hamann-Orci, Tr. 40; but *see* Saxon-Forti, Tr. 2681 (some instances in which interpreters did not adhere to rule). Moreover, during the 1984 Los Angeles Olympics, several interpreters raised concern that they not be required to work with student interpreters who were working for free because they would be in violation of this rule. *See* IDF 351; CX-1246-A; CX-1283-B. The Supreme Court has held that the *per se* rule is violated by agreements tending to provide the same economic rewards to all practitioners "regardless of their skill, their experience, [or] their training[.]" *Maricopa*, 457 U.S. at 348. We find that the "same team, same rate" agreement is an agreement to charge the same price and is thus *per se* unlawful.

We find that AIIC's 1991 rules setting the rate of remuneration for non-working, travel, rest, and briefing days constitute unlawful price

fixing. These rules, by setting forth specific pricing formulas, are also similar to other *per se* unlawful pricing schemes that have used multiple-base-point systems and phantom freight systems. *See FTC v. Cement Institute*, 333 U.S. 683 (1948) (agreement among cement manufacturers to use a multiple-base-point system for freight charges an unfair method of competition in violation of Section 5); *cf. In re Plywood Antitrust Litigation,* 655 F.2d 627, 634 (5th Cir. 1981) (discussing evidence from which reasonable jury could find that phantom freight formula, whereby West Coast freight prices were used regardless of where the shipment originated, was *per se* illegal), *cert. dismissed,* 462 U.S. 1125 (1983).[28] The price-fixing formula used here also prevented interpreters from competing with one another by discounting their rates for non-working days. *See Catalano*, 446 U.S. at 644-45 (discussing role of discounts in competition among wholesalers).

The travel rules prevent conference organizers from realizing considerable economies by planning ahead and taking advantage of special offers.[29] More significant, absent the travel rules, competing interpreters or intermediaries could use savings on travel expenses as a term of price competition. By agreeing to forego competition on this element of price, AIIC and its members have fixed prices in violation of the antitrust laws. *See Catalano*, 446 U.S. at 645; *cf. In re Plywood Antitrust Litigation*, 655 F.2d at 634. We also agree with the ALJ's finding that "AIIC's travel rules help its members maintain their agreement by deterring cheating." IDF 240; Wu, Tr. 2093-94.

Similarly, we find that respondents' agreement contained in the 1991 Basic Texts to charge per diems and to standardize per diem charges, through the use of formulas or otherwise, is an agreement affecting price that is *per se* unlawful. *See Catalano,* 446 U.S. at 648 (agreement to terminate credit discounts that affected price); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F. Supp. 869 (E.D. Cal. 1986) (fixing of standardized component charges was *per se* illegal price fixing).

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[28] This case is distinguishable from *Vogel v. American Society of Appraisers,* 744 F.2d 598, 602-04 (7th Cir. 1984), in which Judge Posner, writing for the court, held an appraising society rule barring fees based on a flat percentage of appraisals to be lawful. Unlike the rules involved in the present case, the rule at issue in Vogel did not prescribe the charge to be made, but only prohibited a particular pricing formula.

[29] For instance, in the case of the 1984 Olympic Games, United Airlines had provided free air travel to the Los Angeles Olympic Organizing Committee ("LAOOC"), so the LAOOC wanted to use United for interpreters' transportation. Weber, Tr. 1247. AIIC advised that this effort by the LAOOC to reduce its costs was "usually unacceptable." CX-1283-A.

We further find that the agreement to abide by a standard cancellation clause, requiring a conference organizer to pay an interpreter his or her full fee in the event the conference does not take place, eliminates another form of price competition and as such is *per se* unlawful price fixing. The clause prevents competition on cancellation fees among interpreters, some of whom might be willing to take greater risks of cancellation.[30] Thus, AIIC's rule on cancellation is an agreement to place on the purchaser a cost of the transaction and is analogous to the agreements on credit terms in Catalano and on freight costs in *FTC v. Cement Institute. Cf. American Radiator*, 433 F.2d at 185-88 (evidence of conspiracies to limit maximum discounts and to eliminate a low-priced product line sufficient for jury to find illegal price fixing).

AIIC's rules, in combination with agreements reached at the NAS meeting in 1989, set the amount to charge for recordings and constitute another form of *per se* unlawful price fixing. *See, e.g., Catalano,* 446 U.S. at 647-48; *Northwestern Fruit Co.*, 665 F. Supp. at 871-72.

Complaint counsel's economic expert testified that the ban on commissions helped AIIC members reach and maintain their cartel agreement by preventing discounts on the minimum fee charged. Wu, Tr. 2150-51. Moreover, at a NAS seminar on sales techniques and negotiations held in January 1994, members were instructed to "[s]peak openly about the subject with hotel employees and technicians who usually get commissions and explain that AIIC members do not do it because they would be obliged to raise their price and everyone would lose." CX-279-Z-3; CXT-279-Z-2 to 5, p.2. Respondents' only defense of their ban on commission payments (*i.e.*, that it serves to inform customers of the respective earnings of the interpreter and the intermediary (Brief for Respondents-Appellants at 35)) is unpersuasive. Particularly when viewed in the context of

[30] For example, the situation that arose during the 1984 Los Angeles Olympics illustrates the application and impact of this rule. Wilhelm Weber, who organized interpretation services for the 1984 Los Angeles Olympics, initially did not offer the standard AIIC cancellation clause to interpreters. IDF 242; Weber, Tr. 1235-36, 1244-45; CX-1300-A to B. The LAOOC wanted a staggered cancellation clause to mitigate potential financial outlays because of concern about the threatened (later actual) boycott by the Soviet Bloc countries. AIIC warned Mr. Weber about his breach of the rules and stated that if the contract were not renegotiated to include the standard cancellation clause, Mr. Weber would be held personally liable for any money due to interpreters in the event of a cancellation. IDF 354, 242; Weber, Tr. 1243-48, 1255-56. As a result of the pressure by AIIC, an "acceptable" cancellation clause was included in the Olympics' contracts and Mr. Weber received a warning from AIIC for his actions. IDF 354, 356, 242; Weber, Tr. 1226-29; *see also* CX-1741-A (Nov. 26, 1984 letter from AIIC to Weber). The change in the cancellation clause substantially raised the costs to the LAOOC as a result of the Soviet Bloc boycott of the Olympics. *See* IDF 354; Weber, Tr. 1256-57.

AIIC's other efforts to set minimum rates, we find that AIIC's ban on commission payments is in effect an agreement to refrain from giving discounts from the fixed minimum rate and as such is *per se* illegal. *See Catalano*, 446 U.S. at 649; *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961) (agreement not to give trading stamps and other premiums to retail gas customers was *per se* illegal); *cf. American Radiator*, 433 F.2d at 185-86. The ban on commissions may also serve to deter entry by preventing new interpreters from paying commissions to intermediaries to help them gain experience, even if at a discounted fee. *See* IDF 254.

Similarly, the ALJ found that "AIIC's restrictions on *pro bono* work deter entry by novice interpreters working without charge. Absent the rule, student or novice interpreters could seek to work without charge in order to gain experience and make contacts in the profession." IDF 250; *see also* Wu, Tr. 2109. For example, this provision became an issue when student interpreters at the 1984 Olympics violated the Code by allowing the LAOOC to pay their airfare from Monterey, California to Los Angeles, California. IDF 249. AIIC's Council, as well as the U.S. Region, warned the organizer (Weber) that his actions "go against a number of principles and rules of our profession." CXT-1320-A to C, p.1.; IDF 249; *see generally* Weber, Tr. 1232-33, 1271-72. Thus, we find that AIIC's 1991 rule on *pro bono* work operated as a prohibition on discounts and is *per se* illegal under Catalano. Alternatively, AIIC's restraints on *pro bono* work can be viewed as setting a minimum price because AIIC members would have to charge some amount for their services in order to receive reimbursement for travel and other expenses associated with charitable work. Minimum price setting in the sale of services, as well as goods, is *per se* illegal price fixing. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782-83 (1975) (state bar association's minimum fee schedule held to be a naked restraint and unlawful price fixing).

B. Market Allocation -- Per Se Unlawful

Agreements among competitors to divide or allocate markets are illegal *per se*. *See Palmer v. BRG*, 498 U.S. at 49-50; *Topco*, 405 U.S. at 608 (citing cases). The Supreme Court has held such horizontal market divisions *per se* illegal, even when unaccompanied by price fixing, *Topco*, 405 U.S. at 609 n.9, or when the market division was between potential, not actual, competitors, *see Palmer v. BRG*, 498

U.S. at 47 (non-competition agreement between former competitors). For reasons discussed *infra* at 30-31, we find that the respondents' moonlighting rules constitute market allocation and are *per se* illegal.

1. Facts

Paragraph b(2) of AIIC's 1991 "Guidelines for Recruiting Interpreters" required AIIC members to hire "freelance interpreters rather than permanents having regular jobs." CX-1-Z-48. Paragraph 6 of AIIC's "Staff Interpreters' Charter" states that staff interpreters should act as interpreters outside their organization "only with the latter's consent, in compliance with local working conditions, and without harming the interests of the free-lance members of AIIC." CX-1-Z-53; CX-2-Z-54; IDF 281.

AIIC members understood these provisions to mean that staff interpreters with permanent jobs should not perform freelance work unless no freelance interpreter is available. IDF 283; CX-301-Z-106 to Z-107 (Bishopp); CX-300-Z-121 to Z-122 (Motton); Lateiner, Tr. 907. The U.S. Region agreed with AIIC's rules that staff interpreters should not work in the private sector unless no freelance interpreters were available. IDF 284; CX-405-C; CX-407-F. The U.S. Region, at a 1988 meeting, admonished its members: "[O]ur permanent colleagues are reminded that if they are offered a contract outside their organization they should check first whether there are any free-lance interpreters available with the required language combination. They have a permanent, steady job and freelancers don't. Therefore they should show some 'restrain' [sic] in accepting work on the private market." CX-432-M; IDF 283.

2. Legal Analysis

We concur in the ALJ's findings that AIIC's moonlighting rules constitute an agreement that staff interpreters will not compete with freelance interpreters. *See* IDF 280-291; CX-300-Z-114 to Z-115, Z-121 (Motton); CX-301-Z-95 to Z-97 (Bishopp); *see generally* Hamann-Orci, Tr. 14-15; Van Reigersberg, Tr. 363-64; but *see* Lateiner, Tr. 905. This agreement is in effect a market allocation because it promotes and protects the economic interests of local, freelance interpreters from competition from permanently employed "staff" interpreters. Thus, the agreement effectuates a market division and is a *per se* violation of the antitrust laws.

Judge Posner's opinion for the Seventh Circuit in *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984), makes clear that horizontal market divisions have the same anticompetitive effects -- and are as unlikely to have efficiency rationales -- as price fixing and output restraints. In General Leaseways, the defendant was an association of local truck leasing firms that, *inter alia*, allowed the local firms to compete with national truck leasing firms by providing for reciprocal service agreements among the local companies across the United States. Other rules, however, limited competition among the member truck leasing firms by limiting the geographic area in which they could compete and restricting their ability to affiliate with the national truck leasing firms. The Seventh Circuit found these latter rules to amount to a *per se* unlawful market division. 744 F.2d at 595.

In 1990, the Supreme Court unanimously reconfirmed the vitality of the *per se* rule against horizontal market allocations in a case involving companies that offered competing bar review courses:

> Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which they both do business or whether they merely reserve one market for one and another for the other.

Palmer v. BRG, 498 U.S. at 49-50 (citing *Maricopa,* 457 U.S. at 344 n.15 (market division is *per se* offense)); *see also Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (complaint allegations sufficient to survive motion to dismiss because, if proved at trial, the allocation of customers among competitors via a call forwarding scheme from phantom dealers would be *per se* unlawful). We therefore find that AIIC's rules to protect freelance interpreters from competition by staff interpreters are *per se* unlawful.

C. Rules Governing Non-Price Terms and Conditions of Employment, Business Arrangements, and Advertising -- Rule of Reason Analysis

The Supreme Court is generally reluctant to utilize a *per se* approach to review professional associations' codes of conduct and has admonished lower courts not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Maricopa*, 457 U.S. at 349 n.19. In fact, we recognized and applied this approach in our recent

decision in CDA. *See* slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. AIIC's restrictions on the non-price terms and conditions of employment, business arrangements, and advertising are not in the categories of restraints traditionally considered *per se* illegal. Moreover, we cannot say that they appear "to be one[s] that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) ("BMI"). We believe it would be imprudent to expand the *per se* rule to these restrictions and, therefore, we apply the rule-of-reason analysis instead.

Under the rule of reason, a court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis' classic formulation remains the touchstone for rule-of-reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g.*, *NCAA*, 468 U.S. at 103-10. Thus, the inquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See IFD*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10 & 109 n.39. As the cases make clear, however, a variety of factors go into conducting an appropriate rule-of-reason analysis, depending upon the particular facts of the case. Generally, a court will look to the following: product and geographic market definition;

market power; anticompetitive effects; barriers or impediments to entry; and any plausible efficiency justifications. Because the rules at issue here are not plainly anticompetitive and complaint counsel has not established anticompetitive effects or respondents' market power, we dismiss the complaint as to the rules governing length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.

1. Market Definition

In defining the relevant product market, the courts and the Commission generally examine what products are reasonable substitutes for one another. In the context of monopolization cases under Section 2 of the Sherman Act, the Supreme Court has stated:

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchange ability for the purposes for which they are produced -- price, use and qualities considered.

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (although du Pont had a 75 percent share of the cellophane market, cellophane was in the same product market as other flexible packaging materials and du Pont did not have monopoly power in this larger market).

In defining the relevant product market in connection with analyzing mergers, the antitrust agencies examine what products would be substitutes in the event of a "small but significant and nontransitory" increase in price. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines Section 1.11 (Apr. 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104. We look to what possible alternatives a consumer would have if, for example, the price of conference interpretation from English into French increased by five or ten percent.

The ALJ found that the "relevant product markets include conference interpretation of language pairs (English to Spanish, Spanish to English . . .)." IDF 366. Both parties have suggested that because an interpreter who interprets only from English into German could not substitute for the English into French interpreter, the appropriate product market is conference interpretation by language

pair. *See, e.g.,* Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, at 43 n.35 and Appendix C, p.1; Wu, Tr. 2057, 2391; Respondents' Proposed Findings, ¶ 113; Silberman, Tr. 2985; Oral Argument, Tr. 18-19. Based on the evidence in this record, as well as the admissions by both sides, it is likely that the proper product market definition is conference interpretation by language pair.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court discussed its approach to defining the relevant geographic market, noting that it was essentially the same as the approach taken to define the relevant product market and that "[t]he geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37 (footnote omitted). Thus, we generally look to the geographic area in which sellers of a service operate and to which purchasers can reasonably turn for those services. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

The Department of Justice and the FTC have set forth their approach to defining the relevant geographic market in the 1992 Merger Guidelines as that area within which a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price that would not be offset by a loss in sales. Horizontal Merger Guidelines Section 1.21. Thus, for example, we would look to whether conference interpreters from outside the United States would offer their services in the United States and whether customers in the United States would seek the services of foreign interpreters if faced with a price increase of five to ten percent.

The ALJ found that the "relevant geographic market is the United States." IDF 366; *see also* Wu, Tr. 2193-94. Respondents initially argued that the geographic market should include interpreters who reside in Mexico and Canada, as well as foreign interpreters who reside in the United States part of the year. Respondents' Proposed Findings of Fact, ¶¶ 142-45. Respondents, however, have not challenged the ALJ's conclusion on appeal. Although there is some evidence that employers and intermediaries may include foreign interpreters on the lists from which they attempt to hire, the rules related to travel and per diem leave us unpersuaded that foreign interpreters function as a constraint on price increases by interpreters

domiciled in the United States. Thus, our review of the record provides no reason to overrule the ALJ's finding in this regard.

2. Competitive Effects and Market Power

As we recently stated in CDA:

> Market power is part of a rule of reason analysis, but it is important to remember why market power is examined. We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed.

CDA, slip op. at 28, 5 Trade Reg. Rep. (CCH) at 23,792 (footnote omitted). Similarly, the Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See IFD,* 476 U.S. at 460-61; *NCAA,* 468 U.S. at 109-10.

Complaint counsel and the ALJ place substantial reliance on evidence that AIIC's members adhered to the price-fixing agreement to prove that AIIC had market power. More specifically, the ALJ found that the Wu Data Set established that the AIIC members "charged at least the 'suggested minimum'" 90 percent of the time. IDF 318.[31] The ALJ also found that the fact "[t]hat AIIC members charged the agreed rates over four years indicates that AIIC had market power in U.S. conference interpretation in the years 1988 through 1991. (Wu, Tr. 2052-53, 2055.) The anticompetitive effects in the United States show that AIIC has market power, since market power is the ability to raise price or restrict output." IDF 327.

We disagree with the ALJ's finding that AIIC had market power because AIIC members charged the agreed-upon price. The fact that AIIC members charge and receive a set price does not necessarily mean that they have market power. It could simply mean that they have made an ill-advised decision to set a price that some market participants accept but that in reality lowers overall demand for their services, or it could mean that the price fixed was set exactly equal to the competitive price. There is no evidence in this record to show, for example, what non-AIIC members charged or received or the percentage of overall private sector conference interpretation work

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[31] *See* IDF 317-27; ID at 122-23; Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, Brief in Support Thereof, and Orders, Volume II, at 115-22. Dr. Wu analyzed the contracts of 42 AIIC members over a seven-year period, finding that the "suggested minimum" was charged 90 percent of the time during the four years 1988 through 1991.

that AIIC versus non-AIIC members perform. Thus, in this case, we do not believe that it is appropriate to attribute market power to AIIC by the mere fact that its members found it in their interest to adhere to a price-fixing agreement. Moreover, if there were evidence of the amount being charged by interpreters who were not members of AIIC, that would not necessarily be dispositive proof of whether AIIC had market power. It is precisely the danger that business persons will find it in their economic interest to go along with a price-fixing agreement that makes price fixing so pernicious and a *per se* offense requiring no showing of market power.

Thus, to determine whether AIIC has market power, we look first to market share evidence. While the parties, as well as the ALJ, agree that the market is properly defined by language combination, there is no evidence in the record from which to determine market shares by language combination. *See, e.g.*, Reply Brief for Respondents-Appellants at 20; Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law, Vol. I, at 43 n.35; Wu, Tr. 2391. The briefs, findings of fact, Initial Decision, and oral argument discuss at length the market shares held by AIIC members, but the shares discussed are all defined by singular languages or the overall number of interpreters working in the United States. For example, the ALJ found that AIIC (in combination with TAALS) has 24 percent of the estimated number of Portuguese conference interpreters and 44 percent of the French conference interpreters (with percentages for other languages between these extremes). IDF 379. Respondents, on the other hand, argue that their market shares for the five Western European languages focused on by the ALJ are "at most from the low to mid-teens to the low twenties." Reply Brief for Respondents-Appellants at 24 (emphasis in original). Without delving into the particulars of the different versions of market shares, we conclude, assuming that the product market is defined as language pairs, that neither the ALJ's, complaint counsel's, nor respondents' calculations can serve as the basis for a finding of market shares. Thus, complaint counsel has failed to carry the burden of proof concerning respondents' market shares by language combination, making it impossible to determine market power.

Even without a showing of market power, if the anticompetitive effects of the rules were clear, we still would be able to make a finding of liability under a rule-of-reason analysis. The competitive effects of the rules at issue here, however, are not obvious from the

rules alone, and the record in this case is virtually devoid of evidence of anticompetitive effects flowing from the non-price restraints. *See generally* IDF 317-65. With the exception of three findings (IDF 341-43), all of the effects discussed by the ALJ stem from the price-related restraints. Two findings address "Team Size" and demonstrate that AIIC members generally abide by AIIC's rules with respect to team size, and that to the extent they deviate from the recommended team strength, they receive additional compensation. IDF 341-42. However, it is not clear that this is an anticompetitive result. Almost all of the witnesses testified that AIIC's team size rules reflected the way conference interpretation works best and that they therefore generally utilize the same team sizes AIIC advocates in its rules. The third finding addresses the length-of-day rule and suggests that interpreters sometimes insist on receiving extra compensation if the conference "exceeds a normal workday." IDF 343. As discussed *infra* at 37-39, the evidence suggests that not all interpreters insist on overtime pay and, for the ones that do charge, the amount they charge varies. Moreover, many of the witnesses at trial testified that the length of day specified in AIIC's rules generally coincides with the reality of the time period after which interpreters begin to experience mental fatigue, which can affect the quality of the interpretation services being provided. *See* discussion *infra* at 37-38. Thus, in our view, the ALJ's findings in this regard are not sufficient to make a finding of anticompetitive effects flowing from the non-price restraints.

3. Efficiencies

Over the past few decades both the Commission and the courts have increasingly recognized the role of efficiencies in assessing the competitive impact of restraints of trade under the rule of reason. *See* CDA, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96. *See generally* 1 Federal Trade Comm'n Staff, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, ch. 2 (May 1996). The Supreme Court relied extensively on an analysis of the efficiencies of certain vertical contractual restraints in upholding such restrictions in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court's decision in BMI is another example of the role of efficiencies: the Court found that BMI's issuance of blanket licenses was not a *per se* violation of the antitrust laws because the activity appeared on its face

to "increase economic efficiency and render markets more, rather than less, competitive." 441 U.S. at 20 (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)); *see also NCAA,* 468 U.S. at 114 (citing district court's conclusion that restrictions on television rights to be offered to broadcasters were not justified by any "procompetitive efficiencies which enhanced the competitiveness of college football television rights").

Lower courts have also taken certain efficiencies into account when reviewing the activities of professional associations. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1491-92 (D.C. Cir. 1984) ("public service" argument); *Wilk v. American Med. Ass'n*, 719 F.2d 207, 221-22 (7th Cir. 1983) ("patient care" motive), *cert. denied*, 467 U.S. 1210 (1984).[32] Thus, in the examination of an industry standard or a professional standard under the rule of reason, efficiencies are part of the analysis. *See* CDA, slip op. at 32-37, 5 Trade Reg. Rep. (CCH) at 23,794-96.

Respondents argue that the restraints at issue in this case are justified by various efficiencies, to wit, that they ensure the quality of the interpretation services provided; maintain the health and safety of interpreters; and provide needed information to consumers about the appropriate way to staff conferences requiring interpretation services. Although our decision with respect to the issues of market power and anticompetitive effects negates the need to assess the adequacy of these justifications, at least some are not facially without merit.

4. Conclusion

For the reasons discussed, we cannot condemn under the rule of reason any of the non-price rules disputed below.[33] Those rules include length of day, team size, professional address, portable equipment, advertising, package deals, exclusivity, trade names, double-dipping and other services.[34]

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[32] This does not mean that an otherwise *per se* violation such as price fixing could be justified as quality enhancing; our discussion *supra* at 14-16, 25-31, makes it clear that it cannot. *Cf. National Soc'y of Prof'l Engineers*, 435 U.S. at 693-96.

[33] Our decision in this regard obviates the need to discuss issues related to entry or enforcement of the rules.

[34] Because the ALJ dismissed the complaint allegations challenging the rules on double-dipping and other services, we do not discuss these rules. However, we note that while we are upholding the dismissal, we disagree with the ALJ's analysis. He found the rules *per se* illegal but dismissed them for lack of enforcement; on the other hand, we believe the rules should be analyzed under the rule of reason and dismiss them because complaint counsel has not met its burden of proof.

5. Rules Being Dismissed

a. Length of Day

The 1991 (Article 4) and 1994 (Article 7) Standards of Professional Practice state that "the normal duration of an interpreter's working day shall not exceed two sessions of between two-and-a-half and three hours each." CX-2-Z-42; CX-1-Z-45. The ALJ found that AIIC's rules allow members to work beyond the hours specified by AIIC as long as they are paid for overtime, and that many AIIC members charge overtime when working beyond six hours. IDF 166-68. The ALJ further found that one intermediary paid interpreters "about 20% more than the standard rate when interpreters worked more than six hours a day (Neubacher, Tr. 804-05)," while another paid interpreters an additional $100-200 for anything over a seven-hour day. IDF 343; Citrano, Tr. 543-45. Some complaint counsel witnesses testified that AIIC members occasionally work longer days without charging overtime. Davis, Tr. 881 (interpreters do not always request additional compensation for working beyond the standard day -- it depends on how much additional time is being required); Lateiner, Tr. 973 (half-hour grace period). Other intermediaries testified that interpreters have refused work for hours that exceed the normal working day. IDF 178. Finally, complaint counsel's expert testified that "[s]ometimes, the overtime charge would be another half day of remuneration, sometimes there would be hourly charges." Wu, Tr. 2120.

The only arguable enforcement of this rule dates back to the 1984 Olympic Games, when AIIC wrote Wilhelm Weber a letter warning him to conform his contracts to AIIC's Code. An AIIC member had objected to a contract offered by Weber that provided for a seven-hour work day. IDF 181; CX-1300-A; Weber, Tr. 1252-53; *see generally* CXT-1693-A to C.

The rules themselves contain no mention of overtime or the appropriate level of remuneration for sessions that exceed AIIC's recommended length of day. Moreover, the evidence suggests that individual interpreters applied this rule in a wide variety of ways. Finally, many of the interpreter and intermediary witnesses (called by both respondents and complaint counsel) testified that this rule helped to maintain the quality of interpretation and the health of the interpreters because working beyond the "normal" working day often results in mental fatigue and interpreting mistakes. Hamann-Orci, Tr.

84-85; Davis, Tr. 871-73; Weber, Tr. 1187, 1292, 1297; Luccarelli, Tr. 1661. Since the evidence does not show that AIIC specified that overtime must be paid, that interpreters uniformly charged for overtime, or that uniform rates were charged for overtime, this does not constitute independent price fixing.[35] Moreover, this rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, the length of day rule has no price aspect on its face and there are some plausible justifications for setting forth what a "normal" day is. For example, even Wilhem Weber, one of complaint counsel's key witnesses, testified that the rules with respect to length of day and team strength ensure the health of the interpreters and the quality of the interpretation services. Weber, Tr. 1278-79, 1296-97.

Complaint counsel argue and the ALJ found that the length of day rule was an output restraint and therefore *per se* unlawful. We agree that if this rule were a strict limitation on output, it would likely be condemned as *per se* unlawful because output restrictions have the same basic economic effect as an agreement to increase prices. *See SCTLA,* 493 U.S. at 423; *NCAA,* 468 U.S. at 100. However, because the rule itself merely sets forth the "normal" length of day, does not prohibit interpreters from working overtime, and does not set any overtime pay, and because the evidence shows that interpreters work overtime (with and without additional compensation), the rule is not a strict limitation on output and we cannot say with confidence that it is a restraint that will always or almost always have anticompetitive effects.[36]

We believe AIIC's rule specifying the "normal" work day is somewhat similar to the standardization of products. As Areeda observed:

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[35] We note, however, that as recently as 1989 AIIC issued a document entitled "Conditions Governing Recruitment and Work at Intergovernmental Meetings Outside the Agreement Section," which could be used under certain specified circumstances "[i]n lieu of the corresponding rates and conditions laid down in Annex I to the AIIC Code of Professional Conduct and Practice." This document specified the compensation to be paid to interpreters who were required to work in excess of the daily or weekly workload levels set forth in the document. CX-2064-A to D. Because there is no testimony or other evidence in the record explaining this document, how it was developed, whether it was adopted by agreement among AIIC's membership, and in what countries it was applicable, a decision as to its legality is not before us.

[36] This flexibility, combined with evidence supporting AIIC's proffered justifications, distinguishes this rule from the absolute ban on operating automobile salesrooms during certain periods that we condemned in *Detroit Automobile Dealers Ass'n*, 111 FTC 417 (1989), *aff'd in relevant part*, 935 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 703 (1992).

Product standardization might impair competition in several ways. For example, producers of automobile tires might agree to produce only five tire varieties for which they adopt common specifications. Such standardization might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.

7 Areeda, Antitrust Law, *supra* note 11, ¶ 1503a, at 373. In examining the sufficiency of the evidence from which to infer the existence of a conspiracy, courts have recognized that "standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (citing *Milk and Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 492 (7th Cir. 1946)). The courts there said that some standardization is understandable, but too much leads to evidence that can be drawn upon to reach a conclusion of the existence of a conspiracy.

Standardization does not, in our view, fall under the *per se* rule, but should be examined under the rule of reason. For example, it hardly is *per se* illegal to sell gasoline by the gallon, although that unquestionably aids horizontal price fixing among gas stations. Here, the length of work-day rule by itself does not enable members to fix price or output; the problem is primarily with the fixing of the price itself. We believe that this rule must therefore be examined under the rule of reason. Therefore, for the reasons set forth *supra* at 33-36, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

b. Team Size

Articles 9, 10, and 11 of the 1991 Basic Texts, Standards of Professional Practice, set forth team size tables for consecutive, whispered, and simultaneous interpretation. CX-2-Z-43 to 46.[37] In the case of simultaneous interpretation, the rule is absolute, providing that "[t]he team strength indicated . . . must be respected." CX-2-Z-46 (Art. 11). Although AIIC at one point maintained two different team size tables with corresponding prices for simultaneous

[37] Although little discussion in the briefs or at oral argument addressed this issue, two provisions of the team size tables set the remuneration for use of smaller numbers of interpreters at 125 percent of the remuneration for the larger team size. For consecutive and whispered interpretation, the 1991 Basic Texts rule provided that if fewer interpreters are recruited than the number recommended by AIIC (which should only occur "under exceptional circumstances"), the remuneration for each interpreter "should be at least equal to 125% of the standard rate." CX-2-Z-43. To the extent that this rule was applied to the United States, we find this aspect of the 1991 rule *per se* unlawful.

interpretation, that dual system was not used in the United States. Thus, the U.S. Region always had only the absolute written prohibition. *See* IDF 171.[38]

There is some evidence of adherence to the team strength rules. Some interpreters have refused work with intermediaries under working conditions that do not conform to staffing requirements (Davis, Tr. 869-70; Clark, Tr. 614-15 (Berlitz was expected to meet AIIC's working conditions)); intermediaries who have deviated from staffing requirements have paid interpreters extra compensation (Citrano, Tr. 539; Neubacher, Tr. 767-69); and individual interpreters have said that they adhere to the staffing requirements (Luccarelli, Tr. 1669; *see also* IDF 179-81). Nonetheless, the fact that interpreters adhere to the team size tables does not answer the question as to anticompetitive effects. Many witnesses testified that they adhere to the team size rules because they reflect the reality of how best to staff a conference and avoid excessive fatigue and maintain the quality of interpretation services. *See, e.g.,* Luccarelli, Tr. 1663-65, 1667-70; Davis, Tr. 885.

Complaint counsel argue and the ALJ found that the team size rule was an output restraint and therefore *per se* unlawful. Although the team size rule is closer to an output restraint than the length of day rule, as with the rule on length of day, the team size rule differs from the *per se* unlawful price-fixing rules, such as those on commissions and *pro bono* work, because, unlike the latter two, this rule as currently written has no price aspect on its face and there are some plausible justifications for setting forth optimal team strength. This rule appears akin to a standard with respect to setting forth optimal staffing to maintain the quality of conference interpretation services, and this similarity to standard setting leads us to conclude that the team size rule should be examined under the rule of reason. Moreover, since we are condemning as *per se* unlawful all of the price-related agreements and prohibiting the implementation of price-related agreements in the future, we believe that once AIIC members begin to compete on price, it is unlikely that there will be anticompetitive effects from this rule. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

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[38] Article 6 of the 1994 Professional Standards contains AIIC's current rules governing team strength for whispered, consecutive, and simultaneous interpretation. CX-1-Z-42-44. The current rules do not reference any rates of remuneration either for the recommended team strengths or for team strengths of fewer than the recommended number of interpreters.

c. Professional Address Rule

Article 1 of AIIC's 1991 Standards of Professional Practice required that members declare a single professional address that they must maintain for at least six months and can change only upon three months' notice. CX-2-Z-40. The 1991 rules also explicitly required that all contracts be based only upon the official professional address of the AIIC member. *Id.* Under the 1991 rules, the professional address also provided the basis for remuneration for non-working days (Article 12), subsistence allowance (Article 13), travel days (Article 14), and travel expenses (Article 15). In addition, rule b(2)(b) of AIIC's Recruitment Guidelines suggested that organizers "bear in mind" selecting conference interpreters with a professional address at, or nearest, the conference venue. CX-2-Z-51; *see also* IDF 212-36.[39]

Under the 1991 rule, even if interpreters actually lived away from their declared professional addresses, they would charge their clients for travel to and from their professional addresses only, even when travel originated from their residences. IDF 221. *See also* CX-302-Z-140 to Z-141, Z-438 (Luccarelli); CX-2-Z-40; CX-301-Z-20 (Bishopp); but *see* CX-302-Z-140 (Luccarelli) (interpreters would sometimes declare their professional addresses to be away from their homes so they could get more work "because it would mean that they wouldn't charge for travel"). Thus, an interpreter with a professional address in Brussels would charge a client in the United States for a round trip ticket between Brussels and the U.S. Hamann-Orci, Tr. 45; IDF 222. *See also* CX-301-Z-21 to Z-22 (Bishopp).

One AIIC member traveled round-trip between Washington and New York to work for the New York Stock Exchange, but charged the client for round trip travel between Vienna and New York because Vienna was her professional domicile. Bowen, Tr. 1011-12; IDF 223. Another member was offered a job in Washington on November 15, 1991, but her professional address did not change from Paris to Washington until December 20. The U.S. Region

[39] Article 1 of the 1994 Professional Standards sets forth the rules governing the declaration of a professional address, requiring that

> . . . in order to ensure that members are able to exercise their voting rights at statutory regional meetings and that the rules pertaining to dues are respected, any change in professional address from one region to another shall not be permitted for a period of less than six months. Any such change must be notified to the secretariat at least three months before the intended change in order to ensure that it can be published in the Association's list of members in good time. The secretariat shall inform the members of the Council and the regional secretaries of the two regions concerned.

CX-1-Z-40 (emphasis added).

Representative suggested that she either seek permission from AIIC in Geneva, or "telephone all other colleagues with [her] language combination in the Washington area, to verify that they were all indeed working on that date." CX-1471; IDF 225.

The ALJ found that AIIC members follow the professional address rule, unless they obtain a waiver, and that the AIIC Council enforces this rule. IDF 227; *see also* CX-300-Z-38 (Motton); CX-284-L; Bowen, Tr. 1029-30; CX-237-H to I; CXT-237-H to I. On November 30, 1991, the U.S. Region Representative admonished one member that he was in violation of the AIIC rules because he had been working in the New York area although he had a Washington, D.C. professional address "without officially notifying AIIC of his change of address." IDF 231; CX-1470-A; *see also* CX-608-Z-221 (1991 AIIC Membership Directory). Wilhelm Weber, the intermediary who helped organize interpreters for the 1984 Los Angeles Olympics, was accused of violating the professional address rule for failing to charge for travel between Geneva, Switzerland, his professional domicile, and San Francisco, even though he only traveled from Monterey, California, where he resided. IDF 229; Weber, Tr. 1264-65.

We believe that the professional address rule, as reflected in the 1991 Standards, has been used by AIIC and its members to provide the reference point for the *per se* unlawful price fixes of per diem, non-working days, and travel arrangements. Nonetheless, once we have struck down respondents' unlawful price-fixing agreements that were tied to the professional address rule, we believe that the professional address rule itself, which requires that AIIC members give three months' notice before changing their professional address and that they retain the address for at least six months, is better analyzed under the rule of reason because there is nothing in the rule itself that suggests it will have anticompetitive effects and there are plausible efficiency justifications for the rule (*i.e.*, facilitates ability to ensure member is voting in and paying dues to the appropriate region), particularly as it is currently written and tied to the regional structure of AIIC. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

d. Portable Equipment

Article 7 of AIIC's 1991 and 1994 Code of Professional Ethics prohibits members from simultaneous interpretation without a booth "unless the circumstances are exceptional and the quality of interpretation work is not thereby impaired." CX-2-Z-37; CX-1-Z-38. Portable equipment costs less than standard booths. IDF 273; *see also* CX-270-G; CX-302-Z-282 to Z-283, Z-804 (Luccarelli); Clark, Tr. 632-33; Obst, Tr. 303, 307. In addition, unlike working with a soundproof booth, a technician is not required for the operation of the portable equipment. IDF 273; Hamann-Orci, Tr. 47; Neubacher, Tr. 777-78.

The ALJ, citing to IFD, found that the rule on portable equipment was a restriction "on the package of services offered" (ID at 117) and should be analyzed under the rule of reason. We agree that this rule must be analyzed under the rule of reason. This rule is akin to a typical professional standard, declaring the use of certain equipment to be inferior and recommending against its use except in certain limited circumstances. In fact, numerous witnesses testified that although the use of portable equipment is acceptable under certain limited circumstances, which AIIC's rules recognize, its use would not be appropriate for large or long conferences because the lack of a soundproof booth subjects the interpreter to environmental noise, compromises the quality of the interpretation services, and increases the interpreter's mental fatigue. *See, e.g.,* Respondents' Proposed Findings of Fact, ¶ ¶ 351-355, citing to Hamann-Orci, Tr. 49-50; Neubacher, Tr. 707; Luccarelli, Tr. 1701-02; Clark, Tr. 632, 643-44; Obst, Tr. 304 (State Department tries to avoid use of portable equipment). We also note that there are in fact international standards for built-in (permanent) booths (ISO 2603 (1983)), portable booths (ISO 4043 (1981)), and other equipment (IEC 914 (1988)). *See* CX-2064-D; CX-2062-G. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

e. Advertising

Both the 1991 and 1994 versions of AIIC's Code of Professional Ethics contain the following provisions:

Article 4 (b): They [Members] shall refrain from any act which might bring the profession into disrepute.

Article 5: For any professional purpose, members may publicize the fact that they are conference interpreters and members of the Association, either as individuals or as part of any grouping or region to which they belong.

CX-1-Z-38, CX-2-Z-38. The "Recruitment Guidelines" further state that "Article 5 of the Association's Code allows members to provide factual information to users about the nature and availability of interpreters' services, but is intended to exclude activities such as commercial forms of one-upmanship." CX-2-Z-52. The ALJ found that "[m]embers understand 'commercial forms of one-upmanship' to be about comparative claims" and that interpreters should not "disparage their colleagues in order to get work." IDF 298; CX-2-Z-52; CX-301-Z-103 (Bishopp); Luccarelli, Tr. 1682-83.

The ALJ found that AIIC's advertising rules and two 1994 instances of disciplinary action against AIIC members amounted to a prohibition of comparative price claims and thus were "naked attempts to eliminate price competition [that] must be judged unlawful *per se*." ID at 116 (citing CDA, slip op. at 19, 5 Trade Reg. Rep. (CCH) at 23,788). We disagree with the ALJ. We do not believe that the language of these rules is sufficient to support a finding that AIIC prohibited price advertising and therefore committed a *per se* violation. Moreover, the two instances of enforcement the ALJ cites do not support a finding that the rules were interpreted or enforced to prohibit price advertising.[40] Any restrictions on nonprice advertising and promotion must be analyzed under the rule of reason. *See* CDA, slip op. at 24-25, 5 Trade Reg. Rep. (CCH) at 23,790-91. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

f. Package Deals

The AIIC Guidelines for Recruiting Interpreters, attached as an annex to the 1991 Basic Texts, in paragraph (b)7, "Duties Towards Colleagues," provide that "Members of the Association acting as coordinators shall not make 'package deals' grouping interpretation services with other cost items of the conference and shall in particular

[40] One of the instances had no relationship to the United States -- it involved an incident in Canada. *See* CX-305-Z-332 (Sy); CXT-501-W. Moreover, there was testimony that the disciplinary action taken in that case resulted from the member's failure to use the internal AIIC grievance procedures, rather than because of the alleged advertising rule violation. *See* Luccarelli, Tr. 1683-86; *see also* CXT-501-W, p. 2. The second incident involved a member who had written a letter to an international organization offering to reduce the cost of language services through her own full-time employment. CXT-502-Z-53 to 54; RX-815.

avoid lump-sum arrangements concealing the real fees and expenses due to individual interpreters." CX-1-Z-49; IDF 255. Paragraph (c)1 states: "The provision of professional interpretation services is always kept clearly separate from the supply of any other facilities or services for the conference, such as equipment." *Id.* Paragraph (b)5 states that "[i]nterpreter's fees shall be paid directly to each individual interpreter by the conference organiser." *Id.*

In 1990 and 1991, the U.S. Region prepared and discussed a provisional paper on AIIC working conditions for interpreters in the United States. The paper stated: "All contracts shall be concluded directly between the conference and the interpreter; the conference shall make payment directly to the interpreter." CX-439-D; *see also* CX-435-A; IDF 256.

The ALJ found that "clients prefer contracting through intermediaries because intermediaries can more readily be held financially liable if the conference is unsuccessful and provide quicker response time to requests for services than individual interpreters." IDF 260; CX-227-J; CX-1633-B. Nonetheless, the ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. We agree and note that there is some evidence that some intermediaries who are AIIC members do occasionally offer lump sum payment arrangements and package deals, with no repercussions from AIIC. *See* Lateiner, Tr. 976. We therefore reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

g. Exclusivity

The AIIC Guidelines for Recruiting Interpreters state: "The conference interpreter makes it clear that she or he does not 'provide' interpreters . . . [and] avoids creating the impression that certain interpreters are available only through her or him, or that she or he controls teams of fixed composition." CX-2-Z-52. The ALJ found that, in compliance with AIIC's rules, coordinating interpreters in the United States do not exclusively represent interpreters and no AIIC member has established a commercial interpretation firm with interpreters as employees. IDF 263; Luccarelli, Tr. 1693-94; CX-2-Z-52 (1991); CX-301-Z-105 (Bishopp). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See*

ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason. In fact, there is evidence that some intermediaries have lobbied against laws in states that were considering whether subcontractors (such as freelance interpreters) should be considered employees of the companies with which they contract because the intermediaries apparently believed that it would be economically detrimental to them if the interpreters were considered employees. Luccarelli, Tr. 1693-96. Therefore, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

h. Trade Names

The AIIC Guidelines for Recruiting Interpreters state that a coordinating interpreter "acts under her or his own name and does not seek anonymity behind the name of a firm or organization, although co-operative services may be offered by a group of interpreters who carry on business under a group name." CX-2-Z-52. The ALJ found that "there are no such 'cooperatives' of interpreters in the United States" and that this rule was a prohibition on the use of trade names. IDF 266, 268; CX-301-Z-104 (Bishopp). Nonetheless, there is testimony that several intermediaries called by complaint counsel have firms that operate under a trade name. *See* Weber, Tr. 1123 (started his own firm, Language Services International); Lateiner, Tr. 976 (operated under the name Lateiner International Associates since 1980); Neubacher, Tr. 761 (started own firm, Linx Interpretation Service). There are also other large intermediaries such as Berlitz and Brahler, both of which recruit freelance interpreters for conferences. *See* Neubacher, Tr. 760-62; Davis, Tr. 836-38 (worked for both Berlitz and Brahler). The ALJ concluded that the competitive effect of this rule is less obvious than some of the others and that it therefore should be analyzed under the rule of reason. *See* ID at 117-18. We agree that this rule is of the type adopted by professional associations that is traditionally analyzed under the rule of reason and in light of this, and of the fact that so many interpreters and intermediaries practice under trade names, we reverse the ALJ and find that complaint counsel failed to carry the burden of proof under the rule of reason.

V. NEED FOR AN ORDER

Respondents argue that an order is inappropriate and unnecessary because their rules affecting price never extended to the United States and, even if they did, respondents abandoned the monetary conditions worldwide in 1992. The Commission has identified the following factors as relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities: the *bona fides* of the respondent's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations. *Massachusetts Bd. of Registration in Optometry*, 110 FTC 549, 616 (1988) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). *Cf. Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (citing W.T. Grant in discussion of proof necessary for relief against allegedly discontinued conduct). These factors all argue strongly in favor of placing respondents under order.

The facts do not support respondents' assertions that AIIC's rules did not apply in the United States and that, even if they did, AIIC has abandoned all monetary rules. The record shows that AIIC's rules were adhered to and enforced in the United States and that AIIC's members agreed to follow, and did follow, AIIC's price-fixing and market allocation rules in the United States. *See* discussion *supra* at 15-31.[41] Despite AIIC's adoption of a "resolution" in 1992 to remove all monetary conditions and a commitment to change its Basic Texts in 1994, there continued to be widespread adherence to a standard rate. Dr. Lawrence Wu, complaint counsel's economic expert, found that many AIIC members continued to set their fees with reference to the AIIC rate even after AIIC stopped publishing a rate for the U.S. Region in 1992. Wu, Tr. 2205-06; IDF 533. For 1992 to 1994 the rates continued to be clustered near the AIIC rate, and through 1993 the most frequently charged rate continued to increase yearly by $25. Although in 1994 and 1995 there was no increase in the most frequently charged rate and there was a greater distribution of prices, most prices for a day's work were still in the $500-550 range, and the clustering found suggests that AIIC's "discontinuance" of the price-fixing agreement was not particularly effective, at least through 1995. Wu, Tr. 2204-05, 2207; *see also* Clark, Tr. 614.

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[41] Dr. Lawrence Wu, complaint counsel's economic expert, examined conference interpreting contracts of freelance interpreters in New York and Washington, D.C., and found that from 1988 to 1991 two-thirds of the contracts examined were at or $50 above the published AIIC rate. Wu, Tr. 2016-17; IDF 104.

Moreover, many of AIIC's other "repealed" rules are still contained in AIIC's Basic Texts (phrased in less mandatory language) and in the standard form contracts AIIC provides for its members' use. Although the evidence in the record is insufficient to determine whether AIIC and its members actually agreed to the terms in its standard form contracts, the standard form contract nevertheless contains many of the same (or similar) provisions we are declaring unlawful. Thus, the continued use of these provisions in the standard form contract seems inconsistent with AIIC's expressed intent to comply with the law in the future.[42]

For example, AIIC's standard form contract provides for fees for non-working days. CX-2059-A; CX-2060-A; IDF 139; Weber, Tr. 1221. In addition, although the 1994 rules eliminate any ties between the professional address and payments for travel, subsistence, and non-working days, the standard form contract continues to tie travel reimbursement to the professional address. The "General Conditions of Work," which are part of the form contract, state:

> Unless both parties have agreed otherwise, the interpreter shall have the free choice of route and dates of travel. He/she is not bound to use chartered flights. He/she shall however only be refunded the costs for the mode(s) of transport laid down in clause VII.1 for direct return travel between his/her professional address and the conference venue . . . As a general rule and unless the parties have agreed otherwise, the interpreter shall travel first class on air journeys of long duration and in business class for a journey of less than 9 hours.[43]

The standard contract also provides for the appropriate remuneration in the event of cancellation in two separate clauses. CX-2059-B. The relevant portions of the contract state that the conference organizer shall be obliged to pay an interpreter the amount provided for in the contract regardless of the reasons for cancellation and whether they were beyond the control of the organizer. CX-2059-B, ¶ ¶ 6&9. Paragraph 6 of the General Conditions of Work further provides in relevant part that "[t]he remuneration shall be paid net of commission."

With respect to the "character of respondents' past violations," respondents engaged in *per se* unlawful price fixing and attempted to

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[42] The Recruiting Guidelines appended to the Basic Texts and Statutes state that AIIC's model contract "should normally be used" and any other contract used "must at least embody the standard conditions specified by the Council." CX-1-Z-49; IDF 139.

[43] CX-2059-B, ¶ 7. Clause VII.1 of the contract provides for the "cost of a first-class return ticket by rail/air/sea from. . . at the current tariff." CX-2059-A.

hide their price-fixing agreements in the past: during the 1980s in the United States, rates were unpublished but no less binding.[44] As one AIIC Council member wrote in a 1995 AIIC Bulletin: "At Brussels [in 1992] we deregulated our monetary conditions and trusted our members to keep the faith. Now why on earth can we not trust our members today to maintain the other working practices even though they may not be mandatory . . . . ?" CX-285-S. *See also* IDF 509-12.

A claim of abandonment is rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred "only after the Commission's hand was on the respondent's shoulder." *Zale Corp.*, 78 FTC 1195, 1240 (1971); *see also Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). In light of all of the circumstances of this case, an order prohibiting respondents from continuing to engage in price fixing is necessary and in the public interest. The remedy we impose has a "reasonable relation to the unlawful practices found to exist" and therefore is within our authority. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

VI. FINAL ORDER

Paragraph I of the order sets forth the applicable definitions. Paragraphs II and III of the order prohibit respondents from agreeing, *inter alia*, to provisions governing: fees, including minimum daily rates; indivisible daily rates; rates for nonworking days, including travel, briefing, and rest days; per diem rates or formulas; reimbursement for travel expenses; standard cancellation clauses; recording fees; commissions; and the recruitment of interpreters based on whether or not they are permanently employed. The order applies only to conduct that would affect activities in the United States.

Paragraph IV of the order requires respondents to discipline individuals who at their meetings engage in discussions about fees applicable in the United States. The required discipline includes warning a participant or participants to refrain from engaging in the prohibited discussions and, if the warning is not effective, removing

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[44] *See, e.g.*, CX-1238 (letter from AIIC's Secretary General to Wilhelm Weber in connection with the Los Angeles Olympics, stating how it was inconceivable that anyone could read the standard form contract to mean that rates could be negotiated downward: "[M]embers all know that [sic] the local rate is and any bargaining with the client can only be upwards and not downwards. It was inserted in this way because of the 'cartel' pricefixing laws in some countries, but members know very well that they must not undercut.").

the person or persons from the meeting. If such disciplinary actions prove unsuccessful, the meeting must be adjourned.

Paragraph V of the order clarifies that nothing in our order prohibits respondents from performing under or entering into any negotiated agreement, as that term is defined in paragraph I (L). Paragraph VI requires respondents to amend, *inter alia*, AIIC's Basic Texts to conform to the requirements of the order. Because of the longstanding nature of many of respondents' price-related restraints, paragraph VIII requires respondents to distribute to their members, officers, directors, and affiliates an announcement about the Commission's action, a copy of the complaint and order, and any of respondents' documents that are amended pursuant to the order.

Paragraph VII of the order is a "fencing-in" provision and requires respondents for a period of five years to eliminate from their Basic Texts and standard form contracts provisions related to certain payments and travel arrangements. In light of the longstanding and comprehensive nature of respondents' price-fixing agreements, fencing-in relief is particularly warranted. As the Supreme Court has observed, "[t]he purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950)). The Court further found in National Society of Professional Engineers that a district court is "empowered to fashion appropriate restraints on . . . future activities both to avoid a recurrence of the violation and to eliminate its consequences," even if that entails "curtail[ing] the exercise of liberties that [respondent] might otherwise enjoy." 435 U.S. at 697. The same is true when the Commission, as opposed to a federal court, fashions the remedial order. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957).

Thus, the Commission can proscribe unlawful activity that the respondent has not yet undertaken, as well as activity that would itself be considered lawful but for the fact that it threatens to perpetuate or revive a violation of law. For example, in National Lead Co., the Commission prohibited the individual adoption of zoned pricing plans because it had found *per se* unlawful horizontal collusion on zoned pricing plans. The Court upheld a temporary and conditional prohibition of individually adopted zoned pricing plans aimed at "creating a breathing spell during which independent pricing might

be established without the hang-over of the long-existing pattern of collusion." 352 U.S. at 425. Since the plan could easily be subject to unlawful manipulation and had been used for nearly 25 years, and since the respondents had been found to have violated the antitrust laws, the provision bore a reasonable relation to the underlying unlawful practice. *Id.* at 421, 429. In light of the temporary nature of this provision, the order was upheld.

Similarly, respondents here have engaged in a longstanding, comprehensive scheme to eliminate price competition on virtually all aspects of conference interpreting. The Commission finds that it is necessary to prohibit respondents, for a period of five years, from maintaining any provisions in their Basic Texts or form contracts, even if phrased in non-mandatory language, that relate to: payment in the event of cancellation of a contract; payment of commissions or a requirement that remuneration shall be paid net of any commissions; payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel; payment for non-working days, travel days, or rest days; payment for a subsistence allowance while on travel; and payment for recordings of conference interpretation.

Finally, the order contains standard reporting and record keeping requirements that will allow the Commission to monitor respondents' compliance with the order, as well as a 20-year sunset provision.

VII. CONCLUSION

The International Association of Conference Interpreters and its U.S. Region adopted a comprehensive price-fixing scheme that restrained competition among conference interpreters in the U.S. in violation of Section 5 of the FTC Act. We find that AIIC's contacts with the U.S. are related to this cause of action and are sufficient to allow the Commission to exercise specific personal jurisdiction over AIIC. Moreover, we find that respondents provide their members with sufficient pecuniary benefits to bring them within our jurisdiction. We further find that AIIC is not entitled to either the statutory or the non-statutory labor exemption for the conduct we find unlawful and hereby enjoin. The respondents' restrictions on all forms of price competition cannot be justified on any grounds, and we condemn these restrictions as *per se* unlawful. The rules governing certain non-price terms and conditions of employment, business

arrangements, and advertising, however, are entitled to an examination under the rule of reason. Because complaint counsel has not carried its burden of proof under the rule of reason, we dismiss the complaint as to those rules. The findings and Initial Decision of the ALJ are upheld in part and reversed in part, consistent with our opinion and final order.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

In an opinion issued just about a year ago, the Commission held that respondent California Dental Association ("CDA") committed a *per se* violation of the antitrust laws by promulgating and enforcing restrictions on members' advertising of prices for dental services in California.[1] Although I agreed with my colleagues that CDA's restraints on both price and non-price advertising merited antitrust condemnation, I disagreed with their *per se* approach, which in my view applied -- by its language and its logic -- not only to CDA's particular price advertising restraints but also to "all agreements among competitors to restrain truthful, nondeceptive price advertising."[2] I pointed out in CDA that *Massachusetts Board of Registration in Optometry,* 110 FTC 549 (1988) ("Mass. Board") -- frequently and fruitfully relied on until CDA, then cast aside (if not explicitly overruled) by the CDA majority for reasons never clearly spelled out -- still provides a dependable framework for the analysis of horizontal restraints.[3]

Once again I agree with the result reached by my colleagues but disagree with elements of their analytical methodology. I concur in the Commission's determinations that (1) the Commission has personal jurisdiction over respondent International Association of Conference Interpreters; (2) the Federal Trade Commission Act's not-for-profit exemption is unavailable to respondents; and (3) neither the

[1] California Dental Ass'n, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007 (Mar. 25, 1996) ("CDA"), appeal pending, No. 96-70409 (9th Cir., filed May 20, 1996). The Commission also concluded that CDA's restrictions on both price and non-price forms of advertising were unlawful under the antitrust rule of reason. CDA, slip op. at 37-39 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,796-97].

[2] CDA, Opinion of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part, at 1 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,815].

[3] "[I]f the majority considers Mass. Board beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in Mass. Board analysis that might be remedied, why not apply Mass. Board in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?" *Id.* at 9 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,818].

statutory nor the nonstatutory labor exemption immunizes respondents' conduct. I also have no objection to the order appended to the majority's opinion, because in my view the majority reached the correct determination as to which restraints should be declared unlawful. I simply do not share the majority's eagerness to replace Mass. Board's prudent approach to horizontal restraints with a system in which reference to categories of conduct -- some condemned *per se*, others judged under the rule of reason -- supplants discerning analysis.[4]

In one footnote in its opinion, the majority makes passing reference to a point that I emphasized in CDA -- that the Supreme Court's horizontal restraints jurisprudence of the late 1970s and early 1980s established the foundation for an analytical methodology like that laid down in Mass. Board.[5] Nevertheless, judging from the juxtaposition of that footnote with the majority's observation (in the accompanying text) that "[r]ecent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses,"[6] my colleagues apparently believe that the Supreme Court decided for reasons unexplained to forsake the approach of IFD and BMI and has instead endorsed the use of categories whose legality falls on one side or the other of a supposedly bright *per se*/rule of reason line.

Obviously, I do not assert that the Supreme Court and the lower courts have never found a practice to be *per se* illegal. Naked price-fixing, bid-rigging, market or customer allocation, and certain types of boycotts are condemned *per se* upon proof of the existence of an agreement -- that is, they are conclusively presumed to restrain trade unreasonably. But over the last 20 years, Supreme Court jurisprudence pertaining to restraints of trade -- both horizontal and vertical -- has steadily evolved into a heightened sensitivity to the economic implications of the conduct at issue and a reluctance to base

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[4] The fact that my colleagues and I agree here -- as we did in CDA -- on which restraints are illegal does not mean that our disagreement over analytical methodology lacks practical significance. Some future cases will likely involve alleged restraints whose competitive ramifications are more ambiguous than those at issue in the present case. Whether the Commission applies a Mass. Board analysis or adheres to the more mechanical approach established in CDA (and followed today) could obviously make a difference to the outcome.

[5] "We note that some earlier Supreme Court cases had suggested the merging of the *per se* and rule of reason analyses. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ('BMI'); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 ('IFD'). Areeda also has suggested that there may have been some convergence of the *per se* category (*see, e.g.*, the willingness to look beyond a horizontal price agreement in BMI) and a full blown rule of reason (*see, e.g.*, the 'quick look' approach of IFD) so that at times the two antitrust approaches do not differ significantly. *See* 7 Phillip E. Areeda, Antitrust Law ¶ 1508c, at 408 (1986)." Slip op. at 14 n.11.

[6] *Id.* at 14.

condemnation of a particular practice on a superficial resemblance to price-fixing.

The Supreme Court decisions on which the majority relies (*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) ("SCTLA")) do not undermine my point that the consistent thrust of the Court's decisions since the late 1970s has been to eschew antitrust decision making on the basis of labels, categories, and mechanical line-drawing. It is hardly surprising that the Court found *per se* violations in Palmer and SCTLA, both of which involved conduct long viewed as plainly anticompetitive; nor is there any doubt that such cases will continue to arise as long as there is antitrust enforcement. But the Supreme Court has not signaled a retreat from the "presumption in favor of a rule-of-reason standard"[7] for analyzing restraints. BMI, IFD, and NCAA[8] still represent the general direction of the Court's thinking in this area; Palmer and SCTLA simply illustrate, against the backdrop of this overall trend, that anticompetitive conduct can occasionally be condemned *per se*.

The approach of the majority does nothing to mitigate -- and in fact perpetuates -- the principal weakness of CDA: that over simplistic analogizing to traditional *per se* categories is not a satisfactory substitute for the cautious analysis mandated by the Supreme Court.[9] By contrast, Mass. Board, with whatever imperfections it had, distilled the essential elements of the Supreme Court's teaching: that seeming restraints of trade may not be what they first appear to be; that it is necessary to devote adequate scrutiny to an alleged restraint's competitive effects unless one can say, with a very high degree of confidence, that it is unmistakably anticompetitive; and that this whole exercise should not be conducted through the use of labels and categories. As I observed above, if the Mass. Board analysis needs improvement, the instant case presents (as did CDA) an opportunity to accomplish that. What I cannot accept is the majority's unwarranted abandonment of the Mass. Board precedent.

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[7] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

[8] *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

[9] NCAA, *supra* n.8; BMI, *supra* n.5.

FINAL ORDER

I.

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

A. *"AIIC"* means respondent International Association of Conference Interpreters, also known as Association Internationale des Interprètes de Conférence, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

B. *"U.S. Region"* means respondent United States Region of AIIC, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, sectors, regions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

C. *"Fees"* means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of services, including, but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, recording fees, compensation for time not worked, compensation for travel time, compensation for preparation or study time, and payments in kind.

D. *"Cancellation fee"* means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

E. *"Interpretation"* means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

F. *"Translation"* means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

G. *"Other language service"* means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing,

supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

H. *"Interpreter"* means one who practices interpretation.

I. *"Translator"* means one who practices translation.

J. *"Language specialist"* means one who practices interpretation, translation, or any other language service.

K. *"Intergovernmental Organization"* refers to any organization to which privileges and immunities have been extended pursuant to the International Organizations Immunities Act, 22 U.S.C. 288 *et seq.*, as amended.

L. *"Negotiated Agreement"* means any contract or other agreement negotiated between AIIC and any user of interpretation, translation or other language service setting forth, *inter alia*, the rates and working conditions for interpreters, translators or other language specialists working on a freelance basis for that user.

M. *"Person"* means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

N. *"Basic Texts"* means the various governing and policy documents of AIIC, including, but not limited to, AIIC's Statutes, Code of Professional Ethics, Professional Standards, and Appendices to any of these documents.

II.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees applicable in the United States for interpretation, translation, or any other language service, including, but not limited to, fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, participating in, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees applicable in the United States for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, offer, or adhere to, any existing or proposed fee for transactions within the United States, or otherwise to charge or refrain from charging any particular fee in the United States;

D. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition in the United States, including, but not limited to, offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, offering discounted rates, or accepting any particular lodging or travel arrangements;

E. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis for services performed within the United States; and

F. Discouraging, restricting, or prohibiting interpreters from performing interpretation, translation, or other language services within the United States free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses.

Provided that, nothing contained in this paragraph II shall prohibit respondents from:

1. Compiling or distributing accurate aggregate historical market information concerning fees actually charged in transactions in the United States that were completed no later than one (1) year before the date of such compilation, provided that such compilation or distribution begins no earlier than three (3) years after the date this order becomes final, and provided further that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions; or

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies or pursuant to a Negotiated Agreement, if such publication states the qualifications and requirements for a person to be eligible to receive such fees.

III.

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

with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, participating in, promoting, assisting, enforcing, or maintaining any agreement, understanding, plan, program, combination, or conspiracy to limit, restrict, or mandate, within the United States:

A. The reimbursement of or payment to interpreters, translators, or other language specialists for travel expenses or time spent traveling; or any discounts, costs, or other advantages or disadvantages to consumers based on actual travel arrangements or geographic location;

B. The recruitment of interpreters, translators, or other language specialists on the basis of whether or not they are permanently employed; or

C. The payment or receipt of commissions.

IV.

It is further ordered, That respondents, directly or indirectly, or through any person, corporation, or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, in connection with any meeting being held, first warn and, if the warning is not heeded, dismiss from any meeting any person or persons who make a statement, addressed to or audible to the body of the meeting, concerning the fees applicable in the United States, charged or proposed to be charged for interpretation, translation, or any other language service. If the aforementioned disciplinary actions are not effective in stopping the prohibited discussion, then respondents must adjourn the meeting until such time as it may be conducted without such prohibited discussion.

V.

It is further ordered, That nothing herein shall prohibit respondents or their members from:

A. Performing pursuant to any existing agreement entered into between AIIC and any Intergovernmental Organization or any other existing Negotiated Agreement, unless such agreement is repudiated

by such Intergovernmental Organization or other user of interpretation, translation, or other language service; or

B. If requested to do so in writing in advance by such Intergovernmental Organization or other user of interpretation, translation, or other language service, negotiating a new or renewed agreement or Negotiated Agreement with any Intergovernmental Organization or other such user, concerning the wages, hours, and working conditions of freelance interpreters, translators, or other language specialists working for such Intergovernmental Organization or other user.

VI.

It is further ordered, That respondents shall, within ninety (90) days after the date this order becomes final:

A. Amend the Basic Texts, including all subparts and appendices, to conform to the requirements of paragraphs II, III, and IV of this order; and

B. Amend their rules and bylaws to require each member, region, sector, chapter, or other organizational subdivision to observe the requirements of paragraphs II, III, and IV of this order.

VII.

It is further ordered, That respondents shall, within ninety (90) days after the date this order becomes final, amend the Basic Texts, including all subparts and appendices, and their standard form contracts, to eliminate, for a period of five (5) years, all provisions related to:

A. Payments in the event of cancellation of a contract;

B. The payment of commissions or the requirement that remuneration be paid net of any commissions;

C. Payment for travel, specification of specific modes of travel, connecting payment or tickets for travel to an interpreter's professional address, or specification of rest days for travel;

D. Payment for non-working days, travel days, or rest days;

E. Payment for a subsistence allowance while on travel; and

F. Payment for recordings of conference interpretation.

VIII.

It is further ordered, That respondents shall:

A. Within ninety (90) days after the date this order becomes final, distribute to each member, affiliate, region, sector, chapter, organizational subdivision, or other entity associated directly or indirectly with respondents, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order; and

B. Distribute to all new officers, directors, and members of respondents, and any newly created affiliates, regions, sectors, chapters, or other organizational subdivisions of respondents, within thirty (30) days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that respondents revise pursuant to this order.

IX.

It is further ordered, That respondents shall:

A. Within ninety (90) days after the date this order becomes final, and annually for five (5) years thereafter on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order, and any instances in which respondents have taken any action within the scope of the provisos to paragraph II of this order;

B. For a period of ten (10) years after the date this order becomes final, collect, maintain, and provide upon request to the Federal Trade Commission: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports, or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of respondents; and all general mailings by respondents to their membership;

C. For a period of ten (10) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the Basic

Texts or appendices thereto, and any new rule, regulation, or guideline of respondents applicable in the United States;

D. For a period of ten (10) years after the date this order becomes final, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, minutes, memoranda, and other records and documents in the possession or under the control of respondents relating to any matters contained in this order, and (2) upon five (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents; and

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution or reorganization of itself or any proposed change resulting in the emergence of a successor corporation or association, or any other change in either respondent that may affect compliance obligations arising out of this order.

X.

It is further ordered, That respondent U.S. Region shall cease and desist for a period of one (1) year from maintaining or continuing its affiliation with any organization of interpreters, translators, or other language specialists within thirty (30) days after the U.S. Region learns, or obtains information that would lead a reasonable person to conclude, that said organization has engaged, after the date this order becomes final, in any act or practice that would be prohibited by paragraph II or III of this order if engaged in by the U.S. Region unless, prior to the expiration of such thirty (30) day period, said organization informs the U.S. Region by verified written statement of an officer of the organization that the organization has ceased and will not resume such act or practice, and the U.S. Region has no grounds to believe otherwise.

XI.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

APPENDIX A

[DATE]

ANNOUNCEMENT

The Federal Trade Commission, an agency of the government of the United States of America, has determined that certain rules and practices of the International Association of Conference Interpreters ("AIIC") violate the antitrust laws of the United States.

Members are advised that agreements between competitors on rates and fees violate the antitrust laws of the United States and may violate the laws of other countries. Other agreements between competitors on matters other than rates and fees may also violate the antitrust laws of the United States or of other countries. Individuals who enter into such agreements may be subject to criminal penalties and fines under the laws of the United States of America. 15 U.S.C. 1; 18 U.S.C. 3571. Individuals who enter into such agreements may also be civilly liable to persons injured in their business or property as a result of violations of the antitrust laws. 15 U.S.C. 15.

AIIC and its United States Region are now subject to an order issued by the United States Federal Trade Commission. The order prohibits AIIC, including its regions and organizational subdivisions, from engaging in various practices that would lessen competition in the United States. Copies of this order are attached to this Announcement.

IN THE MATTER OF

SCHWEGMANN GIANT SUPER MARKETS, INC.

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

Docket C-3584. Consent Order, June 2, 1995--Modifying Order, Feb. 24, 1997

This order reopens a 1995 consent order -- that required the Louisiana-based corporation to divest several supermarkets in the New Orleans area -- and this order modifies the consent order by replacing a provision requiring Schwegmann to obtain prior Commission approval for certain transactions, with a prior notice provision for any acquisition of retail supermarkets in the New Orleans area that Schwegmann makes through June 6, 2005. The Commission determined that the changed provisions are warranted and consistent with the Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions and therefore justified reopening the proceeding and modifying the order.

ORDER REOPENING AND MODIFYING ORDER

On November 21, 1996, Schwegmann Giant Super Markets, Inc. ("Schwegmann" or "respondent"), the respondent named in the consent order issued by the Commission on June 2, 1995, in docket No. C-3584 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Schwegmann asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] The order requires Schwegmann to seek the prior approval of the Commission to acquire any supermarket in the New Orleans metro area. The thirty-day public comment period on Schwegmann's Petition expired on December 26, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engaged in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Schnuck Markets, Inc. ("Schnuck") entered into an agreement with National Holdings, Inc. ("National") to acquire certain supermarkets and that

Schwegmann and Schnuck had entered into an agreement for the acquisition of certain supermarkets acquired from National that, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the retail sale and distribution of food and grocery items in supermarkets in the New Orleans metro area.

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Schwegmann and National in the relevant market; the increase in the likelihood that Schwegmann would unilaterally exercise market power in the relevant market; and the increase in concentration and in the likelihood of collusion or coordinated interaction.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant market is localized and the acquisition price of a supermarket could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Schwegmann could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.[2]

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

It is further ordered, That paragraph IV of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Schwegmann shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any supermarket, including any facility that has been operated as a supermarket within six (6) months of the date of the offer by Schwegmann to purchase

[2] Schwegmann has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

the facility, or any interest in a supermarket, or any interest in any individual, firm partnership, corporation or other legal or business entity that directly or indirectly owns or operates a supermarket in the New Orleans metro area.

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schwegmann or the purchase or lease by Schwegmann of a facility that has not been operated as a supermarket at any time during the six (6) month period immediately prior to the purchase or lease by Schwegmann in those locations.

"Prior Notification to the Commission" required by paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Schwegmann and not of any other party to the transaction. Schwegmann shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Schwegmann shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Schwegmann shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IN THE MATTER OF

WORLD MEDIA T.V., INC.

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

Docket C-3717. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997

This consent order prohibits, among other things, the California-based advertising production and distribution corporation from making pain relief or pain elimination claims in infomercials for any device without possessing competent and reliable scientific evidence to support such claims and prohibits the respondent from representing that any endorsement or testimonial represents the typical experience with the product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

Appearances

For the Commission: *Lesley Anne Fair.*

For the respondent: *Edward Glynn, Venable, Baetjer, Howard & Civiletti,* Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent is a California corporation, with its principal office or place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, CA. respondent engages in the creation, production, and media placement of advertising, including but not necessarily limited to infomercials.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency, production company, and media buyer for Natural Innovations, Inc. and has directed, participated in, and assisted others in the creation and dissemination to the public of advertisements that offer for sale the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

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

PAR. 4. Respondent has prepared and disseminated or has caused to be disseminated advertisements for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain." This advertisement contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

K. DR. GANDEE: But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing. (Exhibit A, p. 3)

L. KEVIN CULVER (Consumer Endorser): I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since. (Exhibit A, p. 8))

M. RUTH MINARD (Consumer Endorser): I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either. (Exhibit A, p. 11)

N. BILL WALTON: I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine. (Exhibit A, p. 9)

O. JAMES LARIMORE (Consumer Endorser): Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. (Exhibit A, p. 6)

P. RON HARTLINE (Consumer Endorser): When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. (Exhibit A, p. 4)

Q. DR. GANDEE: Allergies, the runny eyes, the runny nose. [The Stimulator] really seems like it gives a lot of relief for that. (Exhibit A, p. 6)

R. BILL WALTON: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the

Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better. (Exhibit A, p. 4)

S. DR. GANDEE: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself. (Exhibit A, p. 4)

T. DR. GANDEE: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. (Exhibit A, p. 10)

U. UNIDENTIFIED WOMAN #6 (Consumer Endorser): Oh, I think it works much faster than any medication. (Exhibit A, p. 3)

V. LINDA ANTHONY (Consumer Endorser): He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. (Exhibit A, p. 6)

W. UNIDENTIFIED MAN #2 (Consumer Endorser): It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly. (Exhibit A, p. 10)

X. JOHN TRIPPE (Consumer Endorser): I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this I haven't used any of it. (Exhibit A, p. 3)

Y. UNIDENTIFIED WOMAN #4 (Consumer Endorser): Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have. (Exhibit A, p. 3)

Z. GLEN MATZ (Consumer Endorser): Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve that pain and I don't have to swallow anything. (Exhibit A, p. 3)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that:

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

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

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

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

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

EXHIBIT A

Transcript of Stimulator Infomercial
"Saying No To Pain"

Super: "The following program is a paid presentation from Natural Innovations, Inc."

Voice-over: The following program is a paid presentation from Natural Innovations.

Voice-over: There are many stringent government regulations involved in selling a pain relief product on television, because some products sold in the past may have been ineffective, built false hope, and in some cases, could have been harmful. This product has not undergone the extensive testing that would allow us to satisfy all of the federal regulations. However, similar products have been in use for years with no record of ill effects; in fact, this concept has been used for centuries for pain relief. We make no medical claim that the Stimulator cures any disease, or does anything other than relieve pain for the people seen on this program. We simply believe that each of you has the right to try a product for yourself, and the opportunity to make your own decision to take active control of your own healthcare choices, including what gives you relief from your pain.

Super: Simultaneous visual scrolling of voice-over.

Depiction: A man jogging with a red highlight pointing to his right ankle. A woman on a telephone in a kitchen rubbing her neck with her left hand.

Bill Walton: Unfortunately I know far too much about pain.

Depiction: A boy throwing a baseball and rubbing his right elbow.

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool.

Depiction: A man rubbing his hands.

I fell off of a motorcycle on pavement going 100 miles per hour.

Depiction: A woman grabbing her lower back in pain.

Unidentified Woman #1: The pain is there.

Depiction: A man playing tennis and grabbing his left elbow after hitting the ball.

And it's going to scream at you, "Don't do that to me."

Lee Meriwether: Pain, pain go away. Stay tuned because you're about to meet a very special doctor who has brought us a key to unlock the grip of pain. And if you know someone who's living with pain, please, I'd like you to take a moment and call them right now. Ask them to join us as we hear some amazing stories from people who have been set free -- free to get on with the business of enjoying life and feeling good. Today, on "Say No to Pain."

EXHIBIT A

EXHIBIT A

Joe Anthony: If they said that they were never going to be available again and somebody wanted to buy mine, and I couldn't replace it, I wouldn't sell it for $5,000.

Evel Knievel: I think that this is a better product to use, and you can keep things that do not belong in your system out of your system.

Bill Walton: It's very effective in terms of enabling me to have a better life.

Depiction: Still shots of the people depicted earlier.

Voice-over: Back pains, headaches, joint pain, foot pain. Join Lee Meriwether as she talks with health practitioner Dr. Steven Gandee, NBA all-star player and announcer Bill Walton, special guest star Evel Knievel, and people just like you, whose only special quality is that they're living without pain. Today, on "Say No to Pain."

Depiction: Still shots of Lee Meriwether, Dr. Gandee, Bill Walton, Evel Knievel, and consumer endorsers.

Super: The word "Pain" superimposed on the still shots, followed by the word "No" in large red letters.

Lee Meriwether: Hi, I'm Lee Meriwether. And no matter who you are, what you do, you, me and the rest of world all have something in common. We hurt sometimes. Many of us ignore it, hope it goes away. Or we reach into the medicine cabinet for drugs. Generally, we do whatever we can to live around the pain. But what happens to your life in the meantime? You make sacrifices, don't you? Pain can literally take away our lives.

Unidentified Woman #2: Even like when I pick my child up, and she's ten months old now, when I first had her, it would sometimes cramp a lot. If I'd hold her for a long period of time, like in my elbow area.

Bill Walton: My goal was to get pain free. My goal was to have a life. I had no life.

Unidentified Woman #3: That wasn't me. I was very unhappy because I couldn't function the way I was used to functioning. I just couldn't do the things I was used to doing.

Lee Meriwether: I'd like to introduce a man who has been doing something about pain for almost 20 years.

Depiction: Dr. Gandee examining a patient and presenting a speech.

Dr. Steve Gandee has the largest single doctor practice in Ohio. Over 40,000 office visits a year. Now that puts him in the top one percent in the country. He's the Ohio state representative to the International Chiropractic Association. He's been featured in numerous medical publications as well as his own television series on chiropractic care. His mission has been to help people find a way to say no to pain. Now Dr. Gandee, I know most people seem to do one of two things when they're in pain. They either try to ignore it hoping it will go away. Or, well, unfortunately, they reach into the medicine cabinet.

EXHIBIT A

Dr. Gandee:	Lee, that's true and that's a shame. People nowadays search and reach for drugs first, instead of trying something different. But fortunately with the Stimulator people can take control of their life, of their pain, of their suffering themselves. People like that. I wish you could follow me around my office one day, just one day, and watch people's attitudes when they can start themselves, like you and I can take control of what we feel, what we want to do, and not go to the drug cabinet. It's great. It's a great feeling, great.
John Trippe:	I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this, I haven't used any of it.
Unidentified Woman #4:	Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have.
Glen Matz:	Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve the pain and I don't have to swallow anything.
Lee Meriwether:	What these people are talking about is this simple pain-relief device. It's called the Stimulator and it changes the lives of those who use it. You know, Doctor, when I first saw this product, well, and I heard the phenomenal effects it had on people, I thought, how in the world can something so small have such a phenomenal effect on the body?
Dr. Gandee:	I thought the same way. It is small, isn't it? But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing.
Lee Meriwether:	So you used it on yourself?
Dr. Gandee:	I certainly did. About three or four times a day over a period of a week, I have no more pain. And you know what I did? At that point in time, I made a conscious effort that I was going to get this product to society, to America. Not only America, the world.
Unidentified Woman #5:	That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out.
James Larimore:	It works for me in the area of the sinus problem. It works for me in the area of the muscle problem.
Unidentified Woman #6:	Oh, I think it works much faster than any medication.

EXHIBIT A

Linda Anthony:	The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that gives you that instant relief. I mean I'm talking instant.
Bill Ramsell:	My wife could tell you, I came home and I felt wonderful. I told her, "I just don't believe it. That little thing there could work a miracle [inaudible]. And it was.
Bill Walton:	If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better.
Lee Meriwether:	Doctor, how does the Stimulator actually create such amazing results?
Dr. Gandee:	Very simple. You put the Stimulator up to wherever you hurt, wherever it is. You press in the plunger and a little spark comes out. Feel that?
Lee Meriwether:	Oh, yes.
Dr. Gandee:	You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself.
Pat Wayne:	I just had sacroiliac pain for years and years. And, like I said, I worked for fifteen to 20 years at Goodyear and I had problems with my legs when I worked there and I have never been so relieved since I got this Stimulator.
Glen Matz:	At first, I was a little skeptical. Who wasn't? Who wouldn't be? Something clicks and throws a spark, you know, but the darn-- it takes care of pain. Say what you want to. It alleviates pain.
Ron Hartline:	My truck driving and my football injuries and whiplash and all the things over years that I've accumulated. It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that. But this works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. In the mornings I'd use it on my knees, like from carrying the concrete, carrying the bricks and standing on a concrete floor all day. It just -- it just seems like it relieves it. And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. You know, you start getting older and you do the work I'm doing and you get so sore. And pretty soon you're just kind of thinking, "God, how long am I going to be able to do this?" But this is my future. This is my job. This is my money, you know. So, for some silly little thing like this to work this well, I'm hanging on to it. And if it lasts for life I'm in good shape.

EXHIBIT A

Lee Meriwether: It's obvious the Stimulator works for the people we've seen so far in this program. But I want you to stay tuned because we have a couple of special guests that I'm sure you're going to recognize who really know the meaning of the word pain.

[Break to ordering spot.]

Evel Knievel: You know, you're not talking to someone who fell off of a bar stool. I fell off of a motorcycle on pavement going 100 miles per hour.

Bill Ramsell: I had excruciating pain in my knees. And it was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all.

Super: "Sold nationally $150.00" with a red "X" through it.

Dr. Gandee: The Stimulator may sound to good to be true, but it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people rather than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.

Voice-over: Order now and receive an instructional video, instruction booklet, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four easy payments of $19.95. Call 1-800-982-2600. Or send check or money order for $79.80, plus $8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.

Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.

Super: Visual of ordering telephone number and address.

Ruth Minard: I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe – 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and it did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache.

[End of ordering spot.]

Lee Meriwether: Welcome back. If you just joined us, we've been talking about this amazing little device. It's called the Stimulator. And I'm here with Dr. Steven Gandee who's been using the Stimulator to treat his own patients. Now Doctor, has anyone used the Stimulator and not experienced relief from their pain?

EXHIBIT A

Dr. Gandee:	Nothing works 100% of the time on 100% of the people, unfortunately. But I'll tell you what. I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. Sinuses. The Stimulator works very well with sinuses. Allergies, the runny eyes, the runny nose. It really seems like it gives a lot of relief for that. Sore, stress areas, from the neck down into the shoulders, knees, elbows. All joint pains. It's amazing.
James Larimore:	I've been a teamster for almost 30 years. And I've been driving antiquated equipment for an awful long time. No power steering, no power brakes. Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. And when I go to bed, I hit the lower back and I sleep like a baby. It serves as a pain relief without [inaudible]. And to me that's a plus. If you're the type of person I am, if it works for you, you'll talk about it. I don't see how it works. I don't understand how it works. I don't care how it works -- as long as it works. And if I could have had one of these 20 years ago, I'd have been in a lot less pain for a long time.
Lee Meriwether:	I hadn't really no idea that electricity could be useful in pain prevention.
Dr. Gandee:	Well, it's true. Even the ancient Greeks. Picture this in your mind. The ancient Greeks realized that the body is an electrical system. You know what they did?
Lee Meriwether:	No.
Dr. Gandee:	They put a person in a tub of water and they put eels in the tub of water with them, so they could send electrical current and help the body. That's what they did.
Glen Matz:	I had gone through knee surgery and went through the therapy -- the physical therapy -- and they use elec-- I don't know what words I want to use. What is it, is it electrolysis? Or whatever. But they hooked the wires up to me and I got the same shocking effect. So I really couldn't scoff at the idea because if they use it, why couldn't I use it?
Linda Anthony:	He started telling me about this, you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. Within minutes, I'm back to working and doing whatever I was doing before. And I don't even realize it. All at once I have to say, "Oh my God, that pain is gone."
Lee Meriwether:	Listening to all these people and their incredible, incredible stories, it seems to be that one would be hard pressed to get the Stimulator away from them.

EXHIBIT A

Dr. Gandee: When I first started working with the Stimulator, what I actually did is I tried to buy the Stimulator back from a patient.

Lee Meriwether: Really?

Dr. Gandee: And they said, "Well, where I can get another one?" And I said, "Well, you can't. I have to have it back." And they said, "Well, you're not getting it back." Once you have this, and you can use it on yourself, you can take control of your own health to some degree. You can't get it back.

Lee Meriwether: Well, there's at least one man I know that will never give up his Stimulator and he's someone that needs no introduction. A death-defying daredevil who's put millions of us on the edge of our seats. Evel Knievel.

Depiction: Evel Knievel jumping a motorcycle off a ramp.

Evel, it scares me just watching you on tape in all your jumps. Now what has happened to your poor body?

Depiction: Evel Knievel crashing, flying off a motorcycle.

Evel Knievel: I've had fourteen major open reduction operations. That's where they open you up and put a plate in a bone and attach it to another bone so that you can heal. It's an inner cast.

Lee Meriwether: How many bones have you broken?

Evel Knievel: I've broken about 34 or 35. Everybody kids me about how I've broken every bone in my body, but I used to tell them that I've broken every one except my little finger. But the truth is I've only broken about 34 or 35. When you talk about an injury on the football field or when you talk about a person being hurt playing tennis, or baseball, or a rodeo rider falling off a horse into deep soft dirt or cow manure or whatever it is -- I'll tell you what pain really is. You get on the hood of a car and when your driver gets to 80 miles per hour, have him blow the horn, you bail off out here on the freeway, you're going to find out what pain is.

Depiction: Evel Knievel crashing.

Dr. Gandee: That's what you did.

Lee Meriwether: Oh, oh, oh.

Evel Knievel: And I have been there. When I wake up in the morning, my wrist tends to hurt me very badly. When I put it on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. I also use it on my knees. It does help me feel a lot better and I use it on my ankles. I've broken both of my ankles. It's such a simple thing to use. You don't have to rub it on you. If you have something bothering you and you're out playing golf or no matter what you're doing, if you got it in your pocket, you can pull it out and snap yourself with it three or four times. In fact, I like to use it on the guys when I hit a good shot on the golf course. I pull it out and go

EXHIBIT A

Depiction: Evel Knievel using the Stimulator several times.

and they say, "What's he got? What is that?" They know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. If you use this product, it will work for you. If you have nothing to lose by trying something and everything to gain if you're successful, then by all means, try it. I hope that people will try it and I hope that I will meet people years from now who say I saw you on TV and thank you for telling me about the Stimulator.

Lee Meriwether: Well, we thank you. Now coming up next, we'll visit with basketball great Bill Walton and more people just like you saying no to pain.

[Break to ordering spot.]

Kevin Culver: Well, being a police officer, I'm extremely skeptical. You can't just walk up to me and say, "Hey, this is going to work" without me having a little knowledge of it. It's gotta work. You've gotta show me it's going to work. And fortunately it did. It saved me a trip to the podiatrist, I know that. I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since.

Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.

Voice-over: Write down this important number to take advantage of this revolutionary pain relief secret.

Super: "1-800-982-2600"

Order the Stimulator now and receive free Dr. Gandee's instruction booklet and exciting video "Pain Free Today." They give every technique you need to start saying no to pain immediately with the Stimulator. Also receive absolutely free a plush carrying pouch and plus your free issue of Dr. Gandee's exciting newsletter, "Secrets of Health," packed with dynamic ideas and techniques to help you get healthy and stay that way. The Stimulator is sold nationally for over $150.00. But everyone with pain should be able to afford relief. So for a limited time, we're offering the Stimulator to you for just four easy payments of $19.95. Take advantage of this special offer and call now.

To order the Stimulator for just four easy payments of $19.95, have your credit card ready and call 1-800-982-2600. That's 1-800-982-2600. Or send check or money order for $79.80 plus $8.50 shipping and handling to The Stimulator, Box 36700, Canton, Ohio 44735. This exclusive TV offer comes with a 30-day money back guarantee. So call 1-800-982-2600. Call now.

Super: Visual of ordering telephone number and address.

[End of ordering spot.]

Complaint

EXHIBIT A

Lee Meriwether:	Hello again. During his basketball career, Bill Walton was a dominating center. He's one of the few players to ever win national championships both in college and the pros, and he's also a member of the pro basketball Hall of Fame. But in the world of sports, pain is common. And sometimes greatness comes at a great expense.
Bill Walton:	I was the type of player that by midway through my career, I realized that I was going to leave my game and my health on the basketball court. I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things that I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine.
Lee Meriwether:	Well, there's certainly no question about that. He's definitely a believer. And the Stimulator is making believers out of more people every day.
Dr. Gandee:	Because it's safe, effective, and it works.
Lee Meriwether:	I have to tell you something about the Stimulator that I really think is fantastic. Now I know that I have something that will help alleviate pain with the people that I love.
Dr. Gandee:	I know the feeling of helplessness because I have two children and many times they've awakened me in the middle of the night, crying with pain or hurting or sickness. Now I'm not saying that we should stay away from medical care, of course. But what I am saying is that this feeling of helplessness will no longer be there because you at least have an opportunity to try something yourself to help the family or friends or neighbors.
Lee Meriwether:	Dr. Gandee, I know we only have a few moments left, but is there anything that you'd like to say to our viewers?
Dr. Gandee:	No matter what we've done today, some people are still going to be skeptical. That's just the way human nature is. I can sit here and I can say, well, you should've watched Evel before he even came out here doing himself on his knuckles and his wrist. Remember? Or his knees. And we talked to Bill Walton. And Bill Walton was in pain. And because of [inaudible] surgery [inaudible] had done to his ankles, he couldn't even walk without limping. People can't see that though. All they can see is us up here talking. No matter how skeptical a person is, no matter what they think or what they feel, the only way they're truly going to find out if they can get help and if they can help their family or friends or loved ones to keep from suffering, no matter how much pain they're in, the only thing they can do is try it.
Lee Meriwether:	What we've seen here today is really nothing short of miraculous for those who have used this amazing little power house. People who have literally pushed pain away and started enjoying life once again. Now if you could experience results, powerful results, like you've seen here today, wouldn't it be worth almost anything? Do something now to say no to pain, for yourself or for someone you love.

EXHIBIT A

Bill Walton:	There is no way that I could talk about the positive benefits of this Stimulator if it didn't work for me. I'm into things that work. I'm into winning.
Joe Anthony:	It's a minimum investment with maximum results.
Glen Matz:	Try it and you'll find out. It's that simple. It does work. And if you don't believe me, do it yourself. Give it a try.
Ruth Minard:	Every home needs one.
Unidentified Woman #7:	Even that time of month when you get back cramps.
Unidentified Man #1:	I think everybody should have one.
Evel Knievel:	By all means, try it.
Unidentified Man #2:	It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly.
Linda Anthony:	No one could take it away from me.
James Larimore:	If I could have had one of these 20 years ago, I would've been in a lot less pain for a long time.
Unidentified Man #3:	It does work. There's no doubt in mind whatsoever.
Unidentified Woman #7:	It always -- every time I use it helps me. Every single time I've used it.
Unidentified Woman #8:	I've lived my whole life in pain and it's not worth it. If you have something that will help you, then I'd say go for it.
Bill Walton:	Thank God, thank God for the Stimulator.
Dr. Gandee:	The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. People ask, "Dr. Gandee, if the Stimulator works so well, why doesn't it cost more?" The reason is I want to help as many people as possible get pain relief. This isn't about money. This is about helping you feel better. It's that simple. That's how my office works. I'd rather help a lot of people than just a few. The Stimulator is self-powered, uses no batteries, is American-made, and comes with a one-year guarantee. And I give you my personal guarantee that if you're not completely satisfied with your Stimulator, you can return it within 30 days for a full refund. You're going to love it.
	Depiction: Still shot of the Stimulator, newsletter, carrying pouch, and videotape.
	Super: Visual of ordering telephone number and address.
Voice-over:	Order now and receive an instructional video, instruction book, carrying pouch, and a copy of Dr. Gandee's newsletter, "Secrets of Health." Credit card orders just four

EXHIBIT A

	easy payments of $19.95. Call 1-800-982-2600. Or send check or money order for $79.80, plus $8.50 shipping and handling, to the Stimulator, Box 36700, Canton, Ohio 44735.
Ruth Minard:	I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either.
Pat Wayne:	If anyone is skeptical of my activator -- I [inaudible] to say Stimulator, but it's my activator -- you can call me.
Voice-over:	The preceding program was a paid presentation from Natural Innovations.
	Super: "The preceding program was a paid presentation from Natural Innovations, Inc."

DECISION AND ORDER

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

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

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

1. Respondent World Media T.V., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, California.

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

ORDER

I.

It is ordered, That respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any device, as "device" is defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That use of the device will significantly reduce, relieve, or eliminate musculoskeletal pain, including but not limited to pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, or calves; carpal tunnel syndrome; muscle spasms or strains; or sciatica;

B. That use of the device will significantly reduce, relieve, or eliminate abdominal pain or pain or discomfort caused by allergies, sinus conditions, diverticulosis, cramps, or menstrual cramps;

C. That use of the device will eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, or stress headaches, or headaches caused by benign tumors;

D. That the pain relief or pain elimination provided by the device is immediate;

E. That use of the device provides long-term pain relief;

F. That, for the treatment of pain, the device is as effective as, or more effective than, prescription or over-the-counter medications, including but not limited to aspirin, acetaminophen, Darvon, Darvocet, or codeine;

G. That, for the treatment of pain, the device is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, or reflexology; or

H. About the efficacy or relative efficacy of the product in reducing, relieving, or eliminating pain from any source;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean adequate and

well-controlled clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

Provided that, for any representation that any device is effective for:

(1) The temporary relief of minor aches and pains due to fatigue and overexertion, or

(2) Easing and relaxing of tired muscles, or

(3) The temporary increase of local blood circulation in the area where applied,

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

II.

It is further ordered, That respondent, World Media T.V., Inc, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent, World Media T.V., Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation, or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(1) What the generally expected results would be for users of such product, or

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

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

IV.

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

V.

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

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis for such representation, including but not limited to complaints from consumers and complaints or inquiries from governmental organizations.

VI.

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

VII.

It is further ordered, That respondent shall:

A. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

B. For a period of five (5) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with it or any subsidiary, successor, or assign, within ten (10) days after the person assumes his or her position.

VIII.

It is further ordered, That this order will terminate on February 25, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

IX.

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

IN THE MATTER OF

NATURAL INNOVATIONS, INC., ET AL.

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

Docket C-3718. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997

This consent order prohibits, among other things, the Ohio-based manufacturer and its president from making pain relief or pain elimination claims for their device without possessing competent and reliable scientific evidence to support such claims and prohibits them from representing that any endorsement or testimonial represents the typical experience with their product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

Appearances

For the Commission: *Lesley Anne Fair.*

For the respondents: *Barry Cutler* and *Julia Oas, McCutchen, Doyle, Brown & Enersen,* Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent Natural Innovations, Inc. is an Ohio corporation, with its principal office or place of business at 2717 South Arlington Road, Akron, Ohio.

Respondent William S. Gandee is an officer, director, and sole shareholder of Natural Innovations, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of Natural Innovations, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold and distributed the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission

Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Stimulator, including but not necessarily limited to the attached Exhibit A, a transcription of the program-length television commercial, or "infomercial," entitled "Saying No To Pain;" the attached Exhibit B, an instruction booklet for the Stimulator; and the attached Exhibit C, an instruction video entitled "Pain Free Today." These advertisements and promotional materials contain the following statements:

A. LINDA ANTHONY (Consumer Endorser): [My husband] started telling me about [the Stimulator], you know, and I am like having one of the worst headaches because I have an osteoma right up here. That's a non-malignant tumor that's just going to be there forever unless I have it surgically removed. And I get pressure headaches from it. You just feel like your whole head is just going to explode. They get so bad that I can take Darvocets and it doesn't relieve it. You know, I can be taking them for days and it doesn't relieve it. He puts the Stimulator here and here, it's gone within seconds. (Exhibit A, p. 6)

B. RUTH MINARD (Consumer Endorser): I started out with a stomach ache and I had a stomach ache for, oh, a couple, maybe three, months. It was diagnosed through my internist that it was diverticulosis. And so I had heartburn and gas like you wouldn't believe -- 24 hours, all the time. I couldn't believe, after having pain that long, and I had tried everything that I knew to try over the counter, and [the Stimulator] did the trick. I mean, I got results immediately. It's still unbelievable what it did for me. Today I have no stomach ache. (Exhibit A, p. 5)

C. RON HARTLINE (Consumer Endorser): And the lower back, it's unreal how it worked down there. Because, like, my low back on the one side has always bothered me. And I zap it and it's like it relieves it, you know? It's like taking back ten years on my body. This is something that works on me. (Exhibit A, p. 4)

D. DR. GANDEE: I've been using the Stimulator on many people for different problems, like headaches. All they have to do, wherever the pain is, stimulate the head, right around the area of pain. (Exhibit A, p. 6)

E. UNIDENTIFIED WOMAN #5 (Consumer Endorser): That was the biggest surprise to me -- that a little thing like that Stimulator could help that sinus in that day. No hot and cold packs, no bend over and feel like your eyes are going to fall out. (Exhibit A, p. 3)

F. JAMES LARIMORE (Consumer Endorser): [The Stimulator] works for me in the area of the sinus problem. (Exhibit A, p. 3)

G. DR. GANDEE: Sinuses. The Stimulator works very well with sinuses. (Exhibit A, p. 6)

H. RON HARTLINE (Consumer Endorser): It's just aches and pains. Carpal tunnel in the wrist, which I didn't think anything but surgery could take care of that.

But [the Stimulator] works real well. I mean it loosens -- it's like instantly -- it loosens up the wrist. (Exhibit A, p. 4)

I. BILL RAMSELL (Consumer Endorser): I had excruciating pain in my knees. And [the Stimulator] was fantastic. I couldn't believe what it did for me. You know, it just felt wonderful. As a matter of fact, I golfed 18 holes yesterday and walked quite a bit and it never bothered me at all. (Exhibit A, p. 5)

J. EVEL KNIEVEL: When I wake up in the morning, my wrist tends to hurt me very badly. When I put [the Stimulator] on and I click it, and use it, say, half a dozen or a dozen times on different parts of my wrist, my wrist begins to feel good. . . . [Friends] know that if I use it after all I've been through and all the things that I've tried to kill pain -- that if I use it and they don't see me taking any kind of a drug for pain -- everybody that knows me knows that I do not take drugs -- and they just absolutely know that if I've got a product and I'm using it to help me, then it must be working for me and you can keep things that do not belong in your system out of your system. (Exhibit A, pp. 7-8)

K. DR. GANDEE: But I'll tell you, when I first saw the Stimulator, I personally needed something in my office to help me. And the reason is the knuckle on the forefinger of my hand hurt so bad for the last two years I thought I was going to have to quit chiropractic. I could not work on my patients the way I wanted to. I had to change techniques. I think, seriously, if I hadn't had the Stimulator, I wouldn't be in chiropractic right now. Or I would've had to cut back dramatically on the patients I was seeing. (Exhibit A, p. 3)

L. KEVIN CULVER (Consumer Endorser): I'm up at the club there and I'm bragging about this thing and that's how I ended up here. I said, "That thing worked." You know, I haven't had any pain since. (Exhibit A, p. 8))

M. RUTH MINARD (Consumer Endorser): I got up this morning and I wasn't feeling very well. My feet were hurting me so bad. And I came to sit down to eat my breakfast and Nan got the zapper and she come and zapped me good. Before I could eat my breakfast, my feet were better. It doesn't take me too long to eat either. (Exhibit A, p. 11)

N. BILL WALTON: I had approximately 30 operations on my feet. I was in physical therapy on a constant basis. I worked with people who practiced all sorts of medicine. Orthopedists at the top. Massage therapist, chiropractors, acupuncture, acupressure, reflexology, tremendous amounts of yoga. You name it, I did it. If you have a life where you sit around and are in pain, you're going to be thinking all day long about the things that cause those pains. One of the things I try to do with my life is help people who are also in that chronic pain. That's why I recommend the Stimulator. So that they can move on and have a productive and happy life. And that smile will return to their face, the way it has to mine. (Exhibit A, p. 9)

O. JAMES LARIMORE (Consumer Endorser): Consequently, I get cramps in the hands, cramps in the arms, shoulders, across the top of the neck, back, lower back. And from crawling in and out, I get it in the knees. It's just, it just goes along with the job. Now I don't have to tolerate it anymore. If I have a cramp in my hand or something like that, I can relieve the cramp within 30 seconds. I use it in the evenings when I'm home after work. I use it on the balls of my feet, around my ankles, knees. (Exhibit A, p. 6)

P. RON HARTLINE (Consumer Endorser): When you do as much lifting like I do -- like a weight lifter -- and your wrists get swelled, your hands get swelled. The swelling in my hands is actually going down. I can't explain that but the

swelling in my hands has actually gone down. My watch actually slides now whereas it's always been tight. (Exhibit A, p. 4)

Q. DR. GANDEE: Allergies, the runny eyes, the runny nose. [The Stimulator] really seems like it gives a lot of relief for that. (Exhibit A, p. 6)

R. BILL WALTON: If I had the Stimulator available to me my entire career, I would've had a better career. The short term and long term pain relief that the Stimulator provides would have helped me -- would have helped me work harder -- would've helped me play better. (Exhibit A, p. 4)

S. DR. GANDEE: You can do it wherever you have pain. The knuckle, your elbow, your shoulder, your knees, your feet, your ankles, your wrist, the calves. It does not matter. And what it does is allows the body to help itself. The Creator put us here with a body that was supposed to be healthy. I believe that and most people believe that. And this Stimulator helps the body help itself. (Exhibit A, p. 4)

T. DR. GANDEE: The Stimulator may sound too good to be true. But it is true. The Stimulator works. It helps your body help itself naturally. What you've seen here are exactly the results that people have gotten. As a matter of fact, if anything, we've understated the relief people get. (Exhibit A, p. 10)

U. UNIDENTIFIED WOMAN #6 (Consumer Endorser): Oh, I think it works much faster than any medication. (Exhibit A, p. 3)

V. LINDA ANTHONY (Consumer Endorser): He puts the Stimulator here and here, it's gone within seconds. The pain is so excruciating and the relief is so wonderful. I mean, it's like no aspirin, no pain medication, no nothing can take that -- give you that instant relief. I mean I'm talking instant. (Exhibit A, p. 6)

W. UNIDENTIFIED MAN #2 (Consumer Endorser): It's always there. It's handy. You don't have to go make a call or set an appointment. It just helps relieve the pain instantly. (Exhibit A, p. 10)

X. JOHN TRIPPE (Consumer Endorser): I've been on Darvocets and other pain killers all this time. Darvocets and Darvons and codeines, Tylenol with codeine. And since I've been introduced to this I haven't used any of it. (Exhibit A, p. 3)

Y. UNIDENTIFIED WOMAN #4 (Consumer Endorser): Some things are addictive. You don't want to -- you end up relying on something that it causes other health problems. And I look for a natural way to deal with any health problems that I have. (Exhibit A, p. 3)

Z. GLEN MATZ (Consumer Endorser): Some of us can't just take aspirin. Some of us just can't take certain medications or anti-inflammatory drugs because they upset our stomach. This, I can relieve that pain and I don't have to swallow anything. (Exhibit A, p. 3)

AA. INSTRUCTION BOOKLET: In most cases, The STIMULATOR provides almost instant relief from pain. In cases of chronic pain, it may require several treatments per day over a period of time to achieve results. It has been our experience that as your pain decreases, the frequency with which you use the STIMULATOR will decrease also, until it's only necessary to use it on an occasional basis. (Exhibit B, p. 2)

We all hurt at one time or another, and the STIMULATOR can provide relief for almost everyone. (Exhibit B, p. 3)

Painful conditions which the STIMULATOR may be helpful for: painful joints; Stiff joints; Swollen joints; Muscle spasms; Sciatica; Frontal headaches; Occipital headaches; Migraine headaches; Cluster headaches; Stress headaches; Shoulder

pain; Back pain; Menstrual cramps; Carpal tunnel syndrome; Numbness and tingling; Allergies; Neck pain; Muscle strain; Foot cramps; Abdominal pain. (Exhibit B, p. 3)

Although the STIMULATOR may not work 100% of the time on 100% of your problems, we are confident that you'll find it extremely effective for the vast majority of your aches and pains as well as enabling you to provide relief for family and friends. (Exhibit B, p. 4)

BB. DR. GANDEE: Who needs the Stimulator? Basically, anyone can use the Stimulator because it's safe and effective. My grandmother is 96 years old and she uses the Stimulator every day. She's got leg cramps and feet problems and she uses it just to help her get through the day. (Exhibit C, p. 1)

CC. DR. GANDEE: Yet I'm sure that as you use the Stimulator and as I show you today how to use the Stimulator more effectively, you're going to find that you're going to be able to get relief most of the time. (Exhibit C, p. 1-2)

DD. DR. GANDEE: At first I really didn't see improvement. It felt a little bit better for a short period of time but then it would go back to what it was before. It took about a week until one day just out of the blue I noticed I had no more pain. (Exhibit C, p. 2)

EE. DR. GANDEE: As I work with the Stimulator, it is very obvious to me that soon this product will be worldwide. I believe that every household in America very soon will own a Stimulator. It might even go to the point where each individual person in the household will own a Stimulator because they'll want to keep it with them all the time. I also sincerely believe that the Stimulator will help you lead a more active, productive, and pain-free life. And as you share the Stimulator with your family and friends, which I hope you do and soon, I know that your family and friends are going to be calling you "Doc" or they're going to be asking for you to use the Stimulator on them. (Exhibit C, p. 7-8)

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

A. Use of the Stimulator will significantly reduce, relieve, or eliminate musculoskeletal pain, including pain in the back, feet, knees, wrists, knuckles, elbows, shoulders, ankles, joints, and calves; carpal tunnel syndrome; muscle spasms and strains; and sciatica.

B. Use of the Stimulator will significantly reduce, relieve, or eliminate abdominal pain and pain and discomfort caused by allergies, sinus conditions, diverticulosis, cramps, and menstrual cramps.

C. Use of the Stimulator will significantly reduce, relieve, or eliminate the pain caused by severe headaches, including but not limited to occipital, frontal, migraine, cluster, and stress headaches, and headaches caused by benign tumors.

D. The pain relief or pain elimination provided by the Stimulator is immediate.

E. Use of the Stimulator provides long-term pain relief.

F. For the treatment of pain, the Stimulator is as effective as, or more effective than, prescription and over-the-counter medications, including aspirin, acetaminophen, Darvon, Darvocet, and codeine.

G. For the treatment of pain, the Stimulator is as effective as, or more effective than, physical therapy, massage therapy, chiropractic treatment, acupuncture, acupressure, and reflexology.

H. Testimonials from consumers appearing in the advertisements and promotional materials for the Stimulator reflect the typical or ordinary experience of members of the public who have used the product.

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

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

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.