

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of)
)
)
ZYGON INTERNATIONAL, INC.,) DOCKET NO. C-3686
a corporation, and)
DANE SPOTTS,) DECISION AND ORDER
individually and as an)
officer of said corporation.)

)

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that 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 § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Zygon International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office or principal place of business located at 18368 Redmond Way, Redmond WA 98052.

Respondent Dane Spotts is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his office or principal place of business is located at the above stated address.

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

ORDER

I.

IT IS ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that the use of such product or program can or will have any effect on the user's:

- A. Health or bodily structure or function, including but not limited to sleep; weight, bodyfat content, or body shape or tone; immune system; eyesight or night vision; stress; or jet lag; or
- B. Smoking behavior,

unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation. For purposes of this Order,

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

II.

IT IS FURTHER ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that the use of such product or program can or will have any effect on the user's cognitive or mental functions or skills, including but not limited to reading, vocabulary, learning, foreign language, verbal or math skills; intelligence or I.Q. or that of the user's children; attention or concentration levels; or memory, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

III.

IT IS FURTHER ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program 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. Regarding the performance, benefits, efficacy, or safety of any food, drug, or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, or dietary supplement, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

- B. Regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Part III.A herein), unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

IV.

IT IS FURTHER ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

IT IS FURTHER ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

- A. Representing, directly or by implication, that consumers can receive a refund, through such terms as “money-back guarantee” or similar terms, unless respondents refund the full purchase price at the consumer's request in accordance with the provisions of Part V.B herein;
- B. Failing to refund the full purchase price in accordance with the terms of a guarantee, warranty or refund policy within a reasonable period of time after the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation. For purposes of this Part, a “reasonable period of time” shall be:

1. that period of time specified in respondents' advertisement or solicitation if such period is clearly and prominently disclosed in the advertisement or solicitation; or
2. if no period of time is clearly and prominently disclosed in the advertisement or solicitation, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation.

VI.

IT IS FURTHER ORDERED that respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, are jointly and severally liable for consumer redress as provided herein:

- A. Not later than the date this Order becomes final, respondents shall deposit into an escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this Order ("first escrow account"), the sum of \$150,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the first escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to any consumers:
 1. who, between the dates of October 15, 1995, and the date this Order becomes final, have returned or return any product(s) purchased from respondents to respondents for a refund within thirty days of their receipt of the product(s); and
 2. who have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s).
- B. Any funds remaining in the first escrow account after refunds have been paid to consumers under Part VI.A herein, in the discretion of the Commission:
 1. shall be used to provide redress to purchasers of the Learning Machine who request a refund not later than sixty (60) days after the date this Order becomes final and have not previously received either a refund pursuant to Part VI.A herein, a full refund from respondents, or a full credit from a credit card issuer for the purchase of the product(s);

2. shall be used to provide redress to purchasers who, prior to October 15, 1995, returned, or contacted respondents for authorization to return, any product(s) purchased from respondents to respondents for a refund within thirty (30) days of their receipt of the product(s); have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s); and whose identities become known to respondents or the Commission within sixty (60) days after the date this Order becomes final;
 3. shall be used to pay any attendant costs of administration; and/or
 4. shall be paid to the United States Treasury.
- C. At any time after this Order becomes final, the Commission may direct the escrow agent to transfer funds from the first escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the first escrow account and refund program provided herein, if any, shall be paid from funds in the first escrow account.
- D. Respondents relinquish all dominion, control and title to the funds paid into the first escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States and in the designated purchasers. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.
- E. Not later than the date this Order becomes final, respondents shall deposit into a second escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this Order (“second escrow account”), the sum of \$45,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to consumers if refunds owed to consumers pursuant to Parts VI.A and VI.B herein exceed the amount of money in the first escrow account.

- F. At any time after this Order becomes final, the Commission may direct the escrow agent to transfer funds from the second escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the second escrow account and refund program provided herein, if any, shall be paid from funds in the second escrow account. Any funds remaining in the second escrow account after all consumers have received refunds pursuant to Part VI.A, VI.B.1, VI.B.2, and VI.E herein shall be returned to respondents. If no funds from the second escrow account are needed to provide redress to consumers as provided herein, the funds in the second escrow account, together with accrued interest, shall be returned to respondents within seventy-five (75) days after the date this Order becomes final. If funds from the second escrow account are needed to provide refunds to consumers as provided herein, the funds remaining in the second escrow account, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be returned to respondents within one hundred twenty (120) days after the date this Order becomes final.

VII.

IT IS FURTHER ORDERED that within three (3) days after the date this Order becomes final, respondents shall, to the extent available, provide to the Commission, in computer readable form (standard MS-DOS diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of:

- A. the name and address of all consumers in the United States who purchased the Learning Machine;
- B. the name, address, and date of refund of all consumers in the United States who purchased the Learning Machine and received a full refund from respondents;
- C. the name, address, and date of credit of all consumers in the United States who purchased the Learning Machine and received a full credit from a credit card issuer for the purchase of the product(s); and

- D. the name, address, and date of refund of all consumers in the United States who purchased any product(s) from respondents and received a full refund between October 15, 1993 and October 15, 1995.

VIII.

IT IS FURTHER ORDERED that for three (3) years after this Order becomes final, respondents, and their successors and assigns, shall maintain and upon request make available to the Commission within three (3) business days:

- A. documents and records demonstrating the manner and form of respondents' compliance with Part VI of this Order; and
- B. copies of all correspondence and memorializations of other communications to or from any consumer regarding refunds or requests for refunds for any product(s) purchased from respondents.

IX.

IT IS FURTHER ORDERED that for five (5) years after the last date of dissemination of any representation covered by this Order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

- A. All materials that were relied upon in disseminating such representation; and
- B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis upon which respondents relied for such representation, including but not limited to, including complaints from consumers, and complaints or inquiries from governmental organizations.

X.

IT IS FURTHER ORDERED that respondent Zygon International, Inc., its successors and assigns, shall:

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

- B. For a period of 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 within three (3) days after the person commences his or her responsibilities.

XI.

IT IS FURTHER ORDERED that respondent Zygon International, Inc., its successors and assigns, shall notify the Federal Trade 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.

XII.

IT IS FURTHER ORDERED that respondent Dane Spotts shall, for a period of seven (7) years from the date of entry of this Order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment involving the advertising, offering for sale, sale, or distribution of any consumer product or service. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

THIS ORDER will terminate on September 24, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this Order that terminates in less than twenty years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and

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

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

XIV.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

By the Commission.

Donald S. Clark
Secretary

ISSUED: September 24, 1996

SEAL