

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	
)	
ALPINE INDUSTRIES, INC., a)	
corporation, and)	Civil Action No. 97-CV-509
)	
WILLIAM J. CONVERSE,)	
individually and as an officer)	Magistrate Judge Inman
of the corporation,)	
Defendants.)	

**PETITION FOR AN ORDER TO SHOW CAUSE WHY
DEFENDANTS AND PERSONS IN ACTIVE CONCERT WITH THEM
SHOULD NOT BE HELD IN CIVIL CONTEMPT**

INTRODUCTION AND BACKGROUND

1. In 1993, the FTC began an investigation of Alpine Industries, Inc., and a predecessor company to determine whether there was a scientific basis to support various claims, made in advertising and promotional literature, about the efficacy and performance of Alpine's "air cleaners." The FTC determined that the claims were not substantiated and notified Alpine and its chief officer, William J. Converse, that the agency intended to issue an administrative complaint against them for violations of the FTC Act, 15 U.S.C. § 41 et seq. Alpine and Converse, individually and as President of the corporation, signed an Agreement Containing Consent Order to Cease and Desist ("Consent Order") in February 1995. The FTC Commissioners approved the Consent Order which became effective October 2, 1995.

2. The Consent Order prohibits defendants ". . . in connection with the

manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning product" from representing, in any manner, directly or by implication, that: a) the machines "eliminate, remove, clear, or clean" any indoor air pollutant, or any quantity of an indoor air pollutant from a user's environment, or b) when used as directed, the machines prevent or provide relief from any medical- or health-related condition, unless at the time made the representations are supported by competent and reliable scientific evidence. The Consent Order also prohibits the defendants from making any efficacy, performance or health benefit claim unless scientifically substantiated.

3. The FTC reviewed the "substantiation" submitted as part of defendants' compliance report and concluded that it did not constitute "competent and reliable scientific evidence" to support the product benefits statements defendants and their representatives make in connection with the marketing, sale and distribution of their "air purifiers." Negotiations between defendants and the FTC failed to produce an agreement regarding the sufficiency of defendants' proffered substantiation. Accordingly, on December 30, 1997, the Department of Justice, at the request of the FTC, filed a complaint seeking injunctive relief and civil penalties against Alpine and Converse.

4. The liability phase of this case was tried to a jury in September and October 1999. On November 1, 1999, the jury returned a verdict finding that defendants, Alpine Industries, Inc., and William J. Converse, had made efficacy, health-benefits and product performance claims that fell within the scope of the Consent Order, and, that except for claims relating to removal or reduction of "cigarette smoke," "tobacco smoke," or "smoke," none of those claims was supported by competent and reliable scientific evidence.

5. On January 12, 2000, upon the motion of the plaintiff and after consideration of

the opposition of defendants, this Court issued an interim injunction barring the defendants from making express or implied representations regarding the ability of: a) Alpine "air cleaners" to eliminate, remove, or reduce indoor air pollutants other than "tobacco smoke," b) Alpine "air cleaners" to prevent or provide relief from health or medical conditions," and c) the sensor on Alpine "air cleaners" to limit the ambient level of ozone. The interim injunction also ordered that defendants mail a copy of the injunction to all Alpine dealers. See Exhibit A (interim injunction).

6. On January 12, 2000, Alpine "spun off" Alpine's entire marketing organization to a newly-formed Tennessee corporation called EcoQuest International. The president of Eco-Quest International is Michael Jackson. This is the same Michael Jackson who was (and may still be) Alpine's Vice-President for Marketing, and who is the president of Environmental Health Services, Inc., the firm that manufactures the Alpine "air cleaners." See Plaintiff's Opposition to Defendants' Motion to Dissolve or Modify Interim Injunction ("Plaintiff's Opposition"), pp. 7-9 and accompanying Exhibits D, E, F, and G; see also Supplement to Plaintiff's Opposition, Exhibit A.

7. EcoQuest International, Inc., and the Alpine/EcoQuest dealers have the exclusive marketing rights to Alpine's "Living Air" products. See Plaintiff's Opposition, Exhibit F.

8. Alpine, Converse, Jackson, and EcoQuest International, Inc. are in contempt of this Court's interim injunction in that: 1) are making claims that violate the interim injunction, ¶¶ 33-36, 40-55, infra, and 2) they are disseminating materials that violate the interim injunction, ¶¶ 37-39, infra.

ARGUMENT

A. Standard for Civil Contempt

9. "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly." Maness v. Meyers, 419 U.S. 449, 458, 95 S. Ct. 584, 591, 42 L. Ed. 2d 574 (1975). Where conduct effectively undercuts the authority of a court, the court may find contempt. See generally McComb v. Jacksonville Paper Co., 336 F.2d 187, 191-93, 69 S. Ct. 497, 499-500, 93 L. Ed. 599 (1949). In a civil contempt proceeding, the petitioner must show, by clear and convincing evidence that the respondent "violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." Glover v. Johnson, 934 F.2d 703, 707 (6th Cir. 1991) (quoting NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987)). Although the petitioner must show that the respondent had knowledge of the court order, wilfulness or intent to violate the order is irrelevant to the validity of a contempt finding. McComb v. Jacksonville Paper Co., 336 U.S. at 191, 69 S. Ct. at 499; Rolex Watch U.S.A. Inc. v. Crowley, 74 F.3d 716, 720 (6th Cir. 1996); In re Jaques, 761 F.2d 302, 306 (6th Cir. 1985); TWM Mfg. Co., Inc. v. Dura Corp., 722 F.2d 1261, 1273 (6th Cir. 1983); NLRB v. Local No. 327, 592 F.2d 921, 929 (6th Cir. 1979). Neither the frequency of violations nor the good intention of the violator is material. Screw Machine Tool Co. v. Slater Tool and Engineering Corp., 480 F.2d 1042, 1044 (6th Cir. 1973).

10. Once the petitioner has established that the respondent knew of an order and that the order was violated, the respondents, to avoid a finding of civil contempt must produce evidence of a present inability to comply with the order. Specifically, a respondent must show "categorically and in detail" why compliance is impossible. Rolex Watch, 74 F.3d at 720. "[T]he test is not whether defendants made a good faith effort at compliance but whether 'the defendants

took all reasonable steps within their power to comply with the court's order.' " Glover v. Johnson, 934 F.2d at 708 (quoting Peppers v. Barry, 873 F.2d 967, 969 (6th Cir. 1989)).

B. Purpose of Civil Contempt

11. "Civil contempt sanctions are designed to enforce compliance with court orders and to compensate injured parties for losses sustained." Downey v. Clauder, 30 F.3d 681, 685 (6th Cir. 1994). The magnitude of sanctions imposed should be assessed by weighing the harm resulting from noncompliance and the "probable effectiveness of any suggested sanction in bringing about the result desired." Glover v. Johnson, 199 F.3d 310, 312 (6th Cir. 1999) (citing United States v. Mine Workers, 330 U.S. 258, 304, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947)). If as part of a civil contempt proceeding a court imposes monetary sanctions and their purpose is to coerce compliance with the court's order, such sanctions need not match a "demonstrated" monetary loss. Id., at 313.

C. The Interim Injunction is a Definite and Specific Court Order

12. The Court's January 12, 2000, order is an order "granting an injunction" under Fed. R. Civ. P. 65(d). As required by Rule 65(d), the injunction gives the reason for its issuance:

[I]n light of the jury's verdict which found that the defendants made representations without competent and reliable scientific evidence as required by the consent order, entry of an interim injunction ... is indicated.

See Exhibit A. Further, the Court's order describes specifically and in detail the particular acts and practices defendants are to refrain from performing. Specifically, defendants are enjoined from making express or implied representations regarding: a) the ability of Alpine "air products" to eliminate, remove, or reduce indoor air pollutants other than "tobacco smoke," b) prevention of or relief from health or medical conditions allegedly attributable to use of Alpine "air cleaners,"

and c) the ability of the sensor on Alpine "air cleaners" to limit the ambient level of ozone. Id.

The interim injunction also specifically directed defendants to mail a copy of the interim injunction to all Alpine dealers. Id. On April 10, 2000, the Court amended the notification requirement by limiting its scope to those dealers who had sold Alpine units within the last 24 months and by permitting notification through the Alpine website, by newsletter or by mail. Exhibit B (April 10, 2000, Order). The Court did not dissolve the interim injunction and did not otherwise modify it.

Id.

D. Persons Bound by Injunction

13. Fed. R. Civ. P. 65(d) provides:

Every order granting an injunction and every restraining order shall set for the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, **their officers**, agents, servants, employees, and attorneys, **and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.**

(emphasis added.)

14. Courts look to Rule 65(d) to hold a nonparty in civil or criminal contempt of a court order. After all,

This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 65 S. Ct. 478, 481, 89 L. Ed. 661 (1945).

15. In Swetland v. Curry, 188 F.2d 841, 843 (6th Cir. 1951), the Court said:

The weight of authority is clearly in favor of the proposition that a

person not a party to an injunction suit may not be held guilty of contempt for violating the injunction unless he is shown to be identified with or is an aider and abettor of the party originally enjoined.

16. "Under Rule 65(d), a nonparty with actual notice may be held in contempt where the nonparty aids or abets a named party in a concerted violation of a court order." Independent Fed. of Flight Attendants v. Cooper, 134 F.3d 917, 920 (8th Cir. 1998); see also Reliance Ins. Co. v. Mast Const. Co.

activities and operations of Alpine. See Success Manuals, Trial Exhibits 2, 3; see also Plaintiff's Opposition, Exhibit D, pp. 11, 13-15, 17; Exhibit E, pp. 48, 55-61, 136-37.

F. Jackson and EcoQuest Have Knowledge of the Interim Injunction

19. Michael Jackson has, since 1994, been an officer of Alpine Industries. As pointed out in the preceding paragraph, it is he and Converse who, for years, have directed the activities of Alpine.

20. Michael Jackson now holds the title of president of EcoQuest International. See Plaintiff's Opposition, Exhibits A-C. According to defendants, EcoQuest purchased the entire Alpine marketing organization and has the exclusive right to market Alpine "Living Air" and "Living Water" products. See Plaintiff's Opposition, pp. 7-9, and Exhibits F and G.

21. Public statements, of which the Court may take judicial notice, make clear that Alpine, Converse, Jackson and EcoQuest are parties acting in active concert and participation with each other. See Plaintiff's Opposition, pp. 7-9, Exhibits A-G; Plaintiff's Supplement, Exhibit A. In fact, it is clear that EcoQuest is merely a continuation, under a different name, of the network marketing of Alpine "air cleaners" that has been in existence for years. Id.

22. According to William Converse, Michael Jackson, president of EcoQuest, has personal knowledge of the interim injunction. See Defendants' Motion to Dissolve, Converse Affidavit, ¶ 7.

23. Because EcoQuest acts through its president, Michael Jackson, and his knowledge can be imputed to the corporation, EcoQuest has knowledge of the interim injunction.

24. Rule 65(d) binds Jackson, and, through him and his continuing relationship with Converse and Alpine, binds EcoQuest, to the terms of the interim injunction. See United States v. Hochschild, 977 F2d. 208, 211 (6th Cir. 1992) (Sixth Circuit affirmed a criminal contempt

conviction against a corporation's president although he was not individually named in the injunction order stating "[t]his court has held that 'it is a basic equity principle that whenever an injunction, whatever its nature may be, is directed to a corporation, it also runs against the corporation's officers' in their corporate capacities. 10 W. Fletcher, Private Corporations § 4875 (1970 ed.)' ").

DEFENDANTS, JACKSON AND ECOQUEST ARE VIOLATING THE
THE INTERIM INJUNCTION AND ARE IN CONTEMPT OF A COURT ORDER

25. EcoQuest markets Alpine "air cleaners." Alpine dealers are now EcoQuest dealers. In describing the history of EcoQuest and of its products, the EcoQuest International website includes references to William Converse and includes the same stories about the beginning of the company and its marketing organization as have appeared in Alpine promotional materials for years. Compare Exhibit C, Declaration of Marilyn Neal, and pp. 1-5 of Attachments 1, 2, and 3; Exhibit D, EcoQuest Success Manual, pp 1-20, 30-34, 36-56 (products with same name and specifications as in Alpine Success Manuals); 14, 37, 70, 90, 136, 214 (profiles of Alpine sales leaders) with 1996 and 1998 Alpine Success Manuals, Trial Exhibits 2 and 3.

26. Eco-Quest International is the "only company in the world that can sell Living Systems [Living Air "air cleaners" and Living Water water purifiers] from Alpine Industries. . . ." and "[t]he two companies [Alpine and Eco-Quest International] will continue with the shared mission," See Plaintiff's Opposition, Exhibit F; see also generally Plaintiff's Opposition, Exhibit G, pp. 8-14.

A. Defendants, Jackson and EcoQuest Have Violated the
Notification Requirements of the Injunction

27. On January 31, 2000, this Court notified defendants by Order that a January 14, 2000, letter written by William Erhart, attorney for Alpine, which purported to explain the verdict

by describing "allowable" and "unallowable" claims, was "unacceptable." Alpine had posted that letter, rather than the injunction, on its company website in mid-January 2000. As of the date of service of this petition for a rule to show cause, that letter remains on the Alpine website. See Exhibit C (Neal Declaration), pp. 59-60 of Attachments 4, 5, 6.

28. On February 11, 2000, defendants filed a motion requesting that the Court dissolve or modify the interim injunction ("Motion to Dissolve"). In support of their Motion to Dissolve, defendants submitted an affidavit from defendant Converse. As a basis for deleting or modifying the notification requirements of the interim injunction Converse represented, under oath, that: a) Alpine's "top dealers" had been "informed" of the injunction at a convention, b) defendants had placed a "verbatim" copy of the interim injunction on the Alpine website, c) Alpine's "retained" employees had been mailed a copy of the injunction, and d) "all dealers that will be selling directly for Alpine in the industrial or commercial sector" had received a copy of the injunction. Converse opined in the affidavit that it would be "extremely" ineffective and costly to mail a copy of the injunction to all dealers. He requested that a mailing be limited to anyone who sold Alpine products in the preceding twelve months or anyone who received Alpine's newsletter. Defendants' Motion to Dissolve, Converse Affidavit, ¶¶ 1-4, 6, 9-11.

29. Plaintiff filed an opposition to defendants' motion to dissolve or modify on February 28, 2000 ("Plaintiff's Opposition"). Plaintiff's Opposition presented clear and convincing evidence that Converse's sworn representation that a "verbatim" copy of the interim injunction had been published on the Alpine web site was not true. See Plaintiff's Opposition, Exhibit H, Attachments 1 and 2. Plaintiff also demonstrated, by clear and convincing evidence that, as of February 25, 2000, defendants had failed to remove the "unacceptable" January 14, 2000, Erhart letter from their website. Id., ¶ 4, and Attachments 1 and 2. Further, plaintiff

established by clear and convincing evidence that defendants' sales representatives were continuing to make precisely the same efficacy, health-benefits, and product performance claims for Alpine "air cleaners" that they had made prior to the trial and that they were distributing some of the same marketing materials that the jury had found contained unsubstantiated claims. Id., ¶¶ 6-15, Attachment 3.

30. In late March, 2000, defendants sent a letter to the Court ("Erhart March 21 letter"). Apparently this letter was intended as a surreply in support of their Motion to Dissolve. Defendants appended to the letter an amended Converse affidavit. In his amended affidavit, Converse stated under oath that he had instructed that the text of the interim injunction be placed

and permitting notification through the Alpine website, by newsletter or by mail. See Exhibit B.¹

B. Defendants, Jackson and EcoQuest Make and Disseminate Violative Claims

33. Defendants have continued, through EcoQuest International and Alpine/EcoQuest dealers, through their marketing materials, through national television broadcasts, and through their website, to make claims that violate both the Consent Order and the interim injunction.

- a. Jackson, as president of EcoQuest International, has authorized dealers to continue to make unsubstantiated claims:

Eco-Quest dealers will still tell the story of Bill and Eva [and how when she went into their basement when Converse was developing the air cleaner, her migraine headaches disappeared] . . . We will still be able to talk about 3 million customers and testimonial letters.

Plaintiff's Opposition, Exhibit F.

- b. Defendants' dealers continue to make unsubstantiated claims during sales presentations. See Plaintiff's Opposition, Exhibit H, ¶¶ 7-14; see also, Exhibit F (Affidavit of Thomas Stoebig).
- c. Defendant Converse continues to make prohibited claims by repeating the story of how his wife's migraine headaches disappeared, purportedly due to Alpine "air cleaner" technology. See Exhibit G, Transcript of March 6, 2000, "700 Club" broadcast, pp. 23-24.
- d. Materials on the EcoQuest website make claims that violate the interim

¹ All Alpine dealers are now EcoQuest dealers. See Plaintiff's Opposition, Exhibits F, G; Exhibit E, (January 21, 2000, letter from Lovell to Walker). Defendants have never suggested that they intend to mail Alpine/EcoQuest dealers a copy of the interim injunction or that they will place a copy of the injunction on the EcoQuest International website or include a copy in EcoQuest International newsletters.

injunction. Specifically, EcoQuest states the following, in describing the XL-15 "air cleaner:"

America's #1 pollution problem is indoor air pollution!

Today's building methods and codes, and the demands for energy conservation, have created super-insulated, air tight indoor spaces. These practices result in lower heating and cooling costs; however, they also keep natural air cleaning agents outside while pollution is trapped inside.

Living Systems have been scientifically proven to eliminate odors, smoke and even second-hand tobacco smoke. Tobacco smoke is one of the most complex indoor air contaminants known. Other claims as to the effectiveness of Living air for the removal of mold, mildew, bacteria and viruses or particulate have not been fully substantiated by competent and reliable scientific studies.

EcoQuest® recommends you try Living Air by participating in a free in-home 3-day trial.

Join more than THREE MILLION satisfied customers in seeing for yourself how effective Living Air can be in your home!

We've all taken a walk after a thunderstorm and experienced the clean, fresh smell in the air. That's ozone at work. And it is this natural process that Living Air simulates indoors. It's that same process that enables Living Air to eliminate the up to 4,000 chemical gasses and particulate matter that are found in tobacco smoke, which contains many substances similar to size and irritation to common pollutants found in the home.

Exhibit C (Neal Declaration), Attachment 1, p. 11; Attachment 2, p. 13; Attachment 3, p. 13 (emphasis added); Exhibit H (Declaration of Elizabeth Stein), Attachment 1, p. 1.

34. The foregoing statements which have appeared continuously on the EcoQuest website, make the following claims that are prohibited by the interim injunction. Specifically,

a. The statement that "[o]ther claims as to the effectiveness of Living air for

the removal of mold, mildew, bacteria and viruses or particulate have not been fully substantiated by competent and reliable scientific studies," (Exhibit C (Neal Declaration), Attachment 1, pp. 11; Attachment 2, p. 13; Attachment 3, p. 13; Exhibit H (Stein Declaration), Attachment 1, p. 1), makes an implied claim that, the product is effective in removing mold, mildew, etc. Indeed, the implication is that at least some scientific substantiation for these claims exists.

b. The statements:

[w]e've all taken a walk after a thunderstorm and experienced the clean, fresh smell in the air. That's ozone at work. And it is this natural process that Living Air simulates indoors. It's that same process that enables Living Air to eliminate the up to 4,000 chemical gasses and particulate matter that are found in tobacco smoke, which contains many substances similar to size and irritation to common pollutants found in the home

Exhibit C (Neal Declaration), Attachment 1, p. 11; Attachment 2, p. 13;

Attachment 3, p. 13; Exhibit H (Stein Declaration), Attachment 1, pp. 1),

also violate the prohibition on efficacy claims in the interim injunction.

These statements expressly represent that ozone "enables Living Air to eliminate the up to 4,000 chemical gasses and particulate matter" in tobacco smoke. These express claims are directly contrary to the jury's verdict rejecting, as unsubstantiated, defendants' claims regarding the efficacy of "ozone" and "Living Air" products to remove organic gases and particulate matter from indoor environments. These claims directly violate the prohibition on such representations contained in the interim injunction.

35. The foregoing representations show, by clear and convincing evidence, that Jackson, and EcoQuest are in active concert with defendants Converse and Alpine Industries in violating the interim injunction and are, accordingly, in contempt of the prohibitions set forth in the interim injunction. "When an injunction has issued against a corporation, a subsidiary corporation or an independent corporation acting in active concert also may be bound by the order." Wright, Miller & Kane § 2956; see also Chanel Industries, Inc., v. Pierre Marche, Inc., 199 F. Supp. 748, 752 (E.D. Missouri 1961) (holding a newly formed corporation and its officers in contempt of an injunction order entered against a related corporation because the latter "had notice of the injunction and its application, and in fact, participated together as officers and employees in the effort to avoid it.").

36. Defendants, Jackson and EcoQuest have not shown "categorically and in detail" why compliance with the claims prohibition of the interim injunction is impossible. Rolex Watch, 74 F.3d at 720. They have not taken, or attempted to take, "all reasonable steps within their power to comply with the court's order." Glover v. Johnson, 934 F.2d at 708 (quoting Peppers v. Barry, 873 F.2d 967, 969 (6th Cir. 1989)). Rather, they have taken steps to circumvent the claims prohibition. Defendants, Jackson and EcoQuest are in civil contempt of the notification requirements of the interim injunction.

D. Defendants, Jackson, and EcoQuest Disseminate Violative Materials

37. Defendants and Jackson have authorized Alpine/EcoQuest dealers to continue to use promotional materials that violate the Consent Order and the interim injunction.

- a. Jackson has authorized EcoQuest dealers — Alpine dealers who were simply redesignated as EcoQuest dealers — to use existing stocks of Alpine promotional and marketing materials and simply put an EcoQuest

sticker or label on them:

Within the next few days you will begin to see Eco-Quest on our materials. A new manual will be here hopefully before the end of the month. An Eco-Quest product catalog will be unveiled in a week or so. Living Air and Living Water will be featured. . . . Stickers are being printed with the Eco-Quest logo so existing literature can be converted if desired. Remember though, we are selling Living Air and Living Water. There is nothing wrong with using the literature you have now.

Plaintiff's Opposition, Exhibit F (emphasis added).

During the transition and while the new literature is being developed . . . we're going to continue though in the interim to use Alpine literature. There's not a reason in the world to not continue to pass out Alpine's Success Manuals, literature and whatever. We've made arrangements for that.

Plaintiff's Opposition, Exhibit G, p. 15 (emphasis added). These directives are contrary to defendants' public statements that dealers have been instructed to destroy existing marketing materials. See Plaintiff's Opposition, Exhibit H, Attachments 1, 2 and Exhibit C (Neal Declaration), Attachment 4, p. 61; Attachment 5, p. 38; Attachment 6, p. 61 (Alpine January 19, 2000, press release quoting Converse: "[w]e've instructed our sales force to discard old literature, . . .").

- b. Dealers are in fact using the old, violative materials, specifically including brochures which the jury determined contained unsubstantiated product claims. Compare Plaintiff's Opposition, Exhibit H, Attachment 3, and Exhibit F (Affidavit of Thomas Stoebig), Attachments A (air brochure), B (XL-15 and 880 Brochure) with Trial Exhibit 4 (Air Brochure), Trial Exhibits 58, 83, 84 (XL-15 brochures and 880 brochure).

- c. Defendants' revised sales materials continue to include unsubstantiated product claims. See Exhibit D, EcoQuest Success Manual, pp.10, 26, 27, 29, 32, 33, 34 (efficacy claims); 46 (sensor claim); 60 (Living Proof); 70, 121(partial fax on demand includes tapes by Jackson and Converse, Olcerst particulate removal "study," rejected by jury, etc.); 164-65 (actual recruiting techniques); 170 (Denton testimonial regarding improvement in daughter's asthma, rejected by jury); 216 (dealer training quiz).

38. The foregoing demonstrates, clearly and convincingly, through the references to Alpine history and the success and testimonials of the Alpine sales leaders, and through the authorization to continue to use old Alpine promotional materials, that EcoQuest International, Inc. and Jackson are acting in active concert and participation with defendants. The foregoing also demonstrates by that defendants, Jackson, and EcoQuest International, Inc., are continuing to distribute promotional materials that violate the interim injunction.

39. "Under these circumstances, to permit [the nonparty] to do that which the court has enjoined the defendants from doing would be a stultification of the judicial process." Royal News Co., v. Schultz, 230 F. Supp. 641, 645 (E.D. Mich. 1964), aff'd, 350 F.2d 302 (6th Cir. 1965).

E. "Substantiation" and "Responses" on the Alpine Website
Make Claims That Violate the Interim Injunction

40. As the Court is aware, the jury found that, with the exception of efficacy claims relating to smoke, cigarette smoke, and tobacco smoke, none of defendants' efficacy claims were supported by "competent and reliable scientific evidence." Similarly, the jury found that none of defendants' health benefits claims were supported by competent and reliable scientific evidence.

The jury also found that the defendants' claims that the sensor on certain Alpine "air cleaners" limited ambient ozone levels to .05 ppm were likewise without scientific basis. The jury expressly found that defendants lacked competent and reliable scientific evidence for claims that Alpine "air cleaners" eliminate, remove, clear, or clean organic chemicals, gases, particulate matter, or microorganisms from indoor environments. The jury also rejected defendants' health benefits and sensor performance claims. The verdict necessarily constitutes a rejection of the defendants' evidence on these topics, of the opinions of defendants' experts and the "studies" upon which those opinions were based, and of the defendants' "testimonials."

41. The jury's rejection of defendants' "substantiation" evidence is incorporated into the interim injunction, which specifically bars defendants from making claims regarding the ability of Alpine "air cleaners" to remove any pollutants from indoor environments, or reduce their concentration, except for "smoke," "tobacco smoke," and "cigarette smoke." Nevertheless, within the last few weeks, defendants have placed materials on the Alpine website which they characterize as "substantiation" for various statements presented therein. See Exhibit C (Neal Declaration), Attachment 4, pp. 6-24, 41-46; Attachment 5, pp. 16-33, 40-46; Attachment 6, pp. 16-33, 40-46. In an effort to circumvent the prohibitions of the interim injunction, defendants include in these materials disclaimers purporting to say that the material presented does not constitute "claims."

42. The "substantiation" consists not only, in large measure, of the testimony and "studies" of Robert Olcerst and Jesse Steelman explicitly rejected by the jury, but of misrepresentations of the studies and testimony of two of plaintiff's trial experts. See Exhibit C (Neal Declaration), Attachment 4, pp. 6-24, 41-46; Attachment 5, pp. 16-33, 40-46; Attachment 6, pp. 16-33, 40-46.

43. The Alpine website contains an "Executive Summary" of "scientific research" which provides in pertinent part:²

Executive Summary of Efficacy Research

With regard to both background and substantiation relating to Alpine Industries' air purification systems, the following is a summary of research conducted by:

- Jesse Steelman, President of Envirocon Certified in Risk Management in Environmental Health; Industrial Hygiene in Comprehensive Practice; and Safety in Comprehensive Practice.
- Dr. Robert Olcerst, Industrial Hygienist and Environmental Toxicologist
- Mosely And Associates, Environmental Management Consultant.
- Dr Richard Shaughnessey, University of Tulsa
- Dr Richard [sic] Weschler

1) Particle removal through ionization (includes smoke, dust, molds, mildew, fungus, bacteria, cat dander, dust mites and allergens. Alpine commissioned a study relating to the reduction of particulate. ETL Testing Laboratories tested two different units in accordance with the American National Standard and Method of Measuring Performance of Portable Household Electric-Connected Room Air Cleaners. The testing company monitored particle size, ranging from .5 to .3 microns and found particle reduction over a period of 20 minutes ranging in 23.7 to 70.5 percent

Additional testing using the same protocol, which is designed for filter evaluation, not EcoTech gives CADR rating of 18,13,and 31 for S-D-P respectfully

2) Dr. Robert Olcerst's and H. Jesse Steelman's research and/or use of the product has shown there to be a substantial reduction in particulate suspended in indoor air by use of the machines. These particulate include many allergens. Both testify and there is a direct correlation between the removal of particulate, specifically allergens and antigens, and the amount of symptoms people would experience from allergies and other respiratory diseases caused by particulate.

Dr. Olcerst has done further studies using the air purifiers in conjunction with John Hopkins University, specifically the DACI Reference Laboratory for Dermatology, Allergy and Clinical Immunology. Dr. Olcerst found a 45 percent reduction in cat dander, dust mite antigens (structures that cause allergic reactions) and mold spores viability and resultant reduction in toxicity.

² Plaintiff has not included the portions of this Executive Summary dealing with health effects of various levels of ozone.

3) Gases removed from air by use of ozone. One of the best discussions of ozonization [sic] and its uses in air purification is taken from the book, Ozone by M. Horvatli.[sic] L. Bilitzky and J. Huttner. The authors state on page 259 that ozone provides "the 'purest' and 'most friendly to the environment' oxidant."

Testing by Mosely and Associates showed that a typical double bonded hydrocarbon material isobutylene as reduced by over 35% in just 2 minutes with concentrations of ozone at or below .05ppm. Dr Wescheler [sic] has testified that double and multiple bonded hydrocarbon materials (some 8000 chemicals are in the double bonded category alone) react very quickly with ozone and that the number of materials that will react quickly is expanded if one takes into consideration the hydroxyl and other radicals that are formed in the partial reactions with ozone.

Automobile exhaust emits a number of carcinogenic hydrocarbons. It has been known for at least thirty years that ozone will oxidize the carcinogenic benzopyrene into a less or non-carcinogenic material. Another advantage of using ozone is that when it decays, the only byproduct is O₂, or the form of oxygen which is required to sustain our existence.

There has been a long-standing commercial and industrial application of ozone in exhaust fumes and gases that can contribute to smog in the environment. Use and control of odors and the air exhausted from industrial establishments dates back to the 1930s. The odors removed included the oxidation of mercaptan, amides, phenols and sulfides, etc. The use of ozone in theaters, assemblies and halls for deodorization, refreshing or improving air in offices is widely used in conjunction with the air conditioning system. In this way, demand for make-up air is reduced as the recycled system furnishes air of sufficient purity. It has been shown that unpleasant smells, body odors, cigarette smoke, etc., can be taken care of by treatment with small amounts of ozone.

Storage facilities, warehouses and refrigerators can be disinfected in most cases by the emission of ozonized air. The oxidation of many compounds created odors in such premises has the advantage that it creates an atmosphere resembling pleasant, fresh air. For such a purpose, a very low ozone concentration of between .01 and .04 ppm is sufficient.

4) Cigarette Smoke. Through the use of ionization, filtration and ozonization, Alpine'

that the particulate in smoke would be significantly reduced by use of the Alpine air purifiers.

Testing of the EcoTech system done by Dr Shaughnessy at the University of Tulsa

with ambient ozone concentration.

* * * *

See Exhibit C (Neal Declaration), Attachment 4, pp. 41-43; Attachment 5, pp. 41-43; Attachment 6, pp. 41-43 (emphasis added). All of the underscored portions of the foregoing constitute efficacy claims (despite the disclaimer which appears at the end of the "summary").

44. The foregoing provides clear and convincing evidence that defendants are violating the claims prohibition in the interim injunction.

45. The jury rejected all of defendants' "studies" and testimony relating to elimination, removal, or reduction, "through ionization" of particulate matter, specifically including dust mites, allergens, and cat dander, and of microorganisms, such as bacteria, mold, mildew, and fungi. The jury rejected the testimony of both Olcerst and Steelman on these points. The statements to the effect that ozone at .05 ppm "will be effective" in keeping various organisms in check is contrary to the testimony of Dr. Eugene Cole and contrary to the verdict. The claims based on the work or testimony of Olcerst or Steelman, that Alpine "air cleaners" remove or significantly reduce bacteria, mold, mildew, fungus, particulate, allergens, cat dander, dust mites, and other pollutants, constitute patent violations of the prohibitions in the interim injunction.

46. Moreover, defendants introduced, and the jury rejected as not constituting "competent and reliable scientific evidence," the "studies" or articles referred to above. The jury rejected:

- a. The ETL "studies" referred to in paragraphs 1 (particle removal) and 4 (cigarette smoke) (included in Trial Exhibit 223, "Scientific Studies Relied Upon by Dr. Olcerst);
- b. Horvath & Blitzki, referred to in paragraph 3);

- c. a study by Nagy (which is the basis for the last subparagraph of paragraph 3) (Trial Exhibit 210);
- d. the "New Shelter" article referred to in paragraph 4) (Trial Exhibit 224);
- e. the DeMik article referred to in paragraph 6) (included in Trial Exhibit 223);
- f. the Olcerst DACI "Hopkins study" referred to in paragraph 2) (included in Trial Exhibit 223); and
- g. the Olcerst "Ozone Monograph" (Trial Exhibit 8).

47. The claims in the "Executive Summary on Efficacy Research" that are based on the foregoing evidence are glaring violations of the prohibitions in the interim injunction.

48. Certain of the information included in the foregoing "Executive Summary" relates to "studies" that either did not exist at the time of trial or which defendants chose not to submit into evidence at trial. This includes the Olcerst Williamsburg "study," the Mosely "study," and the Olcerst Johns Hopkins "study." Apparently defendants have decided that if information was not considered by the jury, defendants can rely upon it to make efficacy and health benefits claims. This position is wrong. The interim injunction contains an absolute ban on the claims enumerated therein. There is no exception to the ban for claims that defendants assert are substantiated on material that was not presented at trial. For the purposes of determining defendants' compliance with the interim injunction, it is irrelevant whether the information upon which defendants rely was presented at trial or even existed. The fact is that defendants are prohibited from making specified claims. The claims in the "Executive Summary" relating to particle, gas, chemical and microorganism removal and elimination, are all claims covered by that prohibition. Therefore, all of those claims violate the interim injunction.

49. Defendants also purport, in paragraph 4) of the "Executive Summary" to summarize research by and trial testimony of Dr. Richard Shaughnessy, one of the plaintiff's trial experts. Defendants completely misrepresent the findings of Dr. Shaughnessy's tests of Alpine XL-15 units. Those results, presented at trial, showed no particle removal due to operation of the machine. See Trial Exhibits 191, 192. Dr. Shaughnessy used environmental tobacco smoke as a challenge pollutant, and while there was trial testimony to the effect that, in the presence of ionization, particles of a similar size would rele 93end8.½76 ñne p9. ch §°P

³ The statement in paragraph 3) of the "Executive Summary" to the effect that the only byproduct of ozone is oxygen is also inconsistent with Dr. Weschler's testimony.

scientific evidence." These include efficacy claims which rely upon the testimony and "studies" of Robert Olcerst and Jesse Steelman. Id. As pointed out above, the jury specifically rejected the efficacy testimony of both Robert Olcerst and Jesse Steelman and the "studies" that they had performed. Nevertheless, defendants include them in their bibliography as substantiation for the Alpine rebuttal to the EPA Policy Statement.

52. The jury also rejected defendants' reliance on other studies, including the Elford study (Trial Exhibit 211) and the Nagy article (Trial Exhibit 210). Like the "Executive Summary of Efficacy Research," defendants rely on information that was not submitted to the jury — such as the Olcerst Williamsburg "study" and the Mosely "study" to substantiate the efficacy claims set forth in the Alpine response (such as the reduction of fungi, of aerosolized bacteria, and of hydrocarbons such as isobutylene) to the EPA Policy Statement. Again, the interim injunction does not permit defendants to make such claims simply because they chose not to submit the information they think supports the claims or because the information did not yet exist. Thus, all of the efficacy claims and representations included in the Alpine response to the EPA Policy Statement are blatant violations of the prohibitions set forth in the interim injunction.

53. The Alpine response to the EPA Ozone Generator Policy Statement, like the "Executive Summary of Efficacy Research," contains additional misrepresentations regarding the work and opinions of plaintiff's trial experts, Dr. Richard Shaughnessy and Dr. Charles Weschler. Contrast Exhibit C (Neal Declaration), Attachment 4, pp. 11-15; Attachment 5, pp. 21-25; Attachment 6, pp. 21-25, with Exhibits I, J.

54. Defendants have posted "testimonial" letters that include claims prohibited by the interim injunction on their website. See "You decide" pages, Exhibit C, Attachment 4, p. 35 (OK Tire Service letter that employees "breathe a lot easier"); 38 and 40 (Mondo letter); Attachment

5, p. 4 ("It [machine] makes us feel good, and we don't have to take our allergy medications anymore"); 8, 11 and 13 (Mondo letter implying removal of allergens and chemical vapors); Attachment 6 (same as Attachment 5). It is precisely this sort of health benefits claim that the jury rejected as lacking scientific substantiation. It is precisely these claims which, therefore, violate the interim injunction and warrant holding defendants, Jackson, and EcoQuest International, Inc. in civil contempt.

55. Converse also violates the injunction by stating: "The jury was not judging the effectiveness of Alpine's products - only the depth of Alpine's scientific evidence. This is an important distinction." See Exhibit C (Neal Declaration), Attachment 4, p. 61; Attachment 5, p. 38; Attachment 6, p. 61 (Alpine January 19, 2000, press release). This statement is not true and demonstrates that defendants are continuing to represent that Alpine "air cleaners" are effective in removing particulate, gases, chemicals and microorganisms from indoor environments. These statements misrepresent the jury's verdict and violate the interim injunction.

CONCLUSION

56. Plaintiff has shown by clear and convincing evidence that defendants, Jackson, and EcoQuest International, Inc. have made and continue to make claims that are prohibited by the interim injunction.

57. Plaintiff has shown by clear and convincing evidence that defendants, Jackson, and EcoQuest International, Inc. have disseminated and continue to disseminate materials that make claims that are prohibited by the interim injunction.
and to disseminate materials that make prohibited claims.

58. Defendants, Jackson and EcoQuest International, Inc. have not taken all possible steps to comply with the interim injunction. In fact, they have done everything they can to avoid

complying with the interim injunction, including transferring their dealerships to a different entity to avoid having to comply with the notification requirements of the interim injunction, misrepresenting the testimony and research of plaintiff's trial experts, and making claims that are expressly forbidden by the interim injunction.

59. The defendants have made clear on many occasions that they disagree with the jury verdict and that they are unhappy with the content of the interim injunction. Nevertheless, their unhappiness and dissatisfaction are no excuse for noncompliance with its terms. As the Supreme Court has held:

If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order. . . .The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until is it reversed by orderly and proper proceedings." [citation omitted]

Maness v. Meyers, 419 U.S. at 458-59, 95 S. Ct. at 591.

RELIEF REQUESTED

WHEREFORE, plaintiff United States of America respectfully requests that this Court issue an order directing Alpine Industries, Inc., William J. Converse, individually and as president of Alpine Industries, Inc., EcoQuest International, Inc., and Michael Jackson, president of EcoQuest International, Inc., to appear before this Court to show cause why they should not be held in contempt of the interim injunction entered by this Court on January 12, 2000, and following the issuance of an Order to Show Cause and after an appropriate hearing, enter a judgment of civil contempt against Alpine Industries, Inc., William J. Converse, EcoQuest International, Inc., and Michael Jackson, president of EcoQuest International, Inc., for violations of the injunction and impose the following sanctions:

- A. Order that, because the "Executive Summary of Efficacy Research" violates the interim injunction, Alpine Industries, Inc. remove that document from its website within 24 hours after entry of an order of civil contempt;
- B. Order that, because the Alpine Response to the EPA Policy Statement on Ozone Generators violates the interim injunction, Alpine Industries, Inc., remove that document from its website within 24 hours after entry of an order of civil contempt;
- C. Order that, because the efficacy and health-claims testimonials identified above and which appear on the Alpine website violate the interim injunction, Alpine Industries, Inc. remove those testimonials from its website within 24 hours after entry of an order of civil contempt;
- D. Order that, because the statements contained therein are unsubstantiated claims that rely upon information that the jury found did not constitute "competent and reliable scientific evidence," within 24 hours after entry of an order of civil contempt, Alpine Industries, Inc. shall remove the "Executive Summary of Efficacy Research" from its website;
- E. Order that, because the statements contained therein are unsubstantiated claims that rely upon information that the jury found did not constitute "competent and reliable scientific evidence," within 24 hours after entry of an order of civil contempt, Alpine Industries, Inc. shall remove the "Alpine Response" and accompanying Bibliography from its website;
- F. Order that, because they are a clear misrepresentation of the research and opinions of Drs. Charles Weschler and Richard Shaughnessy, Alpine Industries, Inc.,

remove all references to Drs. Weschler and Shaughnessy from its website within 24 hours after entry of an order of civil contempt (except that if Alpine leaves the EPA Ozone Generator Policy Statement on its website, after removal of the Alpine Response, the references in that Policy Statement to the work of Drs. Weschler and Shaughnessy shall remain intact);

- G. Order that, within 24 hours after entry of an order of civil contempt, Alpine Industries, Inc. publish on its website Exhibits I and J appended to this Petition;
- H. Order that, within 24 hours after entry of an order of civil contempt, Michael Jackson and EcoQuest International, Inc., be required to remove from the EcoQuest website the claims that are referred to or set forth in paragraph 33 of this Petition, specifically including but not limited to the Eva Converse migraine story;
- I. Order that, within 24 hours after entry of an order of civil contempt, Michael Jackson and EcoQuest International, Inc., be required to remove from the EcoQuest website the claims that are referred to or set forth in paragraph 33 of this Petition;
- J. Order that, within 24 hours after entry of an order of civil contempt, Jackson and EcoQuest International, Inc., remove from the EcoQuest International, Inc. website any efficacy, health-benefits or sensor performance claims that are covered by the interim injunction, specifically including the following:

[w]e've all taken a walk after a thunderstorm and experienced the clean, fresh smell in the air. That's ozone at work. And it is this natural process that Living Air simulates indoors. It's that same

process that enables Living Air to eliminate the up to 4,000 chemical gasses and particulate matter that are found in tobacco smoke, which contains many substances similar to size and irritation to common pollutants found in the home

and including but not limited to claims that rely upon or purport to rely upon any of the studies referred to in the "Executive Summary" or "Alpine Response" referred to above, and upon any trial or deposition testimony of Robert Olcerst or Jesse Steelman, or any "studies" in defendants' possession, including the Olcerst Williamsburg "study," the Mosely "study," the Olcerst Johns Hopkins "study," Olcerst's "Microbiological Assessment," Olcerst's "Ozone Monograph," "Particle Removal Efficacy by the Eagle 5000 and XL 15," Olcerst's "Ozone Monograph" or other papers provided to Alpine by Olcerst, any of the articles included in Trial Exhibit 223;

- K. Order that, within 24 hours after entry of an order of civil contempt, Michael Jackson and EcoQuest International, Inc., publish the interim injunction on the EcoQuest International, Inc., website and cause the interim injunction to be included as a part of all EcoQuest International, Inc. dealer websites and that the publication not include an explanation of "allowable" or "unallowable" claims, prepared by defendants, Jackson, employees of or dealers for Alpine or EcoQuest,

prevention or relief of any health related condition, including but not limited to allergies, cold, flu, tuberculosis, and breathing difficulties.

- M. Order that, in the event that defendants, Jackson and/or EcoQuest fail to comply with any of the provisions A-L above, each be assessed a penalty of \$10,000 per day until the date upon which those aforementioned persons have complied with such requirement.

Dated this 10th day of April, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **PETITION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS AND PARTIES IN ACTIVE CONCERT WITH THEM SHOULD NOT BE HELD IN CONTEMPT, with Exhibits A-J**, to be served this ____ day of April 2000 on:

J. RONNIE GREER
206 S. Irish Street
Greeneville, TN 37743
423-638-7534 (FAX)

by FAX (w/o attachments)
and Federal Express (w/attachments)

and on

WILLIAM A. ERHART
Marvin & Erhart
2150 Third Ave., North
Suite 20
Anoka, MN 55303
612-427-1178 (FAX)

by FAX (w/o attachments)
and Federal Express (w/attachments)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)

v.)

ALPINE INDUSTRIES, INC., a)
corporation, and)

WILLIAM J. CONVERSE,)
individually and as an officer)
of the corporation,)

Civil Action No. 97-CV-509

Magistrate Judge Inman

Exhibit H: Declaration of Elizabeth Stein

Attachment 1: Printout of EcoQuest International Website, March 1, 2000

Exhibit I: April 7, 2000, letter from Richard Shaughnessy to Elizabeth Stein

Exhibit J: April 5, 2000, letter from Charles Weschler to Elizabeth Stein