

1

FEDERAL TRADE COMMISSION

2

INDEX

PRESENTATION

PAGE

1 franchises. Indeed, I think the entire franchise
2 industry, itself.

1 George Fetzner was the dealer. He is no longer a dealer.
2 He failed in business after 18 months. And what I'd like
3 to show to the Committee is something that is, to me,
4 extremely telling.

5 I have a Snap-On franchise opportunity

1 to that and, indeed, we have it in Snap-On's UFOC as
2 Appendix J. And I brought along a copy for the Committee
3 because I'd like it entered into the record.

4 MR. TOPOROFF: Let me just ask you. This we
5 can keep?

6 MR. MARKS: Yes. That you can keep and I'll
7 make a photocopy of that and bring it up to you. And
8 here is a disclaimer that says, in essence, that the
9 prospective dealer, so that's the dealer who hasn't even
10 received the disclosure statement, but yet there's a
11 disclosure statement in Appendix J, which is different

1 franchisee, who is investing their money on the hopes of
2 obtaining a profit, and this just, in my opinion, sucks

1 And I might as well get to that first off
2 because I'm going to give you a copy, I'd like to leave
3 this with the Committee, of Appendix C of Snap-On's UFOC,
4 which was given to my client when they considered the
5 Snap-On opportunity. And I will tell you that doesn't
6 tell you very much. You could see that there's a lot of
7 litigation, but it is replete, you know, I have
8 highlighted it for the Committee, with the following non-
9 information. "The action was dismissed with prejudice
10 following the execution of a confidential settlement
11 agreement between the parties."

12 There is more non-information in this section
13 of disclosure than there is information. If the whole
14 point of a UFOC pre-sale disclosure is to tell a
15 prospective franchisee all the aspects of what they're
16 getting involved in certainly I always counsel clients
17 who come to me to look at the litigation section among
18 one of the first sections.

19 I also tell them to look at the terminated
20 franchisee section because this way we're starting to get
21 a balanced picture. But you can't get a balanced picture
22 from this because I -- I haven't done a count, but I
23 would say of the 27 pages of litigation I would estimate
24 approximately 75 to 80 percent of the information here is
25 non-information because it's subject to a confidential

1 settlement agreement between the parties and this is what
2 Mr. and Mrs. Fetzter received when they invested in the
3 franchise.

4 And I will tell you that although Mr. Fetzter's
5 name is on the franchise agreement, most franchise
6 agreements are family agreements. You have the
7 investment of spousal assets, either direct assets or the
8 second mortgaging of the family house or you may even
9 have, as in the Fetzter's case, borrowing money from her
10 father and his mother. And you're talking about
11 companies that reach out to entire families and ask for
12 investment dollars in their company.

13 A franchise is just not working for someone.
14 We all recognize that. You're asking for an investment.
15 And we all know that in an investment you should be given
16 full disclosure. And I think that that is not full
17 disclosure and that is something that the FTC should
18 seriously require in terms of full disclosure.

19 Now, I'd like to ask the Committee to take a
20 look at the arbitration clause or dispute resolution
21 clause because there are problems there. I'd like you to
22 enter into the record a copy of the dispute resolution
23 clause, which I think contains a lot of unfair
24 requirements.

25 The Fetzters reside in the State of New Jersey.

1 Their franchise is located in the State of New Jersey.
2 The State of New Jersey says if you have a dispute, a
3 contractual dispute, you have six years to bring an
4 action for breach of contract. You also have six years
5 to bring an action if there's fraud. Pursuant to this
6 arbitration clause it says that any claim shall be made
7 within one year following the conduct at or event of
8 occurrence.

9 Under this particular clause, my clients, who
10 were given this misleading income information, were still
11 operating and struggling to keep their Snap-On franchise
12 open -- and, by the way, they lost in excess of \$27,000
13 to \$28,000 of hard cash in 18 months. That doesn't
14 include debts that they still owe that they incurred
15 through credit cards and other loan vehicles. But even
16 while they were struggling to keep their business going,
17 according to this arbitration clause their rights of
18 action expired.

19 Now, I'm going to test this clause. I'm going
20 to bring an action in the New Jersey State Court because
21 I think this violates State Public Policy and I think any
22 provision of any arbitration clause which reduces or
23 truncates or makes it more difficult for a franchisee to
24 resolve disputes should be declared violative of public
25 policy.

1 The other way that I would phrase it is that
2 the FTC should say that any arbitration clause which
3 lessens State rights is to be declared ineffectual.

4 I also ask you to take a look at another
5 significant problem with arbitration. Now let me speak
6 about arbitration clauses.

7 Arbitration is a fair method of resolving
8 disputes. It lessens the Court load. It is said -- it
9 is said that it is speedier than Court litigation and
10 possibly it is. It is also said to be less expensive. I
11 don't necessarily agree with that. However, the one
12 thing that troubles me about arbitration is that the
13 decisions are not public. The decisions are
14 confidential. There is no written opinion or finding by
15 the Arbitrator as to what are the reasons for the
16 Arbitrator or Arbitrators finding in favor of one party
17 or the other, as well as the amounts awarded.

18 Again, if the purpose of a franchise disclosure
19 is full disclosure, I would think that the Trade
20 Commission would want a prospective franchisee to know
21 what disputes there were with a franchisor, how it was
22 resolved and on what basis an award was made.
23 Unfortunately, this clause stops you from doing that and
24 says that even if there's a finding in a particular one
25 franchise case, and I've given you 27 pages of lawsuits,

1 even if there was a finding in one case, you cannot use
2 that finding as a precedent, as a basis for other cases.

3 So if you have an improper practice that is
4 used by a franchisor throughout their franchise system
5 and it's used over and over with regard to franchisees
6 and they lose money, they have to reprove that in every
7 single case, unlike Court decisions which, as you are
8 aware, can form a basis of precedent and which the Court
9 can rely on in rendering its decision. In these
10 situations the Arbitrators are in the dark. And even if
11 they know of other cases, they can't rely on it because
12 each case must be proved over and over and over again.

13 Now, what does this mean to a franchisee whose
14 business is in trouble or, in fact, has failed? They've
15 obviously sustained financial losses and they want to
16 redress the wrongs. They now have to enter into the
17 arbitration process, which is going to become expensive.
18 To start arbitration you have to pay an administrative
19 fee of approximately \$750. I think that's through the
20 American Arbitration Association. You then have to pay
21 the Arbitrator's fees -- at least 50 percent because the
22 other side shares in it. And if your -- the matter in
23 dispute is over \$50,000 you have to have a panel of three
24 Arbitrators.

25 So for the first day you're looking at a

1 franchisee who's financially hobbled having to pay
2 somewhere between \$2,000 and \$3,000 for one day's worth
3 of hearing. And I point out to you that a lot of
4 arbitrations are not concluded within one day. They take
5 several days. In fact, I participated in a Snap-On
6 arbitration hearing in Philadelphia that took no less
7 than seven working days. That's a lot of money to
8 someone who's financially injured. You're talking about
9 piling insult on top of injury.

10 So if you have to repeatedly reprove these
11 facts, I suggest that clauses which say that you can't
12 rely on other arbitration decisions having similar facts
13 should be declared to be violative of Federal Regulatory
14 Policy. I think starry decisis or the right to rely on
15 precedent should be here and we should not use
16 arbitration -- we should not pervert the arbitration
17 function. We should not say well, this is a good thing,
18 therefore let's start clipping away at the rights.

19 And I will tell you that I'm going to enter
20 into the record another arbitration clause in a golf
21 score card type franchise that goes even further. It
22 says that there's a limitation of damages. It says that
23 you cannot get any damages where a franchisor has
24 unreasonably withheld or unreasonably delayed any consent
25 or approval of a proposed act by a franchisee. Now, that

1 could be considerable.

2 We know that there are issues with suppliers.
3 A lot of decisions have to be made by a franchisor. But
4 if a franchisor fails to act and as a result there's a
5 lease default and the entire franchise is lost, well you
6 can't get any recovery under this golf franchise. And
7 I'd like to enter that into the record.

8 I will also enter into the record --

9 MR. TOPOROFF: Can I just interrupt for a
10 minute?

11 MR. MARKS: Sure.

12 MR. TOPOROFF: There's nothing on this that I
13 can see. This recent document --

14 MR. MARKS: Right.

15 MR. TOPOROFF: -- that indicates the name of
16 the company.

17 MR. MARKS: I will supply that to the Committee
18 because I'm not sure of the exact name. But if you'd
19 like --

20 MR. TOPOROFF: Or even if we just had some
21 quick reference to it. Even just for purposes of the
22 record so we don't --

23 MR. MARKS: What I will do is I will attempt to
24 get the exact name this morning and I will either come
25 back on the record or submit it to you.

1 MR. TOPOROFF: Well, is there something that we
2 could indicate on here for now just to distinguish it
3 from the Snap-On materials?

4 MR. MARKS: Just call it a golf score card
5 franchise. It's the type of franchise where there is a
6 --

7 MR. TOPOROFF: I'll just put down golf.

8 MR. MARKS: Golf. That's fine. That's fine.
9 On the other hand I'm going to give you something that
10 I'm sure the Committee has seen before. I'm going to
11 give you a Subway arbitration clause.

12 The Subway arbitration clause caps the damage.
13 It says that the parties agree that the total of all
14 permissible claims, and I'm skipping here, shall not
15 exceed \$50,000.

16 Now, if you have something like that, what
17 you're doing is you're taking a good thing and you're
18 pushing it too far. You're taking the idea of
19 arbitration, which is a legitimate idea, and you're
20 saying oh, well we'll limit your damages -- oh, and by
21 the way, in Subway's arbitration clause you have to
22 arbitrate in Connecticut. Let's talk a little bit about
23 having to arbitrate outside where your franchise is
24 located.

25 Well, at the first blush it might not be so

1 terrible, but what happens if your franchise is located
2 in Wisconsin or Oregon? You now have to go to
3 Connecticut for arbitration.

4 What about your witnesses? Who's going to fly
5 them there? Who's going to pay for their lodging? The
6 franchisee who is financially destitute? This is unfair.
7 If you do business in a particular State, you have to
8 stand up and accept dispute resolution in this State.
9 This is -- this is a way of preventing entry into the
10 ballpark. This is financially daunting to franchisees to
11 vindicate any claims.

12 They're stopped at the gate. They can't even
13 get into the ballpark because it's too expensive to
14 travel to Connecticut. Now, of course, we're here in New
15 York and it's not that -- it's not that difficult to go
16 to Connecticut, but it's obvious -- and what about the
17 fact that you have to now probably hire Connecticut
18 counsel because they're closer? You don't want to take a
19 local attorney from New Jersey or New York and pay extra.
20 You're forced now to conduct a selection search for
21 competent counsel and this is more time, more costs.

22 I'd like to submit into the record also
23 something that came across my desk. Strangely enough in
24 the temporary legal market. This is an area that seems
25 to be growing within the legal industry -- legal temps,

1 if you will. And I happened to get a copy of a sales
2 brochure from Law Corps, which is selling a franchise.
3 It's really an employment franchise. An employment
4 agency franchise. But I was astounded to see in their
5 materials something that I thought had died many years
6 ago.

7 Is this Committee aware that according to the
8 United States Chamber of Commerce that after five years
9 93 percent of new franchises are still operating?
10 Compared to 23 percent of new independent businesses?

11 Somehow I think that the Committee imposed upon
12 the Blenheim franchise exposition shows within the last
13 two years that they stopped using this skewed survey,
14 which came out of the 1980s, which has obviously been --
15 found to be wholly inaccurate. It's at least countered
16 by Dr. Timothy Bates' study, which indicates that
17 franchises are only 25 percent successful.

18 So I'd like this entered into the record
19 because I think all franchisors should be aware that they
20 can't use documentation that has been declared by the FTC
21 to be unreliable.

22 Why am I here today? I'm here obviously to
23 help make the process more even handed. But I'm also
24 here for another reason. I think franchising is a very
25 legitimate way of doing business, but you don't in

1 today's period of time, especially with the negative
2 comments being made with regard to the franchise
3 industry, you don't hide behind these types of clauses.
4 You don't hide behind a clause that limits damages.
5 Effectively eliminates dispute resolution by putting it
6 outside of your State, making it too expensive. And I
7 think that the entire franchise industry would do well to
8 adopt some of these suggestions because it would enhance
9 their image and I think it's right and I think it's fair.

10 I'd also like to talk about one other issue and
11 that's encroachment. I have with me today Mr. Joe
12 Cristiano and I know you'll hear from him in a few
13 minutes. He's a Carvel franchisee. And he had a double
14 failure. He had total nondisclosure. He never received
15 a UFOC and he will tell you about that. And as part of
16 that UFOC, if he had received it and if it had been -- at
17 that time there were two UFOCs floating around. If it
18 had been for the benefit of the doubt the most recent
19 one, it would have alerted to him -- alerted him and his
20 wife to the fact that Carvel was going to sell Carvel
21 products in alternate -- through alternate distribution
22 channels within his market area.

23 Now, I'm using the frame market area because
24 I'm not talking about territories. I'm talking about
25 where a local franchise can expect to draw its business.

1 Well, he had no knowledge that Carvel was going
2 to be selling ice cream cakes and other novelties in
3 supermarkets, which were located within walking distance
4 of his store. Joe has closed his store. Joe cannot even
5 sell his store because of this problem that Carvel has
6 created.

7 I think there's a fair approach to this. I've
8 seen people say, well look, purchasing patterns change.
9 We're all subject to change. It's a fast changing world.
10 People may not go to the individual ice cream shop
11 anymore to get their ice cream. We all, according to
12 studies, I guess, work harder and longer and so we want
13 to get our ice cream, as well as our groceries or
14 whatever, as quickly as we can. But why sell and why ask
15 the Cristiano family to invest in a franchise with the
16 left hand and then take away a piece of it with the right
17 hand.

18 If supermarket distribution is, in fact, a
19 proper way of getting the Carvel product before the
20 public then let's make sure that the franchisee gets a
21 piece of those revenues that are generated, a fair piece
22 in his market area.

23 You're looking at me a little quizzically and
24 I'll tell you that I thought how this might be done. I'm
25 not an economist. But if my client can show that for a

1 period before certain alternate marketing channels were
2 open he was earning a level of income of X and after this
3 was instituted it was X minus Y, and it was not due to
4 anything else except this encroachment -- as a matter of
5 fact it's only fair that in his trade area which he
6 invested in in buying this franchise, he should get some
7 economic benefit from that.

8 I think that's a fair way to handle
9 encroachment and I think that there are some companies
10 that are moving toward this, but I think there should be
11 a total disclosure requirement regarding alternate
12 competition. And let's call it what it really is.
13 Competition from your franchisor. Let's not use fancy
14 words like encroachment or whatever. Most people who buy
15 franchises are not interested in these legal or economic
16 niceties.

17 How is your franchisor going to compete against
18 you? That should be a category. And I think it should
19 be disclosed.

20 If I can go off the record for one minute just
21 to see if I --

22 MR. TOPOROFF: Sure. Can we take a break?

23 **(A brief break was taken.)**

24 MR. TOPOROFF: Okay. We're back on the record.
25 Please continue.

1 MR. MARKS: Thank you. I think one of the
2 things that concerns me the most about disclosure is that
3 it's a toothless tiger and we have a very fine set of FTC
4 regulations. I think they're fair. I think they can be
5 improved, but I think they're fair. But you know what?
6 If they're violated --

7 I know that your budget is what it should be.
8 I have no qualms with your budget. And I know you're
9 doing as best as you can, but I think I read a report
10 that maybe you look into, and correct me if I'm wrong,
11 four to six percent of the violations that are reported
12 to you because you just don't have the staff, the money,
13 et cetera. And you know what, I'm not here to say that
14 your budget should be increased because I don't believe
15 in that.

16 I think -- I think the proper attitude was
17 exhibited by the New Jersey Supreme Court in a recent
18 case not involving franchises, but it involved the
19 consumer fraud act of New Jersey which as you are aware
20 is called "Little FTC Act" throughout the United States.

21 And in that decision the Court said you know we
22 don't have to list every single consumer fraud that
23 exists. We can't. They said the creativity of human
24 beings is continually evolving and there's always going
25 to be a way to defraud someone or cheat someone. But

1 what we can do is we can say that when there's a
2 violation we empower the citizens of our State of New
3 Jersey to be private attorneys general. And we have this
4 consumer fraud act and you can go into the State Court
5 and you can bring a cause of action for any consumer
6 fraud.

7 Well, we can't do that in New Jersey with
8 regard to all your regulation rules. In fact, as you are
9 aware, you can't do it really anyplace upon your
10 regulations. Your regulations are a fine athlete.
11 Unfortunately their legs and hands are tied. And I think
12 that this is probably not good for government in general
13 because why enact a fine set of regulations that really
14 cannot benefit all those individuals it is designed to
15 protect. If, in fact, your coverage is six percent, that
16 means 94 percent of every -- of all the other franchisees
17 who are aggrieved and defrauded cannot rely upon the
18 Federal government's regulations.

19 So I think that there should be a private right
20 of action of a company's any sort of revamping,
21 modification and amendment of FTC rule 436.

22 I thank you very much for your time and it was
23 a pleasure appearing here.

24 MR. TOPOROFF: Well, thank you. We appreciate
25 you taking the opportunity to speak with us. I do have a

1 few questions, as does my colleague, Myra. But before I
2 ask my questions it would be helpful for me to get a
3 little bit more information about your practice.

4 MR. MARKS: All right.

5 MR. TOPOROFF: How long you have been in
6 practice as well as -- obviously you represent
7 franchisees. If you could just fill me in a little bit,

1 But that doesn't mean that I can't look -- in
2 fact, I think it means that I can look at franchising
3 with about as objective an eye as you can because I think
4 that anything that's wrong in an industry should be
5 cleared up because it's the benefit. It benefits the
6 entire industry.

7 I would say that for the past ten to 12 years
8 if I have to take a guess -- and I wasn't prepared for
9 this question. I think I -- I probably handled well over
10 500 franchise and distribution matters.

11 MR. TOPOROFF: Well, that's very helpful
12 because it gives us some contacts.

13 First I'm going to raise some issues concerning
14 your last comments and that's on the private right of
15 action.

16 MR. MARKS: Right.

17 MR. TOPOROFF: I hope you're aware that in the
18 interpretative guides to our rule the Commission did
19 state its hope that Courts would construe the franchise
20 rule to confer a private right of action on individuals.
21 And I'm sure you're also aware that Courts have basically
22 rejected that view.

23 MR. MARKS: Yes.

24 MR. TOPOROFF: Finding that the Federal Trade
25 Commission Act, which is the enabling Statute doesn't

1 provide for a private right of action.

2 MR. MARKS: Correct.

3 MR. TOPOROFF: So my question really is doesn't
4 this require a legislative fix as opposed to something
5 that the Commission could do. Under the Constitution its
6 Congress that has access -- that has the privilege of
7 conferring private rights and access to the Federal
8 Courts.

9 So, for example, there are some Statutes that
10 the Federal Trade Commission enforces like the
11 telemarketing sales rule, the 900 number rule, where
12 Congress specifically did give a private right of action
13 under certain circumstances.

14 But it seems to me that this is not an area
15 that's really in the domain of the Federal Trade
16 Commission to really do anything about. And the
17 Commission does not have any power to grant access to
18 Federal Courts to provide a private right and again that
19 would require legislation from Congress.

20 So given that background, is there anything in
21 your view that the Commission could do to make it easier
22 for franchisees possibly to have their claims heard?

23 MR. MARKS: Well, first of all, I think there's
24 a lot that the FTC can do. Firstly, I think you're a
25 significant moral force and I think that -- and I'm well

1 aware of the fact that the problem does not lie within
2 the FTC itself, but within what I would say is a
3 clarification of the enabling legislation.

4 But if the FTC, when it appears before various
5 Congressional Committees, would say look, we have
6 received -- and I would encourage any franchisee to write
7 to the FTC or E-mail them and say look, we want the
8 benefit of your regulations. We want the rights that we
9 thought we were getting to be enforceable.

10 So I think you have a bully pulpit and I think
11 it should be used to spread the word that a private right
12 of action should be clarified or specifically enacted as
13 part of your enabling legislation.

14 I also think that by appearing here you will
15 not just consider that I'm here myself, but that I have
16 many people, not even clients, who are frustrated by the
17 fact that they can't enforce these regulations and they
18 have to do it through convoluted methods.

19 For example, I, myself, have argued under
20 various consumer fraud Statutes that the violation of any
21 action, and there is Court decision -- Court decisions to
22 this effect, that the violation of any State Statute or
23 regulation administrative, be it State or Federal, is a
24 consumer fraud.

25 In some situations I prevailed. You know,

1 other situations, I haven't. There are some decisions
2 that say well buying a franchise is not a consumer item.
3 Well, I have to tell you if the figures are somewhat
4 correct, that between 33 and 40 percent of all retail
5 sales occur through franchising in one form or the other,
6 that means that one-third of the population or more are
7 buying franchises. And I submit that probably next to
8 their house, if not greater than their house, this is the
9 biggest investment they're ever going to make in their
10 life and why shouldn't it be protected.

11 So I think you have a bully pulpit. I hope
12 you'll use it and realize that there's a ground swell of
13 people who want to see teeth put into this tiger.

14 MR. TOPOROFF: I have a few more questions.
15 You weren't here yesterday when we did discuss
16 improvements to the UFOC or disclosure law. And on the
17 assumption that disclosure laws are here to stay and we
18 certainly have an interest in improving them, I just want
19 to ask you some of the questions that we asked yesterday
20 just to get your sense of what your experience has been
21 in this area.

22 One issue that we covered was under item 3, the
23 litigation section of the UFOC, which you touched on.
24 One of the issues that we're wrestling with is right now
25 the Federal Trade Commission's rule on litigation

1 disclosure actually seems to be broader than the UFOC's
2 in that our rule requires the disclosure of suits that
3 are filed by franchisors against franchisees as long as

1 MR. MARKS: I'm glad you brought that up.

2 MR. TOPOROFF: Many of the comments and other
3 testimony before us has indicated that the turnover
4 information appears to be either inaccurate or that
5 there's double counting. We've seen the various
6 categories and how franchisors might list what happens
7 with a particular outlet.

8 Do you have any suggestions for us on ways that
9 the turnover information in item 20 might be improved?

10 MR. MARKS: Well, first of all, I think -- I
11 think that that's an excellent item that should be
12 clearly set out. As part of the Fetzer's suit, I have
13 documentation -- and it's not current. I will tell the
14 Committee that. That I have documentation from Snap-On's
15 own internal documents that for the half-field branch
16 which controlled my client's New Jersey franchise, that
17 according to 1986 figures there was a 20 percent turnover
18 rate. That's Snap-On's own figures and it will be
19 appended as an exhibit to the complaint which we are
20 about to file.

21 Twenty percent. That means that all these
22 people who think they're buying a career, they're going
23 to be in and out in five years or less. I don't think
24 that's what a lot of people who are searching to control
25 their own destiny, to be their own boss and want a

1 franchise to give them a good source of income -- and
2 let's be frank, a good job. They're paying for their
3 job. They're not walking into this saying, well, I'm
4 going to be out of this in five years.

5 So I would definitely like to see turnover
6 rates. And I think it's a relatively easy thing. You
ask the franchisor how many franchisees do you have in

1 Now, if that isn't -- that is a significant
2 thing that they should be advised of. And Mrs. Fetzer
3 will testify as to what she was told by Snap-On about the
4 prior dealer. And I think you should inquire of her what
5 she was told.

6 But these turnover rates, these churning of
7 territories, that's something that's very significant.

8 MR. TOPOROFF: So if you were to draft, let's
9 say, a new provision putting aside any specific case --

10 MR. MARKS: Right.

11 MR. TOPOROFF: -- but based upon your
12 information, what would that look like? What would be
13 your proposal specifically?

14 MR. MARKS: Okay. I don't know what number
15 we're up to on the UFOC, but I'll call it item number 26

1 language.

2 Now, I would say that maybe some tables such as
3 that which are now included in the new UFOC, which you
4 could just look at. You could say, well, all right,
5 here's what it's going to cost me. Here's operating
6 capital I need for four to six months, which, by the way,
7 is a problem with a lot of franchises because they don't
8 disclose the operating capital, which is required until
9 the business truly starts generating enough money if it
10 ever does to pay expenses.

11 But here's a real simple thing. You have a
12 table -- 25 percent, 22 percent, 13 percent, you know.
13 And then they can compare it because I'm sure that there
14 will be companies that will say that within their
15 industry they have the lowest turnover rate. They'll use
16 it as a marketing feature. And why shouldn't someone
17 who's looking to buy a franchise that sells luggage --
18 they would want to go into a franchise that has the
19 lowest turnover rate, the highest success rate.

20 So I think that would be very useful.

21 MR. TOPOROFF: Okay. Thank you. A few more
22 questions. Yesterday we touched on, also in the item 20
23 context, gag orders.

24 MR. MARKS: Yes.

25 MR. TOPOROFF: And by that we mean provisions

1 that franchisees might sign either upon termination or
2 while they are still within the system that basically
3 prohibit them from speaking with anyone else about their
4 experience within the system.

5 And a concern that we raised is well, if I'm a
6 prospect and I go to item 20 and I see the list of the
7 names and addresses of former or current franchisees and
8 if I call them and they can't speak with me, then I'm not
9 able to do my due diligence necessarily and find out to
10 my own satisfaction what's going on within this system.

11 So I want to ask, in your practice -- and this
12 is why I was asking about the nature of your practice.
13 On both the franchisee side and the franchisor side, have
14 you seen instances where franchisees were asked or, in
15 fact, did sign provisions like that? And the flip side,
16 have you ever advised franchisors or seen franchisors
17 that you may have represented that use gag orders like
18 this in settling disputes? Just so that we can get a
19 sense of perhaps how pervasive the franchises?

20 MR. MARKS: None of the franchisors that I have
21 represented have used confidentiality agreements to my
22 recollection. However, the opposite is true. I've seen
23 many confidentiality agreements, some which have a
24 limited term, two, three, some which have five or seven
25 years. But I'm generally adverse to any gag order and I

1 will tell you why.

2 I can't remember which Justice said, but the --
3 whichever Justice it was -- it might have been Justice
4 Holmes who said that the cleansing light of public
5 knowledge does a lot to correct improper or illegal
6 practices which occur within any area of commerce.

7 I think that gag orders really perpetuate the
8 perpetration of improper acts and I think that all fair
9 minded franchisors would want to see their
10 confidentiality agreements eliminated. I think it goes a
11 long way to say listen, we have an industry that is a
12 good industry, it's a good way to get into business.
13 We're not afraid to tell you what's really going on here.
14 We think we have the best way to go. We're not hiding
15 anything. And I think that's good for the industry all
16 across the board.

17 MR. TOPOROFF: I have one additional question
18 and I know Myra has a few questions. One issue that we
19 touched on yesterday is the timing for making
20 disclosures. And right now our rule, at least, requires
21 that a disclosure document be given out at the first
22 face-to-face meeting or at least 14 days, ten business
23 days before the consummation of the sale.

24 And a number of commentators and participants at
25 yesterday's meeting have suggested that perhaps in this

1 day and age when franchise sales are now on the Internet
2 and through telephone and fax and what have you, that
3 perhaps it's not as critical for us to have the first
4 face-to-face prague. That really maybe what we should
5 focus on is the second part and that is as long as
6 franchisees have 14 business days -- 14 days I should
7 say, to review the document before they sign on, that
8 probably is sufficient.

9 I, in particular, raise the concern whether
10 there may be instances that proposal is adopted where
11 franchisors may hook or string on franchisees or
12 prospective franchisees to the point where they're really
13 basically committed before they even see the disclosure
14 documents and perhaps the disclosure document at that
15 point would lose some value or worth because, in effect,
16 again the prospect may be already committed to the
17 purchase.

18 Would you have any problem or do you see any
19 potential downsides if the Commission were to adopt a
20 very clear cut 14-day time frame to review disclosures
21 and perhaps do away with the earlier disclosure trigger,
22 whether it first face-to-face meeting or some other
23 concept like that?

24 MR. MARKS: Well, I think I would have a
25 problem with that. I think that there is a fair method

1 of doing business that is presently in effect and I think
2 we should really just look at the Internet as another way
3 of getting information, another magazine, if you will.
4 It isn't a whole new world in that sense.

5 I think that we should keep the rule the way it
6 is because people are searching for a better way to --
7 for a way to better their life and to a certain extent
8 they're predisposed to hear that oh, if you buy this
9 you're going to improve your life.

10 I think we should keep in effect all the
11 safeguards that we have. I think the cooling off period,
12 the reflective period of the 14 days from the face-to-
13 face, I think it's important and I don't think that the
14 Internet should be regarded as anything that should offer
15 that.

16 MR. TOPOROFF: Okay. Myra.

17 MS. HOWARD: I just have a couple of questions.

18 MR. MARKS: Sure.

19 MS. HOWARD: This first sheet you had given us,
20 the selective financial data --

21 MR. MARKS: Yes.

22 MS. HOWARD: -- I'm clear. Could you just
23 explain the problem that you have with this being
24 included in the promotional materials?

25 MR. MARKS: I think that any chart which says

1 we've only gotten partial information from those who
2 responded to our survey is not an accurate chart.

3 MS. HOWARD: Okay. Well, let's make sure we're
4 talking about the same one. It's my understanding from
5 looking at this that this is simply information that was
6 obtained from Snap-On's annual report.

7 Okay. So this one -- this chart you've just
8 given me looks a lot more like this one.

9 MR. MARKS: Yes.

10 MS. HOWARD: Okay.

11 MR. MARKS: It's in a different form --

12 MS. HOWARD: Okay.

13 MR. MARKS: -- and it's given to you before you
14 even get the UFOC.

15 MS. HOWARD: Okay.

16 MR. MARKS: And what it does is it encourages
17 you to dream how well you're going to do and that's not
18 fair because it says right on there that the results of
19 this table are only from those dealers who responded and,
20 oh by the way, we can't tell you whether it's accurate or
21 not.

22 Well, I'm telling you if they can't tell me
23 that it's accurate, I don't want to see it in a
24 solicitation brochure and I certainly don't want to see
25 it in the UFOC.

1 MS. HOWARD: Okay. That clarifies that.

2 MR. TOPOROFF: And just for the record, to make
3 sure that we're clear on which document we're referring
4 to, this particular sheet is called the Dealer Sales
5 Distribution Sheet and that is the one that, I believe,
6 correct me if I'm wrong, Mr. Marks intended to give us
7 originally --

8 MR. MARKS: Yes.

9 MR. TOPOROFF: -- and it's --

10 MR. MARKS: Yes.

11 MR. TOPOROFF: -- to his statement.

12 MR. MARKS: Yes, it does and it comes out of
13 the Snap-On franchise opportunity brochure.

14 MS. HOWARD: Okay.

15 MR. TOPOROFF: Okay. So I think the record is
16 clear on that.

17 MS. HOWARD: All right. And I would just
18 request since we're going to be putting appendix J in the
19 record it also notes that the notes that follow the
20 statement are an integral part of this statement. If you
21 have those, I would like to include them as well just so
22 it's a complete picture.

23 MR. MARKS: I had it with me and I will -- once
24 I find the photocopy I will -- I will give you the notes.

25 MS. HOWARD: Okay. Great.

1 MRS. FETZER: My name is Debbie Fetzer. That's
2 D-E-B-B-I-E F-E-T-Z-E-R. I'm the wife of George Fetzer,
3 who was a Snap-On dealer for 18 months. Not a very
4 successful 18 months.

5 MR. TOPOROFF: Is there -- well, you know, feel
6 free to bring any matters to our attention and then after
7 that we might ask you some questions.

8 MRS. FETZER: Okay. My number one complaint
9 with Snap-On is -- I'm really nervous. He brought up a
10 -- Gerald Marks brought up a lot of the disclosures.

11 Bob Ertal was Snap-On or he still is Snap-On field
12 manager. He came to my home to interview my husband and
13 he gave us a little budget thing, blank, to fill out what
14 our, like, net worth is and so forth, what we need to
15 survive.

16 We came up with a figure and he verbally said
17 to us that you'll be able to make that no problem and
18 exceed it.

19 Should I say the figures?

20 MR. MARKS: Yeah.

21 MRS. FETZER: Okay. Basically -- we came up
22 that we needed like about \$400 a week. Bob Ertal did say
23 without myself working -- I was pregnant at the time that
24 we were doing this interview, and he knew that, of
25 course, a new mother -- I already have one child. You

1 know, I might be out of work for a little while.

2 He led us to believe that if George did get
3 into this Snap-On that he would be bringing home at least
4 -- netting at least \$500 a week and with that and with
5 the budget that we had shown him I would not have to
6 work.

7 For us that was a very number one selling
8 point. That made us start scrambling to come up with the
9 initial investment that -- he said we would need \$20,000
10 cash to buy the Snap-On business and then Snap-On would
11 finance the rest of it.

12 We told him the only way we would be able to
13 come up with that would be to borrow it and he said to us
14 go ahead, beg, borrow and steal as much as you want, just
15 when we go to the branch to do the final Snap-On
16 interview, don't let them know that.

17 We didn't think anything of that at the time.
18 We did not know that as far as Snap-On, as a corporation,
19 wanted their dealers to have the cash to start without
20 having to borrow it because after we found -- we found
21 out once you get into the business you need cash to keep
22 the business afloat. You have revolving accounts. We
23 buy the tool from Snap-On. We sell it to a customer.
24 They don't give us the money right back. They give it
25 back to us on installment loans.

1 So we needed the money to support this. We did
2 that by putting it on credit cards because we had already
3 signed, we got the tools, we got the truck, we're on the
4 road.

5 For us -- for me it was 18 months of going
6 crazy trying to find where am I going to get money to buy
7 milk. Our income -- we started the business in '95. My
8 daughter was born in August of '95. We started in
9 September actually on the road. I was out of work with
10 her until November when -- at first I had told -- I work
11 at Home Depot. I told Home Depot I probably won't be
12 back until January. I thought I would go back part-time
13 based on what Bob Ertal had told us we would be making.
14 It was no where near that. We made nothing.

15 The first year, I think, we lost our accounts
16 like \$7,000. And that doesn't include the lost income.
17 My husband was working for free basically.

18 Our initial cash investment also turned out to
19 be closer to \$27,000 because in addition to the \$20,000
20 we had to buy a computer, we had to buy a converter --
21 something for the truck to make the computer work on the
22 truck. So our initial cash investment ended up being
23 \$27,000. In the 18 months we put another, about \$30,000
24 on credit cards.

25 And finally I said there's got to be something

1 to this. I found Gerald Marks and we approached Snap-On
2 together because how my husband and I were reading the
3 contract was if we just told Snap-On we wanted to quit we
4 would owe them hundreds of thousands of dollars because
5 of the truck and so forth.

6 Snap-On -- we stayed in there for so long
7 because my husband really does love the tool, the Snap-On
8 tool as a whole he does like. He uses his -- does work
9 on cars and boats.

10 Also in April of '96 he got this award. I
11 refer to it as my sucker award because it says top
12 working. You would think it would be your sales of
13 \$8,000. It's not. This is the tools that he purchased
14 of \$8,000. It does not mean that he sold them and got
15 the money back.

16 That's basically my story, I guess. Oh, the
17 prior dealers.

18 Prior dealer -- the dealer we -- okay. When we
19 first went into it we had no idea what territory we were
20 going to get. Bob Ertal kept saying yes, there are
21 territories in your -- area available, but he didn't say
22 specifically where.

23 At the time we knew from talking to other
24 dealers that there was a Lakewood Hollow route open and a
25 Lakewood Jackson route open. We ended up with the

1 Lakewood Hollow route, which was previously -- the truck
2 and everything that we got from the previous dealer was
3 Tony Van Dora. He was in it for eight months. We did
4 ask why is he going out and they told us because of a
5 back injury.

6 Now, that we are out of it we found out from
7 this guy's father because Tony Van Dora will not talk to
8 us. We have his phone number, his card. He said I can't
9 talk about it. I don't know if he's under a gag order --
10 you know, the gag thing or what. Tony's father said he
11 went out of it because he couldn't support himself. He
12 was a single man living at home. My husband is married,
13 now we have two kids. How did Snap-On feel that we would
14 be able to support it if they knew that this guy couldn't
15 support it.

16 Another thing is there was another dealer
17 before that, I forget his name, that was in it for a very
18 short time also, but we were not told about that one.
19 And the dealer before him was Bill Grobow. He was a long
20 time dealer. He had like three of what Snap-On considers
21 routes now.

22 The size of my route --

23 MR. TOPOROFF: I'm sorry. I didn't hear that.

24 MRS. FETZER: The size of the route.

25 MR. TOPOROFF: The size? Yes.

1 MRS. FETZER: Snap-On said -- when we, you
2 know, finally signed all the papers and this is going to
3 be your route, is -- they said we would have 250
4 customers -- potential customers.

5 They had two bicycle shops. Snap-On, I guess
6 -- whoever, would go in, how many employees are here.
7 There's two employees. They put two potential customers
8 on that -- on our list. How many tools does a bicycle
9 shop need? They need a couple wrenches. They're not
10 going to spend \$100 for a wrench that they don't need.
11 Snap-On's tools are expensive. They had body shops.
12 Snap-On does not have a lot of body shop type tools.
13 Snap-On is more in the automotive, mechanical part, the
14 cars. I think he had like six or seven.

15 But the point is like he had one dealership.
16 The sales people were counted on that list. A sales
17 person doesn't use a tool. Why was he considered a
18 customer? That was a big complaint.

19 I think that's all I have right now.

20 MR. TOPOROFF: Okay. Well, thank you very much
21 for your remarks. I do have one question and that is you
22 said that your husband is currently out of the business?

23 MRS. FETZER: Yes.

24 MR. TOPOROFF: Okay. Is it that he just walked
25 away from the business? Was he formally terminated?

1 What was the process that he went through?

2 MRS. FETZER: He was not formally terminated.
3 We -- after noticing -- we did consider that starting the
4 new business it may take a few years before you really
5 show a profit. That we kind of thought ourselves. But I
6 did not, neither did my husband, know that all we were --
7 it was going to be a money pit. We just kept putting
8 money in, putting money in.

9 We also ended up with like bad money. We have
10 about \$15,000 of uncollectible funds. When it got to
11 that high I went to my husband and said this is it, we're
12 finished. So he just, you know, told Snap-On we're
13 getting out. We have turned in the truck and they bought
14 out part -- they bought out the route. They own the
15 route now. They didn't buy out everybody that owed
16 money. They left us with about \$15,000.

17 MR. TOPOROFF: Was there any formal agreement
18 that was signed?

19 MRS. FETZER: Not yet.

20 MR. TOPOROFF: Not yet. But that's a
21 possibility?

22 MRS. FETZER: Because -- yes.

23 MR. TOPOROFF: Okay.

24 MRS. FETZER: That's where we want to go -- I
25 guess, we have to do arbitration for because Snap-On

1 feels we still owe them money.

2 MR. TOPOROFF: Okay.

3 MRS. FETZER: And -- oh, okay. Snap-On has a
4 set up. You have two ways of getting your money from the
5 people that buy tools. There's EC Collection, which is
6 extended credit. Snap-On gives mechanic number one EC

1 promotional packets and have them shipped. He orders it
2 rather than George ordering it.

3 He did that for about four months before I
4 personally had to call Bob Ertal and say do not order
5 this. He ordered one more. I called the Snap-On branch
6 and told them -- that's how I finally got that to stop.
7 I had to call the branch and say do not send this. You
8 send this I'm not paying for it.

9 My husband didn't do that right at first
10 because he's like I'm a kid in the toy shop. You get a
11 new toy every month. You know, kind of like a book club.
12 It comes. This is good.

13 It's -- it is a very hard business. Snap-On is
14 constantly to the dealer buy this, buy this, buy this,
15 and they want the dealer to give it to the customers. In
16 the promotional packets they would also have like jackets
17 and hats and things like that. The dealer pays for that,
18 but the customer, there is no way a Snap-On customer is
19 going to pay for a Snap-On hat. That's something they
20 want for free, but Snap-On does not give that to the
21 dealers for free.

22 MR. TOPOROFF: Okay. Then why don't we go off
23 the record.

24 **(Off the record.)**

25 MR. TOPOROFF: Are we finished?

1 MRS. FETZER: I'm done.

2 MR. TOPOROFF: Okay. I'm sorry. I didn't
3 realize that you completed your remarks. Well, thank you
4 very much. We really appreciate your taking the time out
5 to speak with us today. We appreciate it.

6 Now we're off the record.

7 **(Off the record.)**

8 MS. HOWARD: All right. We're back on the
9 record, Just as a reminder I want to mention that this
10 is public workshop and the transcripts of today's
11 workshop, as well as yesterday's, will be placed on the
12 public record, including being placed on our Internet
13 Website.

14 So if you can go ahead and please give us your
15 name and spell it for the Court Reporter.

16 MR. CRISTIANO: My name is Joseph Cristiano,
17 spelled C-R-I-S-T-I-A-N-O. I live in New Jersey and my

1 from Carvel, which was supposed to have been delivered to
2 my wife and me directly to comment, to read, to review,
3 to determine whether this is a right investment for us.
4 We never received this document.

5 In this document I would have found out that
6 Carvel had alternate methods of distribution in mind, the
7 very methods of distribution that would have undermined
8 my business by producing and marketing their cakes in
9 supermarkets and other retail outlets in my backyard, in
10 my very trading area, that would have and has diminished
11 the revenues of my business.

12 Cakes represented then and represented up until
13 the time we lost the business approximately two-thirds of
14 our sales. Carvel is a 12-month a year business. It is
15 dependent on cake sales, which is the primary item for
16 sale in any given Carvel franchise. These cakes not only
17 contribute in my particular case two-thirds of the
18 revenue, but represent the very, very item that brings
19 this business through 12 months of activity.

20 Not having received the UFOC, I would have
21 learned about their alternative methods of distribution.
22 I consider myself to be an above average individual with
23 some 25 years of business background. This taught me one
24 thing, to review and carefully investigate and research
25 and I would have read and would have found out, as being

1 a prudent individual, I would never have bought this
2 franchise had I known that I would be competing with the
3 franchisor in my own backyard.

4 What this has done, it has undermined my
5 business. It is critically left in the minds of my
6 customers a credibility gap where I was charging more
7 money as they saw it for the product than they could
8 purchase it in a local supermarket. Not only did they
9 leave my store saying that the prices were less expensive
10 in surrounding supermarkets, but also a credibility gap
11 now existed between myself and my local trade. That I
12 was probably gouging them and why were my prices more
13 expensive than the supermarkets.

14 And I would claim that I'm making, and this is
15 very, very true -- this is a very good method of
16 distribution. This is what Carvel intended back in 1947
17 when he began franchising the stores. Those cakes, those
18 novelties, everything in that store was meant to be
19 produced in the store for distribution and sale in a
20 local market, that store's customers in their trade area.

21 Every Carvel is a manufacturing plant. Every
22 Carvel is an ice cream plant. All of these products were
23 meant for local trade and consumption. This is a very
24 unique -- this is supposed to be America's freshest ice
25 cream and that's exactly how everything had been touted by

1 Mr. Carvel and by the Carvel Corporation for many, many
2 years.

3 In looking at not having this document
4 available, we bought the business. We saw the decline
5 especially in 1995, our first full year of business
6 activity. We have raised our prices in '95, so it was
7 not appreciable at that time, but in 1996 the full -- the
8 full weight of their encroachment on my business, the
9 cannibalization of my business was felt in 1996 where I
10 saw dramatic reduction in revenues and of course, the
11 profit necessary to carry that business through a
12 12 month period.

13 Carvel was never meant to be a seasonal
14 business. Because of the many holidays that we have,
15 character cakes in all distribution was made available to
16 the public year round to accommodate every major holiday.

17 I'm very, very disappointed. I bought this
18 business -- I bought this business to carry me into
19 retirement. This business was meant to replace an
20 industry position which I held as product manager in the
21 copier field for 25 years. We took a great deal of money
22 to invest in this business. My wife, money that she had
23 received from an estate, my own money from a 401K that I
24 accrued while working for a manufacturer, all of these
25 monies came together to purchase this business.

1 And I can only say that we had to walk away
2 from the business on September 1st of this year, two
3 months short of the license and the rental agreement
4 termination. So some 60 days without the benefit of the
5 license and the rental agreement.

6 Carvel would have represented a job, the
7 purchase of a job basically to carry me into retirement.
8 Given my background in business and my ability to promote
9 the business and to grow the business -- I had always
10 been in marketing, in some phase of sales, all my life.
11 I enjoy doing this business because I felt that I had a
12 different flare. I had my public, my local public, to
13 purchase from me and to try to grow the business with
14 some outside accounts as well.

15 This particular business was something that was
16 simple. It was closer to home. And my wife and I felt
17 it would be an excellent way for me to earn a living and
18 carry me, once again I repeat, into retirement. Because
19 I did not have the benefits that should have been given
20 to me, namely to look at this document and know the
21 direction of the company, I would have never, as a
22 prudent person, purchase this business if I knew they
23 were going to compete directly with me. And I find this
24 to be fraud through concealment.

25 I'm not even sure to this day that the document

1 known as the UFOC was even published. I cannot even be
2 certain from anyone I've spoken to that this document was
3 available for me and my wife to review and decide whether
4 this is the investment for us.

5 So you're dealing at arms length when you buy a
6 regular business, an independent business. At least if
7 you have a UFOC you have the means by which some
8 protection, some additional element given to you so that
9 you can review numbers, proposed income, direction of the
10 company, and most importantly litigation. I would never
11 have bought a business knowing so much litigation against
12 Carvel, that those numbers of people had that much of a
13 beef against the franchisor. I would have steered clear
14 of Carvel Corporation. I would have gone elsewhere. But
15 not having this information, I was unable to make this
16 intelligent decision.

17 So this is the reason why. Not only am I in
18 Federal Court with encroachment with 49 other dealers. I
19 have found myself having to seek legal counsel in State
20 Court to protect my rights and to protect what is needed
21 for me through local counsel in State Court because of
22 the failure of disclosure from Carvel Corporation.

23 Basically that's all I have really to say.

24 MALE VOICE: Can we go off the record for a
25 second?

1 MR. TOPOROFF: Sure.

2 (Off the record.)

3 MR. CRISTIANO: Recently I found out by letter
4 from Carvel's -- Fellingham, the CEO of the corporation
5 , that five State Departments of Agriculture
6 have reported shortness of mix content through their
7 weights divisions -- weights and standards divisions.

8 It is my understanding that the bags of mix
9 have been shorted in these five States. Mr. Fellingham
10 has written a letter to the fold, to the franchisees,
11 indicating that he wishes to sue Ultra, the dairy
12 responsible for the shortage of these bad contents of
13 mix, as if to say perhaps that one of his companies was
14 wrong.

15 Now, Ultra is owned by Delwood. Delwood
16 Dairies is owned by Invest Corps as I understand it, the
17 very parent of Carvel Corporation. It almost sounds like
18 Mr. Fellingham is suing his own corporation, his own
19 parent.

20 He supposedly is suing Ultra for 80 Million
21 Dollars to try to obtain damages for all of the
22 franchisees. Over what period of time he's not sure, but
23 he does know that this has been going on for some time.
24 And there are many, many accounts as well, which are in
25 the Federal Courts against Carvel.

1 MALE VOICE: Anything else?

2 MR. CRISTIANO: That is all.

3 MS. HOWARD: Thank you.

4 MR. TOPOROFF: I just have one question really
5 by way of clarification. When you purchased the
6 franchise did you deal directly with Carvel? Was this a
7 new outlet that you purchased?

8 MR. CRISTIANO: This particular outlet was a
9 resell. It had been there 17 years prior, 1997, when I
10 took it over in 1994, April. So this counted as a --
11 even though it's a resell I was still to receive full
12 disclosure as a new buyer, as I understand, of that
13 franchise resell.

14 MR. TOPOROFF: Now, when you purchased it did
15 you purchase it from the current owner or did you
16 negotiate with Carvel for the purchase of the store?

17 MR. CRISTIANO: I negotiated initially with the
18 current owner and then, of course, I was referred to
19 Carvel Corporation to obtain credit information and to be
20 -- basically to qualify and to be approved by Carvel
21 before any transfer could occur.

22 MR. TOPOROFF: So Carvel approved the transfer?

23 MR. CRISTIANO: Carvel approved the transfer.

24 MR. TOPOROFF: Okay. That's the only really
25 clarifying question that I have. Myra?

1 MS. HOWARD: Yeah. I just have one clarifying
2 question as well. You said that had you received a UFOC
3 document you would have discovered the alternative
4 methods of distribution?

5 MR. CRISTIANO: Yes. Yes, ma'am.

6 MS. HOWARD: So does that mean that you've seen
7 one of these documents and their alternative methods were
8 listed in it? I'm not --

9 MR. CRISTIANO: I only learned about the
10 alternate methods of distribution after the fact. I
11 never received the benefit of the UFOC, any disclosure,
12 anything in writing, any protection for my wife and me to
13 know what was going on. We never knew that we would be
14 competing with Carvel Corporation in our own backyard at
15 prices lower than our own.

16 MS. HOWARD: Okay. Thank you.

17 MR. CRISTIANO: You're welcome.

18 MR. TOPOROFF: I'll also echo that. I
19 appreciate your coming and speaking with us today. It
20 was very helpful. Thank you.

21 MR. CRISTIANO: Thank you very much.

22 MR. TOPOROFF: We can go off the record?
23

24 **(Off the record.)**

25 MS. HOWARD: Okay. We're back on the record.

1 And just by way of reminder, I want to mention that we
2 are at day two of our public workshop conference in New
3 York and this is public workshop. We will be
4 transcribing the statements from today and they will be
5 placed on the public record, including our Internet site.

6 So with that, if you can introduce yourselves
7 and please spell your name.

8 MR. B. HOAR: My name is Bruce Hoar, H-O-A-R.

9 MR. T. HOAR: And my name is Tom Hoar, Jr., H-
10 O-A-R.

11 MR. B. HOAR: Okay. I'm going to start. I'm
12 here to address issues of importance to me as a small
13 business owner. My family owns Thomas E. Hoar, Inc., a
14 former Hanes underwear franchisee distributorship in
15 Holbrook, New York.

16 At the time our Hanes franchise was terminated
17 in 1986 after 30 years of distributing Hanes product,
18 annual revenues had reached around three and a half
19 million dollars. We had just completed construction of a
20 state of the art distribution center with new computers
21 and material handling capabilities and employed
22 approximately 20 people full time.

23 Over 90 percent of the product we distributed
24 through Thomas E. Hoar, Inc., was brand specific and only
25 available to use through Hanes. We were always

1 considered one of Hanes' finest and most productive
2 distributors. Today Thomas Hoar Inc., no longer a
3 franchise of Hanes, has no employees.

4 On May 22nd, 1986 Thomas E. Hoar, Inc.,
reluctantlmamam~ p p €ditors f f

1 Each choice offered is as potentially
2 destructive as the next offering no real alternative and
3 the franchisor hopes it will provoke the franchisee into
4 committing some contractually breachable offense.

5 Just 15 business days after we filed suit on
6 May 22nd, Sara Lee noticed our termination in a letter
7 dated June 13, 1986, effective August 12th, 1986,
8 ostensibly for failure to pay outstanding invoices. No
9 demand letter proceeded this notice and no Hanes
10 distributor franchise had ever been terminated for lack
11 of payment nor has any since.

12 Invoices referred to in the notice of
13 termination were just 12 days overdue at the time.
14 Non-payment was naturally used a pretext for our
15 termination.

16 A Sara Lee corporate mandate in or around the
17 start of Sara Lee's fiscal 1986, which began July 1985,
18 had dictated the reduction of the number of its
19 distributors for the signing of the 1988 distributor
20 franchise agreement. A Sara Lee executive secretary, who
21 has asked to remain unidentified for fear of retaliation
22 by Sara Lee, informed me last year after discovery was
23 closed, that an objective in the standards of performance
24 for a particular high ranking Sara Lee executive
25 reporting to her boss in 1985 was to reduce the number of

1 Hanes distributors in order to facilitate "going direct".

2 A more specific goal to be accomplished by this
3 executive in order to receive a more favorable review,
4 which was also seen by this person, for performance in
5 Hanes' fiscal year 1986, beginning July 1, 1985 to June
6 30, 1986, was to eliminate the Thomas E. Hoar Company.

7 Former Sara Lee executives employed by Hanes
8 during the relevant time period have testified under oath
9 that their former boss, President and CEO of Hanes, Jack
10 Ward, wanted to "set an example of Tom Hoar".

11 Incidentally, Mr. Ward resigned just 12 business days after
12 this case received its first and only publicity, a
13 Winston-Salem Journal article dated June 1996. He was 52
14 years old at the time.

15 Most debilitating to our family has been the
16 entry of judgement on one of Sara Lee's counterclaims
17 against Thomas E. Hoar, Inc. in 1992. By the way, in
18 1989 my brother Tom Jr., sitting next to me, traveled to
19 Washington, DC and suggested a zero/zero walkaway to end
20 the suit nearly three years before they secured this
21 judgement. Sara Lee's attorneys said no and that "as we
22 see it, you owe us a million dollars". This judgement,
23 which now stands at close to two million dollars with
24 interest is now executable as we wait appeal. Sara Lee
25 has recently refused stipulating to a voluntary stay

1 pending appeal.

2 Sara Lee's fraudulent counterclaim argued these
3 monies, every penny of every promotional dollar ever
4 advanced to the Thomas Hoar Company from 1980 to 1986
5 plus interest were due them when they knew otherwise.
6 They knew it not to be true when they filed, and they
7 know it not to be true today. Their own witnesses have
8 testified to this.

9 The filing of that counterclaim marked the
10 start of the perpetration of fraud not only on the Hoar
11 Company, but on the Court itself. Banks pulled lines of
12 credit. The judgement against Thomas Hoar, Inc., made
13 growth of the surviving brother/son company Bruce E.
14 Hoar, Inc. impossible and keeps it crippled to this day.

15 Ironically, filing of that counterclaim also
16 belied the original purpose of the audit demand explained
17 initially by Sara Lee/Hanes as routine policing to ensure
18 compliance. They later explained it was because they had
19 proof that we had double-dipped discount allowances.
20 Both these ruse explanations failed miserably during
21 extensive questioning by our attorneys as late as 1995.

22 There is only one true explanation for the
23 audit demand and it makes Sara Lee's attorneys very
24 uncomfortable. The audit was simply a bad faith, unfair
25 and malicious method of provoking a technical breach of

1 the franchise contract.

2 In a desperate attempt to avoid a trial at all
3 costs, Sara Lee brought motion after motion over these
4 past 12 years. They have been successful in eliminating
5 all our claims because there is a void of good franchise
6 legislation and/or case law that would have safeguarded
7 our Hanes franchise and made harassing us and provoking
8 our termination a risky, if not fatal, economical
9 alternative to honoring our franchise agreement to term.

10 Up until the judgement was entered, we have
11 enjoyed excellent relationships with a number of banks
12 after 35 years in business and could routinely command
13 million dollar lines of credit. This fraudulent Sara Lee
14 claim has also caused the judicial process to endure
15 years of scheduling unnecessary litigation dates
16 contributing to the backlogs in our Court.

17 Sara Lee sued my father personally for
18 compensatory and punitive damages in 1990 for defrauding
19 Hanes of the promotional monies. I believe they did this
20 in an attempt to bring him to his knees and end the
21 charade in their favor, of course, which by this time in
22 1990 had the potential for really getting out of hand.
23 It did. Upon information and belief, Sara Lee has paid
24 its Counsel, Washington law firm Covington & Burling,
25 over Six Million Dollars to pursue and destroy Tom Hoar,

1 man and company.

2 I'm now a member of the American Franchise
3 Association. I was unaware of its existence until very

1 public, as well as copies will be posted on the Internet
2 at our Website.

3 So with that background, I'm going to turn it
4 over to the speaker and please identify yourself and
5 spell your name and then proceed.

6 MS. SANDOW: Sure. My name is Iris Sandow and
7 I am from Sullivan County, New York. And I am speaking
8 on behalf of myself and a group of former Blimpie
9 franchisees who are involved in a situation -- a
10 situation with a common thread. And I'd like to try to
11 make a long story short. I have with me Ed Sheskier, who
12 is one of the former Blimpie franchisees in the group.

13 To begin, to make a long story short, we, as a
14 group, bought Blimpie franchises individually. There
15 were five Blimpie franchisees in the Hudson Valley
16 region. Blimpie had -- this was about two or three years
17 ago. Blimpie had previously not been in the Hudson
18 Valley region and the common thread is the fact that we
19 were all, in various ways and in many ways, misled by the
20 area developer. And I'll explain that in a little more
21 detail and I'll go into detail in my own situation, which
22 is different from the others.

23 Blimpie is taking, what I think, is a very
24 unique position legally and I'm not a lawyer, and they're
25 saying -- and I have a copy of a lawsuit that Blimpie

1 filed. And they're saying to us pretty much that they
2 subsequently terminated the area developer's contract
3 with them or whatever it's called, and they're suing him.
4 And they're saying to us, you're right. He's a bad guy.
5 You're right. Everything he told you wasn't fair and
6 probably falsely induced you to buy franchises. However,
7 we're not responsible.

8 And that's -- you know, we only dealt with this
9 area developer as Blimpie's representative. Whether
10 technically they -- you know, they term it that way or
11 not, each of us -- in my case, I read an article in a
12 business publication a couple of years ago about Blimpie
13 and I called the main number of Blimpie in New York City
14 and they put me in touch with this area developer. I had
15 every reason to believe that he was representing Blimpie
16 and that anything he told me had the support of Blimpie
17 behind him.

18 In the case of the other people in my group, I
19 have a copy of an ad that appeared in the local newspaper
20 in the Hudson Valley and it give Blimpie's 800 -- it
21 talks about Blimpie first time opportunity, Organ,
22 Dutchess and Putnam Counties, and it gives Blimpie's 800
23 phone number. The main phone number for Blimpie.

24 So that's -- you know, it's kind of
25 interesting. I'll be happy to leave you copies of this

1 -- of everything that I'm mentioning here.

2 Also -- and I'll go -- I'm going to start from
3 the end and then go back, but I have a letter that I
4 thought was really interesting because -- because of my
5 persistence and we have a rather feisty group and I think
6 that the area developer never counted on us all getting
7 together and joining forces.

8 We had a meeting with the CEO of Blimpie, Tony
9 Conza, last July -- last August actually. And I just
10 want to read you one paragraph from a letter that his
11 secretary sent me confirming the meeting.

12 Mr. Conza -- it says Anthony Conza and Charles
13 Leanness would be available to meet with you at our New
14 York offices on August 29th. Mr. Conza wants you to
15 know, however, that your fax was incorrect in that it
16 stated that you were sold something by an agent of
17 Blimpie International. You should also know that, since
18 Blimpie International had no participation nor
19 involvement with you and your association with the
20 Blimpie location, that we bear no responsibility thereto.

21 I mean, who was the letter from. It's from
22 Blimpie and we bought Blimpie. So, you know, it's kind
23 of like a very vague thing and I know that -- I know that
24 the government looks very strongly on falsely inducing
25 people to buy franchises and I think you have a situation

1 here that might be unique and might be precedent setting
2 in that a franchisor is able to hide behind an area
3 developer. They can let an area developer -- you know,
4 look the other way while he's doing whatever it is he's
5 doing out in the field and then say we had nothing to do
6 with it.

7 And now I'd like to give you more specifics
8 about my situation. I called Blimpie. I was interested.
9 What really appealed to me was -- my background is
10 marketing and public relations. I wasn't about to open a
11 sandwich shop and make sandwiches. That's not what I do
12 well. But I was intrigued by the whole area developer
13 concept and I thought maybe there's a way I could become
14 an area developer because I like to market ideas.

15 The area developer met with me and he said to
16 me -- he said that he -- from the very first meeting, you
17 know, saw what my interest was, told me that I'm like --
18 that the timing was both good and bad in that he was
19 about to become the area developer. At that point he was
20 still technically, on my first meeting with him, an
21 employee of Blimpie. And he said he's about to resign
22 from Blimpie, he worked in the corporate office, and be
23 the area developer and that he had put a group of
24 investors together to buy the Hudson Valley region area
25 and that there was no marketing person and that gee,

1 maybe I could come in as the marketing person. And that
2 appealed to me.

3 And we had subsequent meetings. The second
4 time we met with him he said okay, now I'm wearing my
5 other hat. I'm now an area developer. And he proceeded
6 to show me projections on what type of sales we could
7 expect, which were inflated and, of course, he didn't
8 leave me copies of anything and we have no proof that he
9 did that.

10 So to make a long -- again, I'll try to make
11 this -- it's a very long story and it's been -- like
12 we've been living this for a couple years and it's been
13 really, you know, a bone in my throat and a very
14 upsetting thing and it also has affected my business
15 reputation in the community where I had a very good
16 business reputation.

17 To make -- so what -- at any rate, he said to
18 me, look, you know, I have a great deal for you. He said
19 I don't see you running a franchise. At that point --
20 when I first met him I had a full-time job. I was
21 publicity director for Sullivan County and I was pretty
22 much -- I had decided pretty much to resign from that job
23 and go into some business venture. I have a young son

1 and that had gotten off the ground. We had been
2 relatively new in the area.

3 So anyway I did subsequently leave my job and
4 then he said look, I have an offer for you that you can't
5 refuse. And he said I will give you -- I will own -- I'm
6 going to own -- I'll own a Blimpie with you in your area
7 in Monticello, New York. He said we'll own it 50
8 percent. I will manage it. My -- he said I'm putting
9 together a management operation he said, and you will --
10 you could get as involved as you want and once I have the
11 whole group together I will hire you to do marketing for
12 the region.

13 And that sounded really interesting, but then I
14 got a little nervous and I said to him, you know, if
15 you're doing this all over the Hudson Valley, what
16 guarantee do I have that you're not biting off more than
17 you could chew and you won't be able to adequately manage
18 the Monticello store. He said, I'll give you an offer
19 you can't refuse and I have it in writing here.

20 He said after one year if you're not happy you
21 can have all your money back. And he gave me that in
22 writing and I have it here. And, you know, no one is --
23 Blimpie is not denying that I have it. They're just
24 saying they're not responsible for anything the area
25 developer did. He formed his own entities, Route 9

1 Development, Sullivan County Blimpie, and all kinds of
2 things, to a point where when we did have the meeting
3 with him and Blimpie they, you know, really kind of like
4 told him to get rid of all these various corporations and
5 that was kind of the beginning of the end for him.

6 So, of course, you know, I -- my husband and I
7 discussed it and we said gee, you know, this is
8 interesting. It's a new franchise that seems to be doing
9 fairly well now that is coming to this region. I could
10 be doing the marketing for it, six months or a year. I
11 can pace myself. I'll have this nice investment. How

1 Each agreement is different and I can't speak
2 for everyone. I believe I'm the -- well, except for --
3 Ed was a silent partner too, but his partner ran the
4 business, although he had involvement -- she had
5 involvement with this area developer.

6 In my case I was strictly a silent partner,
7 owning 50 percent, promised that I could have this
8 management contract shortly down the line, and it was
9 great. I mean, for two months it went really well. It
10 was the summer. The restaurant was busy and it just
11 seemed to be going beautifully. And then what happened
12 is everything started to fall apart.

13 Nobody was watching anything. Nobody was doing
14 anything. The things that I was told would be done by
15 his "management team", which was really him and his son,
16 were not being done. And we were -- at first -- and this
17 is why I say it's good that we all spoke to each other.
18 I thought maybe it's just me, you know. And then I
19 happened to be driving by one of the other Blimpies and
20 stopped in to see the owner and she had a list of
21 complaints and problems and questions, you know, a mile
22 long, too. And then we all realized this was going on
23 everywhere and that no one knew -- we're not -- I can't
24 -- we're not questioning where the money went. We'll
25 never know that. That's the least of it at this point.

1 We're -- you know. And I'm sure that, you
2 know, we had some question about that, too. You know,
3 even the marketing money that we were all putting in, no
4 one even knows -- no one even knows where exactly that
5 went. But that was -- that's the least of our problems.

6 All of us in the group -- of the five Blimpies,
7 four went out of business in less than a year. One is
8 still in business and they had very -- what they did is
9 they -- they didn't -- they took kind of, you know, the
10 bull by the horn and ran everything themselves. It's a
11 father and son team. And they did a good job. In their
12 case they were able to do it. They're in a more

1 hardships involved and this wasn't just a frivolous, oh,
2 you know, if I don't buy this I'll buy some stock. I
3 mean, I was serious about this and I spent a lot of time
4 working on it. I wrote a lot of proposals that we were
5 going to use.

6 Now, another interesting thing that came to
7 light, I have a copy of the page from the UFOC that
8 Blimpie had put out at the time that this area developer
9 was in place. And in this -- on this page they mention
10 him as the franchise development manager and they mention
11 his son as the franchise development manager, and then --
12 and I'm sure you're more familiar than I am with how
13 these documents work. In the next section, Item 3
14 Litigation, it says that none of the people identified in
15 Item 1 above are the subject of pending action alleging a
16 violation -- which is the one. And then it said
17 something about oh, felony -- that there's no judgements
18 against those people. All right.

19 And I have subsequently found out that there
20 are probably about 19 judgements against this area
21 developer from his past careers, including the I.R.S.
22 And Blimpie, when we presented this to Blimpie, why
23 didn't you do due diligence, they -- their excuse was
24 that he wasn't the person putting up the money in the
25 group. So they did the due diligence on his partners,

1 but not on him, which is ridiculous because he was the
2 one they were sending out to sell franchises.

3 And, you know, I'll go so far as to say that
4 when the trouble first starting happening and I kind of
5 offered to organize the group and I spoke to one of the
6 officers at Blimpie. In my very first conversation with
7 him he was not surprised there was problems in this area
8 and his comment to me was -- and I said something to him
9 because this area developer had always told us he was
10 quite close with these executives at Blimpie. And I said
11 look, I know, you know, he's a friend of yours or
12 something like that. And he said to me, "I can't stand
13 the guy, but he's a good sales person."

14 So, you know, one would suspect that possibly,
15 you know, they did look the other way and that they knew
16 that they would get somebody to sell franchises like that
17 for them and that they didn't do their due diligence.

18 I have spoken to two lawyers who are still
19 looking for this person from past judgements against him
20 and past lawsuits and both referred to him as a con
21 artist, a phrase that I don't think lawyers use, you
22 know, without thought.

23 So I'm not -- I'm just -- I do have -- I did
24 have an investigation done later on and I did confirm
25 this information that I'm saying. And Blimpie is now

1 suing the whole area development group for unlawful
2 and/or fraudulent investment scheme regarding the sale or
3 investment in Blimpie restaurant franchises.

4 So they're kind of admitting that, you know --
5 they have acknowledge that there's no doubt that this guy
6 was doing things he shouldn't be doing and they're just
7 saying well you trusted him because you thought he
8 represented our company, but too bad. He was an
9 independent contractor. And that's, you know, not the
10 way it generally works. And we had -- you know --

11 As a matter of fact, I remember that I even
12 called the main office of Blimpie after I was in
13 discussion with the area developer just to be sure he
14 really still worked there because he told me he was
15 resigning and -- and they -- I said I live in the Hudson
16 Valley. Who should I speak to? And they still gave me
17 his name. So, you know, I confirmed it.

1 I also have with me a letter that was sent to
2 one of the other people in the group that we all got
3 copies of way in the beginning thanking us for our
4 interest in the Blimpie Franchise opportunity, letters on
5 Blimpie stationary and it's signed by the area developer.
6 Obviously, we thought from the very beginning we were
7 dealing with Blimpie.

8 So the long and short of it is we're all out of
9 business. We've all -- you know, we're all pursuing
10 other aspects of our lives and trying to make up for lost
11 time, et cetera. And we've all lost a lot of money.
12 Probably as a group we lost -- the four franchises lost
13 probably upwards of half a million dollars together,
14 wouldn't you say that's correct? And it's very sad.

15 And I still -- you know, I live in a community
16 where, you know, I'm a professional, my husband is a
17 professional. We had -- we still maintain a good
18 business reputation and this -- however, you know -- this
19 is kind of a black mark against us because of, you know,
20 things that we didn't even know were going on like unpaid
21 bills, et cetera, to local, you know suppliers and
22 merchants.

23 So it's been a nightmare and we have -- you
24 know, we have a lawyer as a group and we hope to
25 eventually get some justice. I don't know exactly, you

1 know, what's going to happen obviously, but from your
2 prospective I really am glad -- I thank you for giving me
3 this opportunity because I feel so strongly that, you
4 know, maybe we could save somebody else this if the
5 government starts to look closer at how franchisors allow
6 their area developers to operate and that -- whether they
7 want to call them an agent or not, they do have a
8 relationship to the franchise they're selling and a
9 serious relationship.

10 MR. TOPOROFF: Well, thank you. I greatly
11 appreciate your taking the time to appear here today and

1 MR. TOPOROFF: Okay.

2 MS. SANDOW: Okay?

3 MR. TOPOROFF: Okay. Well, thanks again.

4 MS. SANDOW: Thank you.

5 MR. TOPOROFF: And we're off the record.

6 **(Off the record.)**

7 MR. TOPOROFF: We're back on the record and I
8 just want to remind everyone that this is a public
9 meeting. The purpose of today's meeting is to allow
10 members of the public to make statements on the record
11 concerning the franchise rule or any issues that may have
12 been raised in our advance notice of proposed rule
13 making.

14 So I'm going to turn this over to our next
15 speaker and please identify yourself.

16 MR. KARP: Yes. Good afternoon. My name is
17 Eric Karp. I'm an attorney. I'm with the Boston law
18 firm of Witmer, Karp, Warner & Thuotte at 28 State Street
19 in Boston. I specialize in franchise law and in
20 particular representing the interest of franchisees and
21 franchisee associations.

22 I'm a member of the American Bar Association
23 Farm on Franchising. I serve on the Advisory Committee
24 to the Franchise and Business Opportunities Committee of
25 the North American Securities Administrator's

1 Association. I'm an affiliate member of the American
2 Franchisee Association. I sit on its Board of Directors.
3 I was the Chair of its Model Responsible Franchise
4 Practices Act in the principle offer of that document.

5 I have testified before Committees of the U.S.
6 Congress and the Massachusetts Legislature. I'm a member
7 of the American Massachusetts and District of Columbia
8 Bars. And having said all that the views I express today
9 are my own and I take sole responsibility for them.

10 I want to make some preliminary observations
11 before I deal specifically with the rule review. A
12 number of months ago at my wife's urging I read a book by
13 John Gray called Men are from Mars and Women are from
14 Venus. The thesis of the book is that men and women have
15 important differences, which we must recognize,
16 appreciate and accommodate if we're all going to live
17 together.

18 It occurred to me while I was reading the book
19 that it had many applications in the franchise context.
20 I've imagined many times the idea of having two focus

1 their own context.

2 I think if you ask the franchisees in their
3 focus group what they wanted out of their franchise
4 relationship or what they expected to get, they would
5 likely say the following three things because I hear
6 these over and over again.

7 One, I want to be my own boss. Two, I want to
8 make more money than if I work for somebody else. Three,
9 I want to build and more importantly realize equity in
10 this business for my retirement or as a legacy from my
11 children. That's what they want, that's what they think
12 they're getting, that's what they're sold.

13 On the franchisor's side, again, with their
14 hair down so to speak, they would tell you that what
15 they're selling is a license. And they use that word not
16 accidentally because a license implies something more
17 time limited than a franchise, to operate a particular
18 business in a particular location for a defined period of
19 time, period.

20 Franchising is essentially a way for a company
21 to finance brand expansion without adding debt to its
22 balance sheet or diluting the interest of existing
23 shareholders.

24 And, again, it is a time limited relationship
25 which can change in two important ways. One, most

1 franchise contracts allow franchisors to change the
2 system, the franchise system during the course of the
3 relationship, particularly through amendments to operate
4 in manuals. It often amounts to a unilateral right to
5 amend the franchise relationship both as to legal and
6 economic terms during the contract term.

7 In addition, on renewal the franchise
8 agreements increasingly, almost uniformly, indicate that
9 at the time of the renewal of the agreement, a new and
10 different agreement containing materially different
11 terms, both as to economics and legalities, will be
12 offered and need not be accepted.

13 So there are two very fundamental different
14 views of the way franchisees look at their experience,
15 what they hope to get and what franchisors think they're
16 selling.

17 One example of this is the concept of renewal,
18 which I just mentioned. In the rest of the commercial
19 world, other than in franchising, renewal has a very
20 simple and easily understood meaning. And the most
21 prominent example that is a typical office lease.

22 I had a lease in my previous office. We had a
23 five year lease with a five year option to renew. The
24 option to renew said if you decide to take this option to
25 renew your rent will go up \$2 per square foot. So when I

1 signed my lease I knew what the terms of the renewal
2 period would be. They were carefully spelled out in
3 advance.

4 When a franchisor represents that there is a
5 right to renew, they don't really mean that. What they
6 mean is that at the end of the initial term they reserve
7 the right to present the franchisee on a take it or leave
8 it basis with a brand new agreement that may have
9 different economic structures and different legal
10 relationships.

11 That's what they call a renewal and it's a
12 renewal within the meaning of the FTC rule and UFOC
13 format because in franchising we are from Mars and the
14 rest of the commercial world is on Earth. And there is a
15 fundamental disconnect there as well. So the right to
16 renew, essentially, in a franchise contract is often
17 smoking mirrors.

18 Now, for so long franchisors have enjoyed the
19 benefits of what Representative LaFalls (phonetic) called
20 the overwhelming imbalance of legal and economic power
21 that they don't even know they have such a high place
22 with such high ground that they're defending. And this
23 is reflected in the unbelievably one-sided contracts that
24 franchisees are presented which would shock the
25 conscience of anybody else in any commercial field,

1 whether it be in leasing or insurance or anything else.

2 And in connection with that I want to leave you
3 with this document. It's a document that I created for
4 the American Franchisee Association in 1995 entitled "The
5 Franchisor's Hit Parade, The Worst of Franchise Agreement
6 Provisions."

7 And basically it's the result of my experience
8 at looking at franchise contracts and singling out some
9 of the worst clauses which reflect that overwhelming
10 imbalance which needs to be addressed quite urgently.

11 So with that background -- and I want to
12 mention one other thing in support of that. Based on a
13 recent article in Nation's Restaurant News, for example,
14 I learned that the top eight pizza franchisors in the
15 United States represent 11 billion dollars in annual
16 sales in 21,000 retail outlets. And it just occurs to me
17 that if you want to be a business person and you want to
18 be in the pizza business and if you want to be in the
19 pizza business with a brand recognized name, and not open
20 one up on the corner, then you have little else -- little
21 place to go than one of the top eight pizza franchisors
22 whose contracts are all essentially uniform. There is no
23 place to go. There is no marketplace because of this
24 overwhelming imbalance.

25 Now, a second subsidiary issue I want to talk

1 about is very simply this. It's clear that the FTC does
2 spend some time pursuing violations of presale disclosure
3 rules. But the question comes when a franchisee accepts
4 a UFOC, pays the money, signs the agreement, are they
5 then magically transformed from being a consumer into a
6 non-entity as far as this agency is concerned. And from
7 a standpoint of its existing regulatory framework which
8 deals only with presale disclosure, that appears to be
9 the case.

10 Now, I have read HR 2243 which amends 15 United
11 States Code Section 45 and it appears to say that a
12 practice in order to be unlawful has to be; (a) likely to
13 cause substantial injury to consumers, which is not
14 reasonably avoidable and not outweighed by countervailing
15 benefits to consumers or the public.

1 the markup? The markup is paid by the franchisee. Who
2 eventually pays that markup? The person that walks in
3 the store and pays \$250 at retail for this frame.

4 So here's an example of a sourcing issue where
5 a franchisee is required to buy these frames from the
6 franchisor, the price is controlled, the impact to the
7 consumer is palpable and obvious.

8 How about the pizza franchisee who has to pay
9 more for the same quality of cheese that his franchisor
10 specifies he must buy that he can buy locally from a
11 distributor. I've even heard of examples where
12 franchisees can buy designated supplies cheaper at their
13 local grocery store than they can from their own
14 franchisor. I ask you who pays the freight ultimately?
15 It's the consumers.

16 What about venue clauses? An element of
17 special risk under the UFOC format. I cannot begin to
18 estimate how much in legal fees has gone right up the
19 chimney arguing in State Court and Federal Court are
20 venue clauses legal or illegal? Are they enforceable or
21 unenforceable?

22 In Massachusetts under our Little FTC Act our
23 State has decided that if somebody brings litigation in a
24 county, not much less a State, a county which is
25 inconvenient to the litigant, that's a violation of our

1 Little FTC Act because our State is recognized and venue
2 clauses are a very heavy handed instrument.

3 Now, who ultimately pays the cost of all that
4 needless litigation? I know lawyer bashing is very
5 popular. Who ultimately pays the freight and all that
6 legal -- all those legal fees to get paid to deal with
7 this? Ultimately it's the consumers.

8 Third subsidiary issue. Where is the FTC? In
9 preparation for this meeting, I searched your home page
10 and I found two consumer protection mission details. I
11 have copies here. I prefer not to leave them with you as
12 I've written all over them, but I reviewed them. And
13 what I found was a very interesting thing.

14 In these two consumer protection mission
15 details, which I found on your Web page which are
16 undated, I found a combination of 58 settlements in which
17 the FTC has engaged in during whatever period of time
18 this covers in its consumer protection mission, which I
19 know includes more than the FTC disclosure rule.

20 But what I found was very interesting. First
21 of all, of the 58 settlements reported, 18 were business
22 opportunity issues principally display rack, vending
23 machines, pay telephones and things of that nature. What
24 I sometimes refer to as the seamy underbelly of our
25 industry. Ten were Funeral Rule violations and the

1 smallest number were, guess what, franchise cases. Out
2 of 58 settlements, six involved franchise cases or just a
3 little over ten percent.

4 Then I looked at what the six cases were. Are
5 they household names? Are they national companies? Do
6 they have high price lawyers? The answer is no. Very
7 briefly, who are they?

8 One, Allied Snax, S-N-A-X, a very catchy name.
9 A defunct company. Hardly a worthy opponent for the FTC.
10 Item two, Building Inspectors of America. They paid a
11 civil penalty of \$35,000 and promised never to do it

1 where the FTC -- it's called civil penalty actions,
2 competition mission, and I look, what are doing in a
3 related but separate area? And I looked at the fines
4 assessed in these other cases.

5 Automatic Data Processing, 2.97 Million Dollar
6 fine. Federative Department Stores, \$250,000. Food
7 Makers, 1.45 Million. STP, \$880,000. And Sara Lee, 3.5
8 Million.

9 So the question really comes how meaningful is
10 the FTC cover page and I quote from it. It says to
11 protect you we require your franchisor to give you this
12 information. Skipping a few more -- a few sentences, it
13 goes on to say if you find anything you think may be
14 wrong or anything important that's been left out, you
15 should let us know about it. It may be against the law.

16 The question is all these franchisees that have

1 maybe because we don't have the resources. Maybe
2 Congress hasn't funded us. But the bottom line is we're
3 not prepared to do that. So don't rely on the fact that
4 we're going to back you up, franchisee, because we are
5 not going to do that.

6 So I think that the cover page is misleading.
7 I dare say deceptive. And I think it needs to be changed
8 or Congress needs to give you more money to do your job.

9 Now, in response to specific UFOC format items.
10 One area where I agree with most franchisor commentators
11 is that I believe that the UFOC format is a superior
12 format and I think that the FTC should adopt it as its
13 own. I don't think it makes sense to have two separate
14 formats out there. I do not think that there are
15 significant additional costs associated with changing
16 over to the UFOC format for those that are using the FTC
17 format. It is, in fact, the defacto national standard
18 and I think it should stay that way.

19 So -- but I also want to say that neither the
20 UFOC format nor the FTC rule really provides enough
21 meaningful information for a franchisee to make an
22 informed decision. So when I say adopt the UFOC format,
23 I mean it's better than the FTC rule but it's far from
24 perfect.

25 I next want to address item 20 issues. The

1 first problem again -- and here's an area where many
2 franchisor and franchisee commentor's have agreed. The
3 UFOC format and the FTC format currently encourages
4 double counting of events in franchise relationships.
5 And we lawyers being -- tending to be cautious by
6 training in nature, if we're invited to double count
7 we're going to double count.

8 The result is that we get misleading statistics
9 in terms of franchise turnover rates which is not
10 helpful. It's not helpful to the franchisors because
11 they're unhappy when their turnover rates are reported as
12 higher than they think they really are. And the
13 franchisees don't get the benefit of the real
14 information.

15 So I believe that the events which are tracking
16 you to item 20 should be specifically related to what
17 actually happened in the franchise. And I'll give you
18 one example.

19 At the last ABA forum Larry Hantman, who is
20 general counsel to Dunkin Donuts, described what his
21 system does when they find franchisees deliberately
22 under-reporting sales, essentially stealing from the
23 company. What do they do? They call the franchisee in.
24 They confront them with irrefutable evidence, video
25 tapes, private investigators, the whole business, and

1 then they give them a defined period of time to sell the
2 store.

3 Now, most of the time because Dunkin Donuts is
4 a fairly successful system and stores have a market, that
5 franchisee, even though they could be terminated for
6 deliberately under-reporting sales, are permitted to sell
7 their location. Now, is that recorded as a transfer or
8 is that recorded as a termination? Under item 20 you
9 really don't know the answer and that event gets buried
10 and is never really known.

11 So if a franchisee transfers and that transfer
12 is precipitated by a termination or a threatened
13 termination, that fact needs to be known to the
14 franchisee. Because what franchisees really need to know
15 truly is what is the actual turnover and failure rate in
16 this system and how many franchisees are actually able to
17 realize the equity in their franchise by transfers?

18 And when I represent franchisees who are
19 thinking about going into a relationship, those are the
20 two signposts that I look for. How many people failed
21 and how many people were successful enough to get their
22 equity up. So I think that item 20 needs some
23 substantial surgery on it.

24 The second issue relates to so-called gag
25 orders and I really think that the discussion about gag

1 orders involves a potential misnomer. There are two
2 kinds of gag orders that I've had experience with.

3 The first kind is the kind that is in almost
4 every single franchise agreement which is a
5 confidentiality agreement. Now, you might say that in
6 theory there's nothing wrong with a franchisor protecting
7 its right to its truly confidential and proprietary
8 information. You know, what's the formula for making
9 Pepsi-Cola or Particularly Yogurt or whatever.

10 But what we find is that the language in these
11 confidentiality agreements are so broad, so over
12 inclusive that they basically cover everything the
13 franchisee knows, may ever know, may ever learn about the
14 franchise system, including confidential information, but
15 much, much more.

16 And I've brought with me and I'll be happy to
17 leave with you highlighted portions of a franchise
18 offering circular in which you can see the language of
19 the confidentiality agreement is so broad that the
20 franchisee has a potential legal barrier to discussing
21 that franchise system with a prospective franchisee
22 because it's so overbroad. And I won't take the time to
23 read it out loud, but I'll leave it with you so that you
24 can see.

25 So this form --

1 MR. TOPOROFF: Just by way of clarification.
2 This is from a UFOC or is this from a contract or --

3 MR. KARP: It is -- what I have there is -- the
4 first two pages is the UFOC. The third page is the
5 relevant -- part of the relevant portion of the
6 confidentiality agreement the franchisee is required to
7 sign at the inception of the franchise relationship.

8 So what I'm saying is that there is an element
9 of gag order here which is out there where franchisors
10 are undermining the ability of franchisees in the system
11 to discuss openly with respective franchisees aspects of
12 the system that are not truly confidential and
13 proprietary.

14 And on the issue of how prevalent this is, I
15 would direct your attention to a North Carolina Law
16 Review article by Robert W. Emerson who I believe is a
17 professor at the University of Florida, it's Volume 72,
18 April '94, Number 4, and he looked at approximately 100
19 fast food franchise agreements. And one of the things he
20 tracked from 1971 to 1993 was the prevalence of these
21 kinds of confidentiality agreements. And what he found
22 is that in 1971 64 percent of franchise agreements that
23 he surveyed had these clauses. In 1993 that had risen to
24 90 percent. And I dare say, anecdotally I admit, that it
25 must be near 100 percent by now.

1 So clearly a very prevalent phenomenon and
2 clearly the scope of these confidentiality agreements is
3 growing. So there is that element of the gag order.

4 The second kind of confidentiality issue
5 involving gag orders are those that are executed in
6 connection with a resolution of disputes between
7 franchisors and franchisees.

8 Now, the first that I want to point out is that
9 UFOCs don't generally say if we get into a fight with you
10 and you sue us or we sue you and we settle, you're going
11 to have sign a gag order. So franchisees don't know
12 that. And gag orders essentially undermine one of the
13 central features of the rule which is to prevent
14 franchisees who are out of the system from speaking with
15 prospective franchisees.

16 I regard the list of terminated franchisees in
17 the UFOC as among the most important elements of it. I
18 tell prospective franchisees call every single person on
19 the list that you can. Admittedly they have a story to
20 tell. They're disgruntled. They're unhappy. They may
21 not be representative, but the information is quite
22 valuable.

23 Additionally, the UFOC format now requires
24 certain kinds of settlements to be reported in summary
25 fashion. I regard the summary in the UFOC as an

1 invitation to further due diligence, not the end of the
2 story. So if there's a franchisee who has left the
3 system and is under a gag order and is both on the
4 terminated list and in the settlement's aspect of the
5 UFOC, there is now a barrier to the franchisee or his
6 counsel or her counsel further investigating the facts
7 and circumstances.

8 It's a clear attempt to undermine both the
9 spirit and I think also the letter of the law here. And,
10 you know, the importance of the ability of prospective
11 franchisees to communicate with people who are in the
12 system and out of the system is highlighted by this
13 market -- what is this called? What is this called?
14 This is called the International National Regional
15 Franchising Entrepreneur's Marketplace of the Wall Street
16 Journal yesterday.

17 An ad here for AlphaGraphics. It says "ask our
18 franchisees how they feel about our leadership position
19 in the industry. Ask them how they feel about their
20 sales and profitability. Ask them if AlphaGraphics is
21 the best investment they ever made."

22 So clearly this franchisor understands that a
23 prospective franchisee wants to talk to franchisees in
24 the system, I think, is an essential element of the
25 disclosure.

1 And lastly on this subject I note that the FTC
2 settlement in the Tutor Time case includes a prohibition
3 on gag orders. So clearly that's an issue that has
4 caught your attention.

5 I also want to say that it's not high in my
6 priorities. It's an easy issue. You ought to make the
7 improvement, but there are far more important issues to
8 deal with.

9 Item three, litigation disclosures. Should
10 litigation that's commenced by a franchisor be disclosed?
11 If franchising weren't on Mars and it was on Earth like
12 everything else in the commercial world, the answer would
13 be of course. You'd have to be -- it just wouldn't even
14 be a question.

15 In my view the issue of franchisor litigation
16 is no less relevant than franchisee commenced litigation.
17 And are there additional costs associated with writing a
18 three sentence summary of a piece of litigation where the
19 franchisor has commenced it instead of the franchisee. I
20 can't imagine that there are. Management knows about
21 this lawsuit. They're spending a lot of money in legal
22 fees on it. It is just not a burden for them to disclose
23 it and it is important and it is relevant.

24 Does the rest of the world think that
25 litigation is relevant? Yes, it does.

1 I direct your attention to this book, "Merges
2 and Acquisitions of Franchise Companies" by Leonard
3 Vines, Editor, sponsored by the ABA Form on Franchising.
4 This is a book about due diligence when you buy a
5 franchisor. What should you look at? What's important
6 to know when you buy a franchisor. I suggest to you that
7 the criteria are the same when you buy a franchisee
8 company.

9 And in this he has a due diligence checklist.
10 What do you look at when you're buying a business? And I
11 dare say that this due diligence checklist applies in
12 almost any commercial transaction to buy any kind of
13 business, franchised or otherwise.

14 Page 233, what do you need to get in order to
15 avoid being accused of malpractice when you're
16 representing somebody who is buying a company?

17 One, a description of any pending lawsuit or
18 controversy and any known claims asserted by or against
19 third parties whether or not insured or any facts which
20 may reasonably give rise to such claims.

21 Two, descriptions of any lawsuits not presently
22 pending, but to which the company has been a party during
23 the past five years.

24 The important point here is that the buyer gets
25 to make the determination of how material and relevant

1 the lawsuit is. The disclosure is simply. It's easy.
2 It's cheap. There's no reason for it not to happen.

3 In -- excuse me just one second. Okay.

4 In terms of earnings claims, first of all I've
5 always been troubled by the phrase earnings claim for a
6 couple of reasons. One, it's not really a claim. A
7 claim implies something that you're alleging that you
8 might not be able to prove or requires further
9 substantiation. I don't think the word claim is a word
10 that ought to be used. It implies something that is
11 forward looking. And almost all of the earnings claims,
12 so called, that I've ever seen are not forward looking.
13 As a matter of fact, if they're well drafted they
14 specifically exclude any prediction of future results.
15 They only rely on historical data. So I think the word
16 claim should not be used.

17 Is it earnings? It really isn't earnings.
18 What we're really looking for is financial performance
19 more broadly and in many industries net income is not the
20 most appropriate use or most appropriate measure, rather,
21 of the financial performance of a franchise business or
22 any other business. In certain businesses unit sales are
23 more important than net profit. In the hotel business
24 occupancy rates can be more important than gross revenue,
25 et cetera.

1 So is it -- should it be called an earnings
2 claim? I don't think so. I think it should be called
3 something like a financial statement or a statement of
4 historical financial performance. That way it is clear
5 that it's backward looking and not forward looking.

6 Many commentors to this proposed rule have said
7 and I will repeat, this is the most important information
8 any prospective business owner could ask for or get. And
9 in a franchise business it's no different than any other.

10 There is -- particularly in the franchise
11 business where the franchisors have for years been
12 claiming that franchising is a business where you have a

1 Dean of business valuation perhaps in the United States.
2 He has published a book and in it, in Exhibit 4.1, he
3 gives a list of preliminary documents and information
4 checklist for business valuation of a typical business.
5 And item one on the list is "balance sheets, income
6 statements, statement of changes in financial position,
7 and statement of stockholders equity for the last five
8 years." Item two is "income tax returns for the same
9 years".

10 What he is essentially saying is that in order
11 to appraise a business, which you can do for the purposes
12 of purchase or sale, or in the case of somebody who dies
13 for estate purposes, you start with historical financial
14 information. Not three years. Five years. That's the
15 standard.

16 I go back to Mr. Vine's book. His due
17 diligence checklist on page 235. What does he say is the
18 standard for due diligence in purchasing a franchise
19 company? Item 13 on page 235, "copies of existing
20 financial statements of the company, audited where
21 available, and its various subsidiaries for the past five
22 years". Item C, "copies of all Federal, State and
23 foreign income tax returns for the same time". That's
24 the standard on the franchisor's side of the fence when
25 they're buying a company. The standard should be the

1 same when a franchisee is buying a franchise in the same
2 company.

3 Then I looked to what some people consider the
4 ultimate authority, the Internal Revenue Service. What
5 does the Internal Revenue Service say is the standard of
6 due diligence when you want to buy, value, appraise a
7 company or if a franchisee is lucky enough to own a
8 franchise which he or she is lucky enough to be worth so
9 much money that there's Federal Estate tax when they die?

10 Revenue Ruling 59-60, which has been the law of
11 the United States for 38 years says what do you look at?
12 Item D, "detailed profit and loss statements should be
13 obtained and considered for a representative period
14 immediately prior to the required date of appraisal,
15 preferably five or more years." Revenue Ruling 59-60.

16 So, again, franchising is on Mars. The rest of
17 the world is on Earth. Everybody else in every other
18 business says you start with the financial statements and
19 you move on from there.

20 Franchisors say it's too hard to do. One size
21 does not fit all. Reminded of what Harry Truman used to
22 say. If you say you can't do it, you're right. You
23 can't do it. But it can be done.

24 And I assume that the Commission is aware of
25 this book called "Franchising, The Bottom Line,"

1 published by Source Book International, which contains
2 150 examples of earnings claims made by franchisors
3 across the country. I've looked at these. They're all
4 reasonably detailed. The franchisors have learned and
5 they know what is important to disclose in their earning
6 claim statements. It can be done. These 150 companies
7 are doing it. Approximately 20 percent of franchisors
8 are doing it. It can be done and it should be done.

9 Why don't franchisors want to do it? It's not
10 because it's too hard. It's not because it's too
11 expensive. It really isn't because they don't have
12 access to the information. It's really because it gives
13 them cover to claim that they don't have to or even some
14 say it's illegal for them to do it as you may know. It's
15 easier for them to make oral representations of
16 profitability or to make them on the back of a cocktail
17 napkin or an envelope where there's no basis for it and
18 then hide behind the statement, which we all know is
19 false, which is that it is illegal to make an earnings
20 claim. It gives them free reign to close their eyes to
21 what their franchisor sales people are doing in the field
22 and that has just got to stop.

23 So there has to be a way to find a formula
24 under which meaningful and not misleading information can
25 be provided because the rest of the commercial world says

1 that historical financial information is the most
important thing. It's the starting point

1 thing from a management standpoint.

2 Which leads me to my last point on earnings
3 claim, which is that -- and I know this is not the
4 purpose of the rule, but it is a salutary benefit in any
5 event. Mandating earnings claims has an additional
6 benefit to existing franchisees. It gives them feedback.
7 Let's face it. It's their information anyway. They
8 report this information on a quarterly or yearly basis.
9 It goes in to the franchisor. Most of them never see it
10 again. It provides them with no help.

11 If earnings claims were mandated, franchisors
12 would be essentially giving that information back in an
13 organized form in a way that's meaningful, not only for
14 prospective franchisees, but for existing franchisees so
15 that they know how they're doing. Measuring their
16 financial performance of their business. Is their cost
17 of goods sold high or low? Is their occupancy expense
18 above or below the norm? Where do they stand in relation
19 to their other franchisees? That would be a helpful
20 thing for franchisees and I think it ought to be done.

21 So in conclusion what I want to say is the FTC
22 rule was issued 20 years ago. The sophistication of
23 franchisors, the one-sidedness of franchise agreements
24 existed at that time, but nobody could have anticipated
25 how much franchising could have grown in the ensuing 20

1 years or the extent to which that imbalance of legal and
2 economic power would grow greater over that period of
3 time and it grows all the time. And until some steps are
4 taken to level that playing field, what we're going to
5 find is more and more disputes in franchising and more
6 and more money being spent on legal fees and dispute
7 resolution and less money on doing what everybody wants
8 to do which is to grow their business.

9 Thank you.

10 MR. TOPOROFF: Well, thank you very much. We
11 greatly appreciate your taking the time today and
12 providing the information that you did. It was extremely
13 helpful.

14 Two comments. Not so much questions. But in
15 your remarks you did cover the cover sheet issue as well
16 as item 20.

17 MR. KARP: Yes.

18 MR. TOPOROFF: And I would encourage you, if
19 you so wish, to supplement your statement by filing
20 something with us that is a proposal, for example, on
21 what a cover sheet should look like, as well as item 20,
22 what the turnover rate should be.

23 It's very helpful to get anyone's comments on
24 these subjects, but we need to move it to the next stage
25 and that is what is the specific language change or

1 proposal. So I would encourage you and everybody else
2 who has an interest to do that as well.

3 MR. KARP: I'd be happy to enter that.

4 MR. TOPOROFF: Thank you.

5 MR. KARP: Sure.

6 MR. TOPOROFF: Myra, do you have any questions?

7 MS. HOWARD: No.

8 MR. TOPOROFF: Okay. Again, I really
9 appreciate your taking the time.

10 Also let me just add for the benefit -- for
11 your benefit as well as anybody who is here. I cannot
12 tell you again how much we appreciate information like
13 Law Review articles or studies or other information. We
14 don't necessarily have access to all of this. We're not
15 -- we're doing a million and one things in addition to
16 focusing on the rule.

17 We'll also -- the two of us who are sitting
18 here today are also litigators and we have cases and we
19 just cannot focus on doing research into many of these
20 issues.

21 So to the extent that there are studies, Law
22 Review articles, newspaper articles or journal articles
23 or any other information that can be sent to us as a
24 comment and we can include that in the record. So we
25 would appreciate that. It is a very valuable source of

1 information for us. So I would encourage again you, if
2 there's any other information, or anybody else to do the
3 same.

4 MR. KARP: I'd be happy to take a hand at item
5 20. I think you may know that the Franchise and Business
6 Opportunities Committee of NASA is looking at item 20 and
7 I'm on a task force looking at that. I'm not sure that
8 the Commission would be happy with what I might say your
9 cover page ought to say in light of my remarks, but I
10 will, in all serious, take a hand at that.

11 MR. TOPOROFF: Well, I won't prejudge what the
12 Commission may or may not find or conclude, but it would
13 be happy for -- it would be helpful for us to have
14 proposals, written proposals on the table for at least us
15 to look at.

16 Once again, that was one of the issues that we
17 covered yesterday. Unfortunately, you were not here. But
18 we are seeking a comment on that very issue of what the
19 cover page might look like and any improvements to it.

20 So again, thank you very much. I appreciate
21 it. We'll take a break.

22 **(Off the record.)**

23 MS. HOWARD: All right. Good afternoon. This
24 is a reminder that we are here on the public record with
25 a statement that you're going to give us. It will be

1 transcribed and placed on the public record, as well as
2 our Internet Website.

1 program, full-time legal counsel on their staff that was
2 supposed to have been available to me. Coordination of
3 yellow pages advertising effort because advertising in
4 the area where I operated in Nasa County on Long Island
5 is quite costly. Ongoing training and support from
6 seasoned professionals. That was the initial promise
7 Bimonthly regional support and visits, which they had
8 promised.

9 There was also national recognition through
10 national commercial TV ads. At the time they had been
11 advertising on national TV. The "Wheel of Fortune" show,
12 for example, and several other places.

13 Their failure after a short period of time to
14 provide these services occurred near the time that they
15 sold the franchise territory contiguous to mine in Great
16 Neck, New York. I was not notified before nor after its
17 opening. Its strategic location is such or was such that
18 I'm sure I've lost easily a third of my customers who had
19 previously patronized my location. The territory included
20 in their location that they had sold was -- they had told
21 me was only a one mile radius of location.

22 This limitation did not preclude customers from
23 patronizing that location who live or work within the
24 territory I purchased. At least 60 percent of the
25 population within my purchase territory was in closer

1 proximity to the Great Neck location that they had sold.
2 I can easily attribute a 33 percent loss of business to
3 this secretive sale.

4 The operations manual that they had provided me
5 referred to -- which was referred to in my original
6 franchise agreement, obligated them to inform me at least
7 after the sale of a territory contiguous to mine.

8 Shortly after my complaint about that I was
9 informed of a solicitation letter sent to several

1 There is a non-compete clause in that agreement
2 and predicated on that letter of termination I am
3 prevented from going into business or being in the
4 business that I -- was the only way I, for many years,
5 that I knew how to make a living.

6 When I originally purchased the franchise I had
7 mortgaged my home in order to do so. I invested an awful
8 lot in promoting their name and I was told when I
9 conversed with them and told them that I wasn't -- wasn't
10 going to renew our franchise agreement, I kind of
11 expected them to say well, thank you. Thank you for
12 letting us know. I would expected -- I would have -- I
13 let them know -- because I think in their position I
14 would have wanted to know. I thought it was the proper
15 thing to do, that I was not going to renew or repurchase
16 or whatever you want to call it, the franchise for
17 another period because they were no longer offering me
18 any of the services that they had promised or had
19 initially offered me when I first went with them. They
20 treated me, along with other franchisees, terribly.

21 I expected them to say well, thank you, Mark,
22 for being a franchisee for ten years. What you people
23 made it. Thank you for developing our name and promoting
24 our name in your area because we now have something to
25 sell. Instead they said we're going to put you out of

1 business. Well I didn't really believe my ears when they
2 told me that -- what do you mean, you're going to put me
3 out of business? I wasn't -- I had forgotten about a
4 non-compete clause.

5 Well anyhow they sold -- they sent me a letter
6 stating that I was not -- that I was terminated. I said,
7 my gosh, you know, terminated in the six weeks that the
8 franchise agreement is expired. I'd already re-
9 identified the name of the business so I would not
10 interfere with their copyrights. They sent me a letter
11 of termination and told me that they were going to pursue
12 me and force the non-compete clause. I couldn't believe
13 it. They were still identifying me as a franchise, yet
14 they had sent me a letter of termination.

15 I don't -- I contacted the Federal Trade
16 Commission -- one of the Federal Trade Commission offices
17 to see if they had a listing of the terminated franchises
18 and was I, in fact, terminated, which means that they
19 could -- under the terms of that contract, which I think
20 is unfair. And that's one of the reasons I'm here. I
21 don't think anybody should be told unfairly that they
22 can't continue to make a living in what they're doing. I
23 feel sorry for people who lose their jobs.

24 If somebody's an engineer and they're told
25 well, we're downsizing our company and you can't work

1 here anymore. They're not told they can't get a job down
2 the street or around the corner or -- people have
3 families to support.

4 We've gone through some tough economic times.
5 I don't want to elaborate on -- too much on what I've
6 gone through over the last year and a half, but it's been
7 a little rough. Not to be able to have a business taken
8 away where I had -- I was told that I had 45 days to get
9 myself out of my business. I had obligations. I had a
10 lease. I had obligations to the various yellow pages,
11 contracts for advertising. I had a fleet of cars.

12 And I was told that I had to get out of
13 business by June 1st of 1996, which is the beginning of
14 the season that my business is actually a business. You
15 lose money in my business during the winter months and
16 hopefully gain it back and hopefully then some, of

1 contacted the Federal Trade Commission I found out that
2 there had been 51 terminations during that year. I was
3 told just the other day by someone that this past year
4 there were another 60 terminations of franchisees by this
5 franchisor or franchise system. That's maybe 400 or
6 thereabouts or according to their Internet site 400,
7 maybe, locations. I don't know how many that equates to
8 as far as locations as it equates as to franchisees. It
9 might be 300 or 400, but it's alarming. Absolutely
10 alarming amount of people that have been possibly put out
11 of business in the same manner I was.

12 Their focus -- these people were like many
13 other franchisors, I guess, on a different agenda. Not
14 to promote a business, but to get people's initial
15 franchise fees.

16 Interestingly, when -- after they -- I was
17 forced to leave my business on the non-compete clause
18 they opened up another franchise near me. They gave him
19 my telephone number. Somebody I knew had called them and
20 asked for me and said well, we've moved and he's no
21 longer working for us. I never worked for these people.
22 I don't know if they were instructed by the franchisor to
23 do that, to mislead the public that way or not.

24 Interestingly, within a year, less than a year,
25 the franchise was no longer operating. I don't know if

1 -- what they sold the franchise for. They sold my
2 initial franchise for -- to me for \$15,000. In royalty
3 fees, my costs well exceeded \$150,000.

4 I've got one kid who just started college,
5 another one two years behind her. I have no idea how I'm
6 going to do it. I can't work doing what I know how to do
7 for another year or so and I just don't think that this
8 should happen to anybody else.

9 I had written a letter here which I'm going to
10 leave you a copy of it. It was to Senator John Marchi in
11 Staten Island to propose the bill that was called the New
12 York State Fair Franchise Practicing -- Practices Act.
13 And it imposed a level of competence upon franchisors

1 sell franchise claims that they can show -- they can show
2 -- present a potential franchisee how to do something.

3 I don't -- I think somebody has to stop this.
4 I think other people who put their faith into something
5 that they might, you know, get at a trade show or over
6 the Internet, you know, and goes out to -- in most cases
7 has to mortgage their home as I did, I don't think this
8 should be able to happen. I'm sorry I digressed.

9 Part of the -- part of the proposed bill, the
10 New York State Fair Franchise Practices Act, was that if
11 a franchisor wants to enforce a non-compete clause, first
12 it must make a fair market value offer to purchase the
13 business belonging to the person that they want to put
14 out of business and prevent from operating in that
15 business. And if they can't, they have no business to --
16 and I agree with that. My hope that you people can, in
17 Federal regulations with the Federal Trade Commission
18 rule, incorporate some of this in the rules just to make
19 it fair. Just so people don't get cheated.

20 I've looked and I don't see any protection at
21 present for people like I was who were looking for, you
22 know, things that were promised them by a franchisor. I
23 hope you have the power to change this. I hope -- I
24 wouldn't want to see this happen to anybody else. I'd
25 like to see the people who did this to me stopped.

1 I didn't mention their names, but they're well
2 known or not so well known as they used to be because
3 they don't promote their name for the purpose -- other
4 than to sell franchises. Used car -- used car rental
5 franchise.

6 I don't know if I've missed anything. I'm sure
7 on the way home I'll be talking to myself and saying gee,
8 I should have told them about what they did and when they
9 threatened me with this or that, or when they --

10 MR. TOPOROFF: Well, on that square, you
11 certainly could supplement your statement today by either
12 a letter or by E-mail or by our phone line, information
13 later on. So this isn't necessarily your sole and only
14 opportunity to make a statement to provide us with
15 information.

16 MR. DEUTSCH: Why don't I leave you with this
17 letter.

1 the statement or used in lieu of -- in lieu of what I
2 just told you. I think it explains more -- than I can --

3 MR. TOPOROFF: Okay.

4 MR. DEUTSCH: -- thoroughly. I'm too
5 emotionally --

6 MR. TOPOROFF: No, I understand.

7 MR. DEUTSCH: -- tied up in this right now.

8 MR. TOPOROFF: If this is attached I just want
9 you to realize that it does name specifically the
10 company.

11 MR. DEUTSCH: It does.

12 MR. TOPOROFF: So -- I mean, I'll be happy to
13 attach it to your statement if you wish, but I just want
14 you to understand that it will be made public.

15 MR. DEUTSCH: You know what. I think if it's
16 made public it will serve these people right.

17 MR. TOPOROFF: Or another option is we could
18 hold onto it and you could let us know at a futueacdate
19 if you want us to make this public or that --

20 MR. DEUTSCH: My only fear is my family. I
21 just -- retaliation from these people. That's my only
22 fear of not mentioning their name right now. And I don't
23 mean legal retaliation.

24 MR. TOPOROFF: No. I understand.

25 MS. HOWARD: Another possibility, if you wish

1 to submit this letter, if you wanted to cross out the
2 references to the specific company you could do that and
3 we would have the substance of the letter. So it's up to
4 you.

5 MR. DEUTSCH: Let's leave it in there.

6 MR. TOPOROFF: And attached to your statement.

7 MR. DEUTSCH: Yes. Or if you'd like to contact
8 me and question me about it -- about any aspect of it,
9 please do.

10 MR. TOPOROFF: Okay. But I just want, for the
11 record --

12 MR. DEUTSCH: And that letter was written to a
13 State Senator.

14 MR. TOPOROFF: Okay. Well, just for the record
15 I just want to make it clear that the letter in its
16 entirety will be attached to your statement that you gave
17 today. Okay. And made public. Okay.

18 Well, thank you. We greatly appreciate your
19 taking the time to speak with us today. It was very
20 helpful. And again, if at any time you want to add
21 additional thoughts, as you mentioned, on the way home
22 maybe you realize that you neglected to address a
23 particular point, you can always get in touch with us by
24 letter and we could include that with your statement.

25 MR. DEUTSCH: At this point I think I'd just

1 like to go on to my life and wish you good health and
2 hope that you will continue on an effort to create a more
3 level playing field for small business people who want
4 nothing more than to make an honest livelihood for
5 themselves.

6 MS. HOWARD: Thank you.

7 MR. TOPOROFF: Well, thank you. Thank you.

8 **(Whereupon, the meeting was**
9 **concluded.)**

10 - - - - -

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1

2

C E R T I F I C A T I O N O F R E P O R T E R

3

4

DOCKET/FILE NUMBER: R-511003

5

CASE TITLE: FRANCHISE RULE

6

MEETING DATE: SEPTEMBER 19, 1997

7

8

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

9

10

11

12

13

DATED: OCTOBER 2, 1997

14

15

16

RUSS PUZACK

17

18

C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

21

22

23

24

25

DONNA N. REA

