UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. SCUBA RETAILERS ASSOCIATION, INC., Defendant.	)	CIV-ZLOCH CASE NO. 96-6112 **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR <u>DEFAULT FINAL JUDGMENT</u>**

The United States of America hereby submits this Memorandum of Law in support of its Motion for Default Final Judgment and Permanent Injunction against defendant, Scuba Retailers Association, Inc.

I
Factual Background

The United States currently is conducting a civil investigation into possible illegal activity, including a group boycott, with respect to the sale and distribution of scuba diving equipment to consumers. As a consequence of that investigation, the United States determined that defendant, Scuba Retailers Association, Inc., had violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

The United States filed a Complaint against the defendant on January 30, 1996 in the United States District Court for the Southern District of Florida, Fort Lauderdale Division. The

Complaint alleges, in two counts, certain anticompetitive practices by defendant in violation of Section 1 of the Sherman Act. On the same day the United States filed its Complaint, the Court issued a Summons in a Civil Action which, in part, notified defendant that it must, within twenty days after service of the Summons, file with the Clerk of Court, and serve upon the attorney for the United States, an Answer to the Complaint. Defendant, through its Executive Director, James R. Estabrook, received service of the Complaint and Summons on February 13, 1996. The United States Marshals Service personally served the Complaint and Summons upon Mr. Estabrook at his place of business in Somerville, Massachusetts. Following the filing of the Complaint by the United States, Mr. Estabrook made statements in the press to the effect that defendant might not defend the action because it could not afford to do so.

By the expiration of the twenty-day period specified on the Summons, the defendant had not filed an Answer to the Complaint with the Clerk of this Court, nor had it served a copy of the Answer upon the United States. To date, the defendant has not responded to the Complaint, nor otherwise appeared in this action.

On March 8, 1996, the United States notified Mr. Estabrook by certified mail that it intended to petition the court for a judgment by default. The United States received no response from Mr. Estabrook, nor any other agent or representative of defendant, to this letter.

II
The Defendant Has Failed to Answer the Complaint or Otherwise Defend This Action and the United States is Entitled to a Judgment By Default

Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure provides that a defendant shall serve its answer to a complaint within twenty days of service of the latter. As noted above, the Complaint in this case was filed on January 30, 1996, and personally served upon the defendant, through its Executive Director, on February 13, 1996. The Summons, issued by the Court on January 30 and served upon the defendant together with the Complaint, notified the defendant of its obligation to file an answer with the Clerk of Court, and to serve a copy of the Answer upon the United States, within twenty days from the date of service. Twenty days, excluding the Birthday of Martin Luther King, Jr. (Fed.R.Civ.P. 6(a)), from the February 13 service date was March 5, 1996. As of March 5, defendant had not filed an answer with the Clerk, had not served an answer upon the United States, had made no entry of appearance in this matter, and had not otherwise responded to the civil action instituted against it by the United States. To this date, defendant has undertaken no defense in this matter.

The United States recognizes that entry of a default judgment against a defendant is a severe remedy. See, e.g., E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284, 285 (5th Cir. 1972). Where, as here, however, a party does not respond to a properly served Complaint and ignores a duly issued and properly served Summons of

a Court, a default judgment, though drastic, is the appropriate and, indeed, only recourse. See In re Knight, 833 F.2d 1515, 1516 (11th Cir. 1987)(where party offers no good reason for late filing of answer, entry of default judgment appropriate); First City Nat'l Bank of Fort Worth v. Cook, 117 F.R.D. 390 (N.D. Tex. 1987)(default judgment appropriate where party served has failed to answer). The United States would prefer that this case be decided upon its merits and has every confidence it would prevail at a trial. Since the defendant does not appear disposed to defend this action, however, this Court has as the only avenue available to conclude this matter, the entry of a default judgment against defendant.

III
The Injunctive Relief Sought by the United States Should Be Awarded by this Court

When the Court determines that a defendant is in default, the factual allegations of the complaint are taken as true, and this rule applies whether the complaint seeks legal or, as in this case, equitable relief. Fed. Trade Comm'n v. Kitco of Nevada, Inc. 612 F. Supp. 1282 (D.C. Minn. 1985). The United States is submitting to the Court, together with this Motion, a Default Final Judgment. For the benefit of this Court in determining the remedy to apply in this case, should the Court agree to enter a judgment by default against defendant, the United States offers the following summary of what it expects its evidence would have shown at a trial of this matter.

A. The Scuba Diving Industry

An estimated three million Americans participate in the recreational sport of scuba diving. The scuba diving industry essentially is unregulated in the United States, with the exception of United States Department of Transportation regulations regarding scuba tanks or cylinders. The industry is composed of diver training and certification agencies, scuba diving equipment manufacturers, vacation resorts that offer scuba diving, publishers of scuba diving magazines, and retail vendors of scuba diving equipment.

Scuba diving equipment is manufactured both domestically and abroad. In the United States, manufacturers distribute their products to the public primarily through independently operated retail dive stores. Dive store retailers are perceived by other segments of the industry to be the primary point of contact between the industry and the consumer. Typically, a consumer interested in taking up the sport of scuba diving will receive his or her training from an instructor who is affiliated with, or is the owner of, a local dive store. The consumer may also purchase scuba equipment from the dive store through which he or she received training, may use the dive store to make repairs on the equipment, and may arrange travel to diving resorts through the dive store.

Many dive store retailers realize most of their income through the sale of scuba diving equipment. These retailers compete for the sale of scuba diving products with other dive

stores in their locality and, on a national scale, with vendors who sell scuba diving equipment through the mail. "Mail-order" scuba products are generally offered to the public at prices below what comparable products sell for at the typical dive store. Most dive store retailers perceive that mail-order vendors have a competitive advantage, particularly with respect to pricing.

Other segments of the scuba diving industry, sensitive to the dive store retailers' perceived concerns with respect to mail-order vendors, have taken measures to protect dive stores from the competition posed by mail-order vendors of scuba equipment. Few, if any, major manufacturers of scuba diving equipment will sell brand-name products to mail-order companies, and many manufacturers have dealer agreements which require vendors of their products to sell only from a storefront location, to keep regular business hours, to offer training in use of the product, and to have an on-premises air compressor with which to fill scuba air tanks. Such agreements effectively prohibit mail-order scuba diving equipment vendors from becoming authorized dealers of brand-name scuba diving equipment products.

Mail-order vendors of scuba diving equipment obtain their product in several ways. Some manufacturers sell their branded products directly to mail-order vendors. Other manufacturers, while not selling branded products to mail-order vendors, will make "private label" products available to mail-order vendors. Private label products do not contain the brand name of the manufacturer but instead have the name of the mail-order vendor on the product. Some mail-order vendors also obtain product through

"transshipping," i.e., purchasing products directly from another vendor. Despite the competition from mail-order vendors of scuba equipment, most scuba gear is sold to the consuming public by retail dive stores.

B. Description of the Defendant

Scuba Retailers Association, Inc. ("SRA") is an Illinois corporation with its principal place of business in Somerville, Massachusetts. It is a trade association which, at last count, had some 450 members, most of whom own and operate retail dive stores. SRA acts through its board of directors, and it publishes a quarterly periodical called the Scuba Retailer. SRA organized in 1989 and incorporated in 1990.

C. Illegal Agreement to Persuade Divaire, Inc., to Sell its Products Only Through Retail Dive Stores

The first cause of action alleged in the Complaint is that defendant violated Section 1 of the Sherman Act by threatening to boycott Divaire, Inc. ("Divaire"), a manufacturer of snorkels, if Divaire did not agree to market its products only though retail dive stores. In the October 1993 issue of Rodale's Scuba Diving magazine, an advertisement appeared for a snorkel manufactured by Divaire. That advertisement included a toll-free telephone number. Several members of defendant's board of directors called the telephone number and learned that Divaire was selling its snorkels directly to consumers via the toll-free number.

On or about September 3, 1993, a member of defendant's board of directors telephoned Divaire's offices in Walled Lake, Michigan. The member identified himself as a representative of

defendant and said defendant was upset that Divaire was selling snorkels directly to consumers. Shortly thereafter, the member of defendant's board of directors and the editor of the Scuba Retailer telephoned Divaire, threatening to write a negative article about the company and to "blackball" the company in the industry if Divaire did not agree to abandon its toll-free number.

Following this conversation with Divaire, the member of defendant's board of directors telephoned the executive editor of Rodale's Scuba Diving magazine and demanded that Rodale Press, Inc. ("Rodale Press") assist defendant in persuading Divaire to sell its snorkels only through retail dive stores. On September 6, 1993, the executive editor of Rodale's Scuba Diving magazine telephoned Divaire and said that defendant was demanding that Rodale Press encourage Divaire to market its snorkels only through retail dive stores. The Complaint alleges that as a direct consequence of the actions of defendant and others, including defendant's threat to "blackball" Divaire in the industry, Divaire agreed to sell its snorkels to consumers only through retail dive stores.

The Complaint alleges that the defendant, by its actions, encouraged and, as a combination of retail dive stores under Section 1 of the Sherman Act, participated in a group boycott to refuse to deal with Divaire as a seller of scuba diving equipment to the public through the mail and to eliminate price competition in the sale of scuba diving equipment. The group boycott as described in the Complaint constituted a violation of Section 1 of

the Sherman Act and had the effect of unreasonably restraining trade and commerce in the sale of scuba diving equipment.

D. Illegal Agreement to Change the Advertising Policy Of Rodale's Scuba Diving Magazine

The second cause of action alleged in the Complaint is that defendant violated Section 1 of the Sherman Act by encouraging and, as a combination of retail dive stores, participating in a group boycott to deprive mail-order vendors of scuba diving equipment of access to the means of obtaining, marketing, or selling scuba diving equipment, including the advertising of scuba diving equipment for sale through the mail.

Rodale Press announced to the industry in January 1992 that it planned to launch a new diving magazine in the Spring of 1992. At an industry trade show held between January 16 and January 19, 1992, members of the defendant's board of directors learned that Rodale Press planned to carry in the magazine advertising for vendors who sell scuba diving equipment through the mail. The defendant thereupon made efforts to persuade Rodale Press to change the advertising policy for Rodale's Scuba Diving magazine by excluding any advertising for the sale of scuba diving equipment through the mail. The Complaint alleges that defendant conducted its campaign against the advertising policy of Rodale's Scuba Diving magazine in several ways.

On April 21, 1992, at a meeting of the Florida Area Dive Operators, members of defendant's board of directors met with the magazine's publisher and insisted that the advertising policy be

changed. The next day, the chairperson of defendant's board of directors met with the publisher for the same purpose.

Defendant also published several articles in the Scuba Retailer. At least one of these articles advocated that dive store retailers not carry Rodale's Scuba Diving magazine because of the magazine's intention to carry mail-order advertising. At the time, the Scuba Retailer was edited by members of defendant's board of directors and distributed to all segments of the scuba diving industry.

The Complaint alleges that as a result of the concerted demands received from the defendant and others, Rodale Press agreed that Rodale's Scuba Diving magazine would not accept any advertising for the sale of scuba diving equipment through the mail. Accordingly, it announced on May 1, 1992, that Rodale's Scuba Diving magazine would not accept advertising for mail-order scuba diving equipment products. That policy continues to the present day.

The Complaint alleges that the defendant, by its actions, encouraged and participated in a group boycott of mail-order vendors of scuba diving equipment by depriving these vendors of access to the advertising of scuba diving equipment for sale through the mail. The group boycott as described in the Complaint constituted a violation of Section 1 of the Sherman Act and had the effect of unreasonably restraining trade and commerce in the sale of scuba diving equipment.

E. The Complaint States Claims on Which Relief May Be Granted

Section 1 of the Sherman Act proscribes every "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states[.]" Group boycotts, or concerted refusals to deal, fall within the class of restraints prohibited by the Sherman Act. See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 212, 211 (1959). A classic group boycott involves, as does the boycott by defendant in this case, concerted action by competitors with "'a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive object, or both.'" Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 183 (3d Cir. 1988).

The Complaint in this case alleges, in two counts, that the members of defendant agreed to undertake concerted efforts to exclude, and thus eliminate, mail-order competitors from the scuba diving equipment market. An association such as defendant's is a group of competitors, and an agreement among members of an association unreasonably to restrain interstate trade violates the Sherman Act. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1007 (3d Cir. 1994), cert. denied, ___ U.S. ____, 115 S.Ct. 1691 (1995). Concerted action by dealers to protect themselves from the price competition posed by discounters, as the complaint in this case alleges, constitutes a form of horizontal price fixing, and is a per se violation of the Sherman Act. Denny's

Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1221 (7th Cir. 1993).

F. Explanation of the Default Final Judgment

The United States believes that the Default Final Judgment provides an adequate remedy for the alleged violations. The Default Final Judgment is intended to insure that defendant does not continue to attempt to prohibit mail-order dealers of scuba diving equipment from acquiring such equipment for marketing and sale. It prohibits defendant from engaging in a variety of means and methods of conduct designed to deprive mail-order dealers from gaining access to sources of supply, advertising space, mailing lists, or other resources useful in the marketing or selling of scuba diving equipment. The Default Final Judgment does not prevent the SRA from unilaterally declining to deal with any mail-order dealer so long as its reasons for doing so are bona fide. Furthermore, nothing in the Default Final Judgment prohibits any individual retailer of scuba diving equipment from unilaterally declining to deal with any mail-order dealer or mail-order product.

Section IV of the Default Final Judgment contains five categories of prohibited conduct. Certain limited exceptions with respect to unilateral conduct are contained later in this section.

Section IV (A) prohibits the defendant from taking any action to encourage, advise, recommend, or require any person to sell its product only through retail dive stores. This provision directly

addresses the situation alleged in Count 2 of the complaint with respect to Divaire.

Section IV (B) prohibits the defendant from taking any action to arrange, advance, establish, implement, encourage, or enforce any refusal to deal with any mail-order dealer. This provision would prevent, for example, any efforts to arrange or participate in a group boycott against any mail-order dealer by the defendant or others participating with the defendant.

Section IV (C) precludes the defendant from preventing, or attempting to prevent, any mail-order dealer from gaining access to means of marketing and distributing scuba diving equipment. Defendant is ordered not to prevent or attempt to prevent any mail-order dealer from gaining access to mailing lists, advertising space, corporate sponsorships, trade shows, trade associations, or other means of marketing or selling scuba diving equipment. This particular provision directly addresses the conduct alleged in Count 2 of the Complaint.

Section IV (D) of the Default Final Judgment precludes the defendant from preventing, or attempting to prevent, any mail-order dealer from obtaining access to sources of supply of scuba diving equipment for resale to the public. This provision will prevent the defendant and its members from attempting to pressure or discourage any manufacturer of scuba diving equipment from dealing with mail-order dealers.

Section IV (E) of the Default Final Judgment prohibits the defendant from directly or indirectly adopting, disseminating or

publishing any rule, by-law, resolution, policy, guideline, or related statement that has the purpose or effect of advocating or encouraging any of the practices identified in Sections IV (A) through (D) of the Default Final Judgment. This provision should prevent the defendant from advocating boycott activity towards mail-order dealers and other vendors of scuba diving equipment, as it has in the past through its publication, the Scuba Retailer.

While the Default Final Judgment prohibits a wide variety of concerted activities by the defendant and its members, certain limited conduct by the defendant is permitted. For example, nothing in the Default Final Judgment prohibits the defendant from declining to deal with any mail-order dealer so long as its reasons for doing so are bona fide. The burden will be on the defendant to prove in any enforcement proceeding initiated by the Department that the defendant's refusal to deal with the mail-order dealer was done so unilaterally, for bona fide reasons, and was not anti-competitive in purpose or nature. Further, nothing in Section IV of the Default Final Judgment will require the defendant to sell, trade, exchange, or otherwise make available its list of member names to third persons. Finally, nothing in Section IV of the Default Final Judgment will prohibit any individual retailer of scuba diving equipment, acting alone and not on behalf of defendant or in concert with any other retailer, from unilaterally declining to deal with any mail-order dealer. Thus, the Default Final Judgment prohibits collusive and concerted

activity by the defendant while preserving the defendant's ability to exercise limited and appropriate business judgment.

IV
CONCLUSION

Based upon the knowledge it has acquired through its investigation of defendant and defendant's conduct, the United States believes that the Default Final Judgment will effectively prevent future violations of Section 1 of the Sherman Act by defendant, without imposing any onerous burdens on the SRA's ability to function as a trade association dedicated to serving the legitimate needs and interests of its members. For the foregoing reasons, the United States respectfully requests that the Court enter a judgment by default against defendant and that it enter a permanent injunction restraining defendant from further violations of Section 1 of the Sherman Act.

Respectfully submitted,

_____/s/_____
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