or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TRANS-AMERICAN COLLECTIONS, INC., ET AL.

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

Docket 8901. Complaint Oct. 16, 1972—Decision, Sept. 26, 1973.*

Consent order requiring a Bloomington, Illinois, seller of debt collection services, among other things to cease using materials which simulate telegraphic communications; using materials which misrepresent the nature, content or purpose of any communication; threatening debt collection suits, not in good faith; failing to include a notice to the effect that communications are only a reminder notice and that respondent, Trans-American, cannot accept monies nor will it take any action regarding this claim; and furnishing to others means and instrumentalities of misrepresentation or deception.

Appearances

For the Commission: *Leroy M. Yarnoff*, *Frederick D. Clements* and *Thomas S. Westhoff*.

For the respondents: *Wald, Harkrader & Ross*, Washington, D.C. and *Glickfield & Graves*, Marion, Indiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Trans-American Collections, Inc., a corporation, and Wayne E. Martin and Eleanor G. Martin, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect

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*The complaint is reported as amended by the administrative law judge's order of January 9, 1973.

thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Trans-American Collections, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1206 North Towanda Plaza, Bloomington, Illinois.

Respondents Wayne E. Martin and Eleanor G. Martin are individuals and are officers of the said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale and sale of a service for the collection of alleged debts. This service consists of the preparation and mailing by the respondents of a series of form notices and letters to alleged debtors.

Respondents sell their service through commissioned salesmen in various States of the United States. Creditor-purchasers of the service are provided with a book of serialized coupons, one coupon per account to be serviced, for which they pay a flat-rate fee in advance, which rate is determined by the number of accounts to be serviced. To initiate the service the creditor fills in one of the coupons with information concerning the alleged debtor and debt and himself and mails it to the respondents who then cause a series of form notices and letters to be mailed to the alleged debtor at regular intervals over a period of about ninety days. Two basic styles of forms are used in this series: (1) that which is titled TELEGRAM; and (2) that which bears the letterhead of Trans-American Collections, Inc.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are now, and for some time last past have been, engaged in sending to and receiving from persons, firms and corporations located in various States of the United States, by means of the United States mail, letters, notices, forms and other material for use in the collecting of alleged delinquent accounts. Respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the payment of alleged delinquent accounts, the respondents mail or cause to be mailed, and have mailed or caused to be mailed, to alleged delinquent debtors various printed forms and other printed material.

Typical and illustrative, but not all inclusive, of said forms and material are the following:

1. A yellow window envelope on which a return address is printed, with no name, and to which is affixed a metered stamp depicting a spread eagle. The word TELEGRAM is printed in large black type over the window.

2. A yellow, printed form styled TELEGRAM, designed to be inserted in the envelope described in subparagraph 1 of this Paragraph.

Photocopies of some such forms described in subparagraphs 1 and 2 of this Paragraph are annexed to and made part of this complaint.

PAR. 5. By and through the use of the envelopes and forms described in subparagraphs 1 and 2 of Paragraph Four, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication to those to whom said forms are mailed that:

1. The communication is a telegraphic communication of the type usually termed to be a telegram.

PAR. 6. In truth and in fact:

1. The communication is not a telegraphic communication of the type usually termed to be a telegram. Rather, it is a printed form letter, mailed to alleged debtors, which form by its color and appearance, styling, printing and format simulates a telegraphic communication and which, by virtue of said simulation, misleads the recipient as to its content and import, purpose, and urgency.

Therefore, the use by respondents of said envelopes and forms as set forth in Paragraphs Four and Five was and is false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and for the purpose of inducing the payment of alleged delinquent accounts, the respondents mail or cause to be mailed, and have mailed or caused to be mailed, to alleged delinquent debtors various printed forms, letters and other printed material containing certain statements and representations.

Among and typical, but not all inclusive, of such statements and representations are the following:

* * * TRANS-AMERICAN COLLECTIONS, INC. SERVING ALL COUNTRIES OF NORTH AMERICA * * *

*   *   *   *   *   *   *

* * * INTERNATIONALLY FAMOUS FOR COLLECTING PAST DUE ACCOUNTS * * *

* * * * * * *

* * * Collection Division * * *

* * * * * * *

* * * Claims Division * * *

* * * * * * *

* * * Claims Department * * *

* * * * * * *

* * * This is a courtesy notice to inform you that your delinquent account with the above named creditor has been referred to this agency for collection. Your creditor requests that you be allowed ten 10 days to settle this account before they begin collection procedures * * * It is the intention of the creditor to exhaust every legal means to collect this account. These procedures may be extremely costly to the debtor. You may avoid such additional costs and impairment of your credit rating only by making prompt settlement now * * *.

* * * * * * *

* * * We are recommending that the claimant exhaust every legal means to liquidate this claim * * *

* * * * * * *

* * * Attention Debtor.

You have failed to discharge the debt directed to us for collection by the above-named creditor. The ten-day courtesy period has expired. Therefore, we are recommending that proceedings be instituted if settlement of this account is not made if liability warrants such action. Expenses incidental to such litigation may be chargeable to the debtor, including court costs, legal feets, and such other charges as the suit may entail * * *

* * * * * * *

* * * You have received the benefit of earlier notices from this office but have failed to discharge your debt to the above named creditor. We are, therefore, recommending that the creditor file suit to recover the full amount of his claim if obligation warrants this action. If you have no valid defense a judgment may be rendered against you. Any judgment rendered may be collected by seizure of your assets, attachment of automobile or other personal property with sale at public auction to the highest bidder. Processing of a claim to the lawsuit stage may be commenced in one week. We, therefore, advise you to avoid these costly penalties by making payment to your creditor immediately * * *

* * * * * * *

* * * If full settlement is not made within 48 hours upon receipt of this Dispatch, we recommend that you consult your attorney at once to determine legal consequences * * *

* * * * * * *

* * * You are further notified that claimant requests that Trans-American Collections, Inc. resume procedures to liquidate claim involved, in order to satisfy the liability set forth above. If employed, we request verification as to employers

name and address. If incorporated or self-employed, name of firm and banking institution with whom you do business * * *

* * * * * * *

* * * Notice is hereby given that we shall recommend that our client advance court costs and immediately enter suit in favor of credit grantor according to law, if the amount owed warrants this action * * *

* * * * * * *

* * * You are hereby requested to liquidate claim at claimants office * * * within 5 days after the delivery hereof * * * or protest liability of claim on file. Failure to comply may result in commencement of litigation by creditor if claim warrants such action, with ultimate seizure of property, including monies, automobile, credits, and bank deposits, now in your possession. If claimant receives an amount sufficient to satisfy the liability set forth herein, prior to the time of protest as scheduled, you may apply for, and with consent of claimant your appearance will not be required * * *

* * * * * * *

* * * Your refusal or neglect to satisfy the above liability at claimants claim office, compels us to notify you, that if claimant obtains judgment, you may present assets exempt from levy and protest the validity of claim immediately by calling * * * within 48 hours upon receipt of this final notice. All statements will be recorded * * *

* * * * * * *

* * * Final—72 hour—notice * * * We wish to put you on notice that your payment of this claim must be received by the creditor at once. You are further notified legal proceedings by the creditor following judgment may compel you to bring all financial records to court for examination. A writ of execution may be issued and may be satisfied by a levy on your automobile or other personal property, real estate, bank accounts, chattels, goods and accounts receivable. A public auction of the aforementioned property may be held after public advertising of same and usual sales process is conducted by sheriff. Court costs, sheriff fees, judgments, and all other expenses relative to these proceedings may be assessed against the debtor. Litigation is expensive. Remit payment direct to creditor now to avoid these costs * * *

PAR. 8. By and through the use of the aforesaid statements and representations, including the use of the word "collections" in the corporate name, and others of similar import and meaning not expressly set out herein, the respondents have represented, and are now representing, directly or by implication:

1. (a) That the said corporate respondent is a collection agency;

(b) that delinquent debtors' accounts are referred to corporate respondent by creditors for collection; and

(c) that corporate respondent is prepared to institute, or cause to be instituted, legal proceedings in the collection of delinquent debts.

2. That legal action with respect to an allegedly delinquent account has been or is about to be initiated.

3. That if payment is not made, the alleged debtor's general or public credit rating will be adversely affected.

PAR. 9. In truth and in fact:

1. (a) The said corporate respondent is not a collection agency;

(b) delinquent debtors' accounts are not referred to corporate respondent by creditors for collection; and

(c) corporate respondent does not and cannot institute legal proceedings for the collection of delinquent accounts.

On the contrary, respondents sole business is the preparation and mailing of form letters and notices to alleged debtors, exhorting them to pay their alleged creditors.

2. Legal action with respect to the allegedly delinquent account has not been, or is it about to be, initiated. On the contrary, while respondents' service is being used, it is virtually certain that no legal proceedings are being initiated.

3. If payment is not made, the alleged debtor's general or public credit rating is not adversely affected.

Therefore, the statements and representations set forth in Paragraphs Seven and Eight were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals engaged in providing services of the same general kind and nature as those provided by respondents.

PAR. 11. The use by respondents of the envelopes and forms as set forth in Paragraph Four hereof, has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that the said communication is a telegram, an emergency communication, or one of similar concern containing urgent matter. Furthermore, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of substantial sums of money by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commere in violation of Section 5 of the Federal Trade Commission Act.

Urgent Message

TELEGRAM 1:05 P.M.
July 27, 1971.

Pay to—

RF: Amount of claim, $27.00

Notice is hereby given that we shall recommend our client advance court costs and immediately, according to law, enter suit in favor of claimant, if recommended by legal council and the legality of claim warrants this action. It is imperative that you settle this claim within the next 72 hours. Important to you, that claimant receive full settlement in time allowed. It makes no difference to us whether you pay voluntarily or under compulsion. If claimants legal counsel accepts our recommendation to commence litigation, and if legal action has been filed, you may be subject to court costs even upon full remittance. Do not remit to Trans-American Collections, Inc. or their mailing addresses at 333 North Michigan Ave., Chicago, 1505 E. 17th St., Santa Ana, Ca., 303 W. 42nd St., New York City, 1225 Post St., San Francisco, Ca., 636 W. Broadway, Vancouver 9, B.C.

[Postal Meter FRANK]

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DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Trans-American Collections, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1206 North Towanda Plaza, Bloomington, Illinois.

Respondents Wayne E. Martin and Eleanor G. Martin are officers of said corporation. They formulate, direct and control the policies, acts and practices of the said corporation, and their business address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, Trans-American Collections, Inc., a corporation, its successors and assigns, and its officers, and Wayne E. Martin and Eleanor G. Martin, individually and as officers of said corporation, and respondents' agents, representatives, and employees directly or through any corporation, subsidiary, division or other device in connection with the offering for sale, sale or distribution of any service or printed matter for use in the collection of or inducing or attempting to induce, the payment of delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, or placing in the hands of others for use, envelopes, letters, forms, or any other materials which appear to be, or simulate, telegraphic communications;

2. Using, or placing in the hands of others for use, envelopes, letters, forms, or any other materials which misrepresent the nature, contents, or purpose of any communication;

3. Representing directly or by implication that:

(a) Respondents are prepared to institute or cause to be instituted, legal proceedings in the collection of delinquent debts.

(b) Legal action with respect to an allegedly delinquent account has been, or is about to be, or may be initiated.

(c) Nonpayment of the delinquent account will adversely affect the credit rating of the debtor.

Provided, *however*, That it shall be a defense in any enforcement proceeding initiated under this Paragraph 3 for the respondents to establish that such representations are factually correct.

4. Failing clearly and conspicuously to disclose in each letter, form or notice to delinquent, or alleged delinquent, debtors the following statement:

This communication is only a reminder notice. Trans-American Collections, Inc., cannot accept monies nor will it take any action, legal or otherwise, regarding this claim.

This statement shall be made in prominent type, of a size no smaller than the basic body copy in the letter, form or notice, and in red ink to contrast with the text of the letter to be printed or written in black or blue ink, or in black and blue ink, or in black or blue ink if the text of the letter is printed or written in red.

The respondents may use the term "collections" in their corporate name.

5. Making any statement or statements in any letter, form or notice to delinquent, or alleged delinquent, debtors which is/are inconsistent with, negate/s or contradict/s, the affirmative disclosure required by Paragraph 4.

6. Placing in the hands of others the means and instrumentalities to represent any of the matter prohibited in Paragraph 3 or which fail to comply with the requirements of Paragraphs 4 or 5 of this order.

It is further ordered, That the respondent corporation shall distribute a copy of this order to each of its operating officers, agents, representatives or employees engaged in any aspect of the offering for sale, sale or distribution of any service or printed matter for use in the collection, or attempting to collect, or assisting in the collection of or inducing or attempting to induce the payment of delinquent accounts, and that said respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance with obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, signed by the respondents, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALL STATES LINCOLN-MERCURY, INC., TRADING AS CROSS ROADS LINCOLN-MERCURY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-2460. Complaint, Sept. 27, 1973—Decision, Sept. 27, 1973.

Consent order requiring a Cleveland, Ohio, retailer of new and used automobiles, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Vivian L. Solganik.*

For the respondents: *Charles Hyman*, of *Hyman, Zagrans & Carothers*, Elyria, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act, and Regulation Z, the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that All States Lincoln-Mercury, Inc., a corporation, d.b.a. Cross Roads Lincoln-Mercury, and Charles E. Mullinax, Wallace A. Scotten, Earl B. Porter, and Harry W. Lum, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent All States Lincoln-Mercury, Inc., d.b.a. Cross Roads Lincoln-Mercury, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 9415 Broadway, in the city of Cleveland, State of Ohio.

Respondents Charles E. Mullinax, Wallace A. Scotten, Earl B. Porter, and Harry W. Lum are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for sometime last past have been, engaged in the advertising, offering for sale, and sale of new and used automobiles to the public.

PAR. 3. In the course and conduct of their business as aforesaid respondents have caused, and are now causing, advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to be placed in various media for the purposes of aiding, promoting or assisting, directly or indirectly, in the credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, of respondents' said automobiles.

PAR. 4. Subsequent to July 1, 1969, in certain of the advertisements referred in Paragraph Three hereof, the respondents have represented, in connection with an extension of consumer credit, the amount of an installment payment, the number of installments and the period of repayment, the amount of downpayment required, and the amount of the finance charge expressed as an annual percentage rate, without disclosing all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1) The cash price.

2) The deferred payment price, or the sum of the payments of the item advertised.

PAR. 5. Subsequent to July 1, 1969, certain of the advertisements referred in Paragraph Three hereof stated the rate of financial charge expressed as an annual percentage rate without using the term "annual percentage rate," as required by Section 226.10(d)(1) of Regulation Z.

PAR. 6. Subsequent to July 1, 1969, certain of the advertisements referred to in Paragraph Three hereof used the term annual percentage rate without printing such term more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

PAR. 7. By causing to be placed for publication the advertisements referred to in Paragraphs Four, Five and Six hereof, respondents failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of that Act, such failure to comply constitutes a violation of the Truth in Lending Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent All States Lincoln-Mercury, Inc., d.b.a. Cross Roads Lincoln-Mercury, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 9415 Broadway, in the city of Cleveland, State of Ohio.

Respondents Charles E. Mullinax, Wallace A. Scotten, Earl B. Porter, and Harry W. Lum are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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

ORDER

It is ordered, That respondents All States Lincoln-Mercury, Inc., a corporation, d.b.a. Cross Roads Lincoln-Mercury, its successors and assigns, and its officers, and Charles E. Mullinax, Wallace A. Scotten, Earl B. Porter, and Harry W. Lum, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the arrangement, extension, or advertisement of consumer credit in connection with the sales of automobiles or other products or services, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) do forthwith cease and desist from:

(1) Causing to be disseminated to the public in any manner whatsoever, any advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, which advertisement states the amount of downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless it states all of the following items in the manner and form as required by Section 226.10(d)(2) of Regulation Z:

(a) The cash price or the amount of the loan, as applicable;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if credit is extended;

(d) The amount of the finance charge expressed as an annual percentage rate; and

(e) The deferred payment price or the sum of the payments, as applicable.

(2) Failing in any consumer credit transaction of advertisement to state the rate of finance charge expressed as an annual percentage rate without using the term "annual percentage rate," are required by Section 226.10(d)(1) of Regulation Z.

(3) Failing in any consumer credit transaction or advertisement to use the term annual percentage rate unless such term is printed more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

(4) Failing in any consumer credit transaction or advertisement to make all the disclosures, determined in accordance with

Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resultant in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That individual respondents named herein each promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall show each respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

PEPSICO, INC.

Docket 8903. Interlocutory Order, Sept. 28, 1973.

Order (1) vacating ruling of law judge denying complaint counsel's request to offer into record subpoenaed data, once received, of third-party soft drink concentrate companies; (2) allowing complaint counsel to offer corrected sales data of Crush International, Inc., so as to give complete picture of market shares; (3) directing General Counsel to submit proposed orders containing an agreement to settle third-party subpoena enforcement actions to the D.C. District Court for approval; (4) remanding case for further proceedings in accordance with Commission's order; and (5) with respect to procedural ruling, the law judge must promptly notify the Commission when the law judge certifies a motion for enforcement of subpoena but later rules the information is not needed or will not be allowed into evidence.

Appearances

For the Commission: *Amy R. Richter*, *Stephen G. Stocker*, *Ira A. Nordlicht* and *James E. Egan.*

For the respondent: *Edward Howrey*, of *Howrey, Simon, Baker and Murchison*, Washington, D.C.; *James Frangos and John Kirby*, of *Mudge, Rose, Guthrie & Alexander*, New York, New York.

Order Ruling on Interlocutory Appeals and Objections to Proposed Settlement of Subpoena Enforcement Suits

Before the Commisison are three matters: (1) application by complaint counsel, filed September 13, 1973, for review of administrative law judge's ruling denying request to offer corrected sales data of Crush International, Inc., into the record; (2) request of complaint counsel, filed September 14, 1973, for review of administrative law judge's ruling denying request to offer subpoenaed data of other third-party soft drink concentrate companies once they are received; and (3) proposed settlement of third-party subpoena enforcement actions.

Upon request of complaint counsel the administrative law judge granted permission for them to file interlocutory appeals from his rulings.[1] Respondent has filed an opposition to said appeals. As to the proposed settlement of the subpoena enforcement actions, this matter was negotiated by the Commission's General Counsel with the third-party defendants. Counsel for PepsiCo was informed of the proposed settlement and has been invited to comment on its terms, which it has done by letter dated September 19, 1973. Complaint counsel has filed a reply to PepsiCo's comments.

I. Proposed Settlement of Third Party Subpoena Enforcement Actions

We will first take up the proposed settlement since disposition of that matter affects the outcome of the other matters.

On July 5, 1973, the administrative law judge certified in writing to the Commission a request by complaint counsel that court enforce-

[1] Although Rule 3.23(b) specifies that the hearing officer certify in writing that the matter meets certain criteria for interlocutory appeal, the law judge's "certification" here was given orally. However, it appears this was due to the exigencies of time and the requirement that the certification be made in writing will be waived in this case.

ment of four subpoenas *duces tecum* be instituted against the chief executive officers of the Coca-Cola Company, the Seven-Up Company, Royal Crown Cola Company, and Cott Corporation. The law judge reported that the subpoenas had been issued at the request of complaint counsel and called for information "which will allow complaint counsel to establish market shares and concentration in the sale of soft drink concentrate and to establish respondent's rank among competitors." Also, they called for information relevant to an alleged trend towards vertical integration among leading manufacturers of soft drink concentrate manufacturers.

The administrative law judge further reported that following service of the subpoenas, the above-mentioned third parties filed motions to quash or in the alternative for protective orders granting so-called *Mississippi River* treatment (69 F.T.C. 1186–89) to the requested data. These motions were denied but the law judge entered a protective order for the information.[2] The law judge denied motions by the third parties for permission to file an interlocutory appeal and certified the request for court enforcement with the suggestion that the General Counsel be directed to seek such enforcement on an expedited basis.

Pursuant to the administrative law judge's certification, the Commission directed the General Counsel to seek court enforcement of the subpoenas on an expedited basis, and on September 5, 1973, the United States Department of Justice filed enforcement petitions on behalf of the Commission in the United States District Court for the District of Columbia (Civil Action Nos. 1700–73, 1701–73, and 1703–73) against three of the defaulting parties.[3] Subsequently, the General Counsel and the parties negotiated a proposed settlement which has now been submitted to the Commission for its approval. As indicated, the Commission solicited the views of PepsiCo on the terms of the settlement.

The proposed settlement would take the form of a court order directing the third parties to submit the data called for in the original subpoenas. Also included in the court order would be provisions protecting against public disclosure of details of the third-parties' sales data. Only counsel for the Commission and their economist witnesses, PepsiCo's independent retained outside counsel and outside economist

[2] The protective order entered by the law judge would have permitted disclosure of the data to four officials of PepsiCo who were subsequently identified as PepsiCo's director of market research, manager of information analysis, senior vice president, and chairman of the board of Rheingold Corp.

[3] No action was filed against the Cott Corporation, the fourth defaulting party. After receiving notice of the Commission's intent to seek court enforcement of the subpoena, Cott voluntarily agreed to turn the requested data over to complaint counsel.

witnesses, and the administrative law judge, Commission, and reviewing courts, would be able to see the underlying data.

Other protective provisions are included: *e.g.*, counsel and their witnesses, before seeing the data, must sign a statement agreeing that they will not violate the terms of the protective order, shall use the information only in connection with this proceeding, and shall return all notes and other papers reflecting the information to the responding company at the conclusion of the proceeding.

There is also a provision which restricts not only counsel, but the law judge, the Commission, and reviewing authorities, from publicly disclosing the information except "to show the combined total sales of all companies in the industry, the combined total sales of the largest four companies, the percentage which the latter bear to the former, the relative ranking of PepsiCo, Inc. in the industry (*e.g.*, first, second, third), whether PepsiCo's sales are more than 50% (or 100%, or any fifty percentage point increment) greater than the next leading member of the industry, or such other data as shall not reveal data or information as to any of the individual companies that are not respondents in Docket No. 8903".[4]

Respondent PepsoCi objects to the Commission accepting the proposed settlement order. Its threshold argument is that the settlement order would "unilaterally and summarily abrogate" the June 7, 1973, protective order of the administrative law judge contrary to the Commission's rules which provide for interlocutory appeals and the right of respondent to be heard thereon.

We find this objection to be without merit. The fact that our rules provide for interlocutory appeals does not prevent the Commission from negotiating a settlement of a court suit which it is satisfied adequately protects the rights of the parties below.

Furthermore, although this is not necessarily a controlling factor, we find nothing in the rulings and orders of the administrative law judge which would lead us to believe that the proposed protective order

[4] This type of *in camera* provision, which binds the Commission and purports to bind even reciewing courts, is not generally favored by the Commission. See Section 3.45 of the Commission's Rules of Practice which provides in part: "The right of the [Administrative Law Judge], the Commission, and reviewing courts to disclose *in camera* data to the extent necessary for the proper disposition of the proceeding is specifically reserved." However, we are satisfied that in all probability public disclosure of the details of the subpoenaed sales data in later written opinions will not be necessary. In view of the fact that expedited hearings have been called for in this case, we will accept such a provision, not withstanding possible conflict with Rule 3.45. However, our willingness to do so in this case should not be deemed a precedent for future cases.

would conflict with what he deemed to be appropriate in this case. Indeed, it is clear that he believed *Mississippi River* treatment (which would have barred even *outside* counsel and consultants of respondent from seeing the subpoenaed data) was appropriate but that under prior Commission case law he had no discretion to apply *Mississippi River* treatment with respect to sales data in merger cases. (Tr. 12–37, pre-trial conference of June 6, 1973 and Order of June 7, 1973) In his order of June 19, 1973, denying the application of the Coca-Cola Company for an interlocutory appeal from denial of *Mississippi River* treatment, the law judge indicated that in the last analysis this was a judgment the Commission could properly make:

> In any event, should Coca-Cola refuse to comply with the subpoena, the undersigned would at that time, on motion of complaint counsel, certify the matter to the Commission for enforcement in the courts, at which time the Commission would have the opportunity to consider and review the rulings of the undersigned and weigh the propriety of extending *Mississippi River* treatment to sales data. The undersigned believes this would be more expeditious in light of the August 15, 1973 deadline for commencement of hearings than to permit an interlocutory appeal.

It is clear from the foregoing that by accepting this proposed settlement we would not be imposing a type of protective order that was clearly rejected by the law judge or that would be inconsistent with his rulings. Also, by granting respondent opportunity to comment on the terms of the proposed settlement we have provided it with the same right to be heard had the matter come before the Commission on an interlocutory appeal under Rule 3.23(b).[5]

Turning now to PepsiCo's substantive objection, it argues that the proposed settlement would prevent its counsel from disclosing the subpoenaed data to four designated PepsiCo employees, "experts in the soft drink concentrate industry," for assistance in preparing *voir dire* and cross-examination.[6] Respondent's counsel claims they received assistance from these PepsiCo officials in uncovering deficiencies in other subpoena returns.

We are not persuaded that such assistance is so clearly necessary as to require rejection of this settlement. The information sought is

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[5] For reasons that will be made clear later, respondent's argument that the subpoena enforcement action is moot, by virtue of the administrative law judge's closing of the record as to complaint counsel's case-in-chief, is unavailing.

[6] As previously noted, the four PepsiCo employees are PepsiCo's senior vice president, director of market research, manager of information analysis and chairman of the board of respondent's Rheingold Corporation subsidiary. The subpoenaed parties have strongly resisted disclosure to these officials of what they claim are highly confidential sales data.

relatively simple sales totals,[7] not highly technical data of the type which requires analysis on the part of experts. Either the data submitted comply with the specifications of the subpoena or they do not. We are satisfied that if any deficiencies are to be uncovered, counsel should be able to do this on *voir dire* or cross-examination without the need of disclosure to PepsiCo officials.

On a similar issue in another case where the subpoenaed data of a competitor was considerably more complex and technical, the enforcing court upheld a Commission protective order that barred disclosure to the respondent company. The court went even one step further by also barring disclosure to one of the counsel of record for the respondent company on the ground that he was also secretary to the company and disclosure should not be made to a corporate officer. *Federal Trade Commission* v. *United States Pipe and Foundry*, 304 F.Supp. 1254, 1261 (1969). See also *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 999 (1965) and *United States* v. *R. J. Reynolds Tobacco Co.*, 1969 Trade Cases ¶ 72,848 (D. N.J.).[8]

We have carefully studied all of respondent's objections and are satisfied that the proposed settlement adequately protects its rights and is in the public interest. Accordingly, the General Counsel has been directed to submit the proposed order to the district court for approval. We are informed that if the settlement order is approved by the court, the subpoenaed parties will turn over the information forthwith.

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[7] The data called for are:

"Documents (or in lieu thereof a true statement) sufficient to show for 1958, 1963, 1967, 1971 and 1972:

"(a) Total sales in dollars, including internal sales, of soft drink concentrate by your company.

"(b) The number of ounces of finished soft drink which can be produced from such sales of your company's concentrate.

"(c) Total sales of soft drink concentrate by your company to all bottlers owned wholly or partly by your company.

"(d) Total purchases, of soft drink concentrate from companies other than your company by bottlers owned wholly or partly by your company, in dollars; and

"(e) The number of ounces of finished soft drink which can be produced from such concentrate so purchased from companies other than your company, by brand.

"The various terms above shall have the meanings set forth in the subpoena duces tecum dated August 16, 1973.

"Any statement setting forth such total figure shall identify the brands included in such totals and the method of calculating total ounces of finished soft drinks."

[8] As previously mentioned, a provision in the proposed protective order would require that before any counsel or their witnesses could see the data called for they would have to "signify their assent to the terms of this Order by executing a written statement indicating that they have read this Order and agree to be bound thereby." It is clear that this does *not* mean, as counsel for respondent imply, that if they assented to such terms for the purpose of gaining access to the data at the hearing, they would be waiving on behalf of their client its objections to this protective order. We can assure counsel that no such waiver would result.

II. COMPLAINT COUNSEL'S INTERLOCUTORY APPEALS

Notwithstanding that in his July 5 certification to the Commission he indicated the need for enforcement of the third-party subpoenas, it now appears that in an order dated August 10, 1973, the administrative law judge ruled that he would not permit any of the data to be received into the record even if produced.

It should be noted in passing that until this appeal was filed the Commission was totally unaware of the law judge's ruling. That ruling, if left standing, would obviously moot the court enforcement actions which the law judge had one month earlier asked the Commission to undertake. We ask that in the future, if an administrative law judge has certified a motion for enforcement of a subpoena but later rules that the information is not needed or will not be allowed into evidence, that the Commission be promptly notified by the law judge of that determination.

In this case it appears from the order of the law judge denying complaint counsel's request for permission to offer the subpoenaed data when received, that he was primarily motivated by his belief that "subpoena enforcement proceedings take months, and not infrequently years before they are ultimately resolved" (Order of August 10, 1973, p. 6). He recites the fact that complaint counsel had consistently urged that the proceeding be expedited and that the Commission had issued an order requiring hearings to commence on August 15, 1973. Yet, he points out, complaint counsel requested issuance of seven subpoenas and "as anticipated by the Administrative Law Judge" four of the companies refused to comply. He states that although "the Administrative Law Judge has acted with extraordinary expedition" in the matter, "in strange contrast, complaint counsel's request for certification was not filed until * * * two weeks after the last application for interlocutory appeal had been denied." [9] He also observed that while the Commission had authorized enforcement, no papers had yet been prepared on the matter by the General Counsel, and no contact had yet been initiated with appropriate personnel of the Department of Justice. The law judge ruled that to grant complaint counsel's request would amount to an indefinite open-ended delay and would be unfair and prejudicial to respondent.[10]

[9] We note, however, that the parties were not yet in default and complaint counsel requested certification in a timely fashion after they were in default.

[10] The law judge also based his denial on the view that if he allowed new exhibits to be introduced this would violate our April 18 Order that required complaint counsel to have designated their witnesses and exhibits by May 1, 1973. However, respondent was put on notice on May 1 by complaint counsel's list of witnesses and their proposed testimony. In

On September 7, 1973, the administrative law judge again ruled that complaint counsel would not be permitted to call additional witnesses to offer the subpoenaed data. After the last witness was called by complaint counsel, on September 14, 1973, the hearings were adjourned and scheduled for resumption on October 2 for presentation of evidence by respondent.

In view of the fact that, contrary to the law judge's expectations, the information called for by the subpoenas will now undoubtedly be forthcoming in a matter of days as a result of our acceptance of the proposed settlement, we will vacate his ruling and direct him to afford complaint counsel an opportunity to offer the data and compilations thereof into the record. Some time should be allotted, of course, to provide respondent with an opportunity to study the data and prepare for cross-examination of the witnesses through which the data will be offered. Whether commencement of respondent's case should be delayed a reasonable period of time if respondent so desires as a result of the offer, we leave to the law judge to decide.

Since complaint counsel's case-in-chief will be reopened for introduction of newly obtained data, there would be no point in denying complaint counsel the opportunity to offer corrected figures of Crush International—the subject of the second interlocutory appeal before us. It appears that through no fault of complaint counsel, Crush provided incomplete sales figures in their subpoena return. This was not learned until Crush's representative was examined on *voir dire* by respondent's counsel. The law judge criticized complaint counsel for forcing respondent's counsel to do his "homework" and ruled that he could not recall the witness or offer corrected exhibits.

The purpose of the hearing is to ascertain the correct facts, not to try the abilities of counsel. At most, counsel for respondent would have been put to the task of checking new corrected exhibits. This would not have constituted "prejudice" to respondent and it would not appear that substantial delay in the proceeding would have resulted.

Since the sales data from Crush is being offered by complaint counsel in conjunction with sales data from the other subpoenaed firms to establish market shares and concentration ratios for what appear to be the eight largest soft drink concentrate suppliers in the United

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any event, as the law judge himself correctly recognized on other occasions (Tr. 88–91, 1262–65), the April 18 Order set the broad outline of the trial and did not remove the law judge's authority to allow additional data to be offered.

States, it is in the public interest that complaint counsel be allowed to offer corrected sales figures for Crush so as to give a complete picture of market shares.

The matter is remanded for further proceedings in accordance with this opinion.

It is so ordered.

IN THE MATTER OF

COMPACT ELECTRA CORP., ET AL.

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

Docket C-2461. Complaint, Oct. 1, 1973—Decision, Oct. 1, 1973.

Consent order requiring a Bellerose, New York, five-corporation business engaged in the selling of vacuum cleaners and accessories to consumers, among other things to cease using deceptive and misleading selling and debt collection tactics.

Appearances

For the Commission: *James Manos.*
For the respondents: *Norman S. Langer,* Brooklyn, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp., Compact Associates, Inc., corporations and Hyman Sindelman, also known as Hy Delman individually and as an officer and Theodore Decker, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp. and Compact Associates, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. All of the above-named corporate respondents have their principal offices and places of business at 264–16 Jericho Turnpike, Bellerose, New York.

PAR. 2. Respondent Hyman Sindelman, also known as Hy Delman, is sole stockholder and an officer of each of the corporate respondents herein named, and he formulates, directs and controls the policies, acts and practices of said corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The corporate respondents do not operate as independent, individual corporations but are components of one business entity which respondent, Hyman Sindelman, also known as Hy Delman dominates and controls. He shifts and reassigns personnel of each corporate respondent to function and perform duties for other corporate respondents so that as a consequence a nexus of such degree exists between and among each of the corporate respondents that they have lost their individual identities. Thus the acts and practices of each of the corporate respondents named herein may be deemed the acts and practices of all of the other corporate respondents named herein.

PAR. 3. Respondent Northeast Discount Corp. is a corporation formed solely for the purpose of collecting debts incurred by purchasers of the other corporate respondents' products.

Respondent Theodore Decker is an individual engaged in the practice of law as a member of the bar of the State of New York, with his office and principal place of business located at 250 West 57th Street, New York, New York. In the course and conduct of his practice of law, respondent entered into a contractual agreement with respondent Northeast Discount Corp. regarding the preparation of form letters under his attorney's letterhead to be employed in the collection process of Northeast Discount Corp.

COUNT I

Alleging violations by respondents Compact Associates, Inc., Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., and Hyman Sindelman, also known as Hy Delman of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 4. In the course and conduct of its business, respondent Compact Associates, Inc., is now and for some time last past has been engaged in purchasing vacuum cleaners, parts and accessories and, as a franchisee, memberships in a shopping service which in turn it sells, transfers, and/or assigns to corporate respondents Compact Electra Corp., Compact Bellerose, Inc., and Compact Discount, Inc. The latter act as Compact Associates' sales representatives and are now and for some time last past have been engaged in the sale of vacuum cleaners, parts and accessories to consumers. For the purpose of inducing prospective purchasers to buy their Compact vacuum cleaners and accessories respondents offer prospective purchasers a free one year membership to a shopping service. Respondents' salesmen and/or agents prepare at the purchaser's home an enrollment application to the shopping service which they then cause to be mailed from the State of New York to the shopping service in the State of New Jersey. The shopping service mails to enrolled purchasers in New York State price lists, instructions, booklets, pamphlets and other literature regarding merchandise which may be purchased through the shopping service.

In addition, Compact Associates, Inc., sells and ships its vacuum cleaner products from New York State to purchasers located in other states.

Thus, respondents Compact Associates, Inc., Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., and Hyman Sindelman, also known as Hy Delman, maintain and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' products are identified by the trade name "compact."

PAR. 5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, respondents, their agents and employees have made and are making numerous statements and representations to purchasers and prospective purchasers with respect to the terms and conditions of sale of their products, the savings available through memberships in the shopping service and the characteristics of memberships in the service.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

1. An unconditional free gift is offered to respondents' prospective customers.

2. Purchasers of respondents' products will receive a free lifetime membership in the shopping service.

3. Members of the shopping service will enjoy substantial savings in the purchase of products through the service and such savings will provide monies for the payments due to respondents.

4. The shopping service is a wholesale service and members purchase items wholesale or at "cost" prices.

5. The shopping service has about one million members.

6. Normally, the price of a lifetime membership in the shopping service is $360.

7. Respondents control the shopping service, or that it is a subsidiary of or owned by the respondents.

8. Respondents and/or their methods of doing business have been approved by the Better Business Bureau.

9. The shopping service purchases in mass quantities and thereby obtains low prices for its members.

10. Purchasers of respondents' products may obtain memberships in the shopping service provided they purchase respondents' products at the initial visit by respondents' salesmen; if individuals decide to purchase respondents' products at a later time, they will not be entitled to become members of the shopping service.

11. The respondents' products are left with the customer on approval and the customer is required to sign a "receipt."

12. The contract to purchase respondents' products may be broken if the purchaser's spouse does not sign the contract.

13. The telephone numbers provided by respondents' salesmen to purchasers are the salesmen's "home" telephone numbers which customers may call to cancel their contracts.

14. Respondents' salesmen will sell the purchaser's old vacuum cleaner and send the proceeds of such sale to the purchaser and that the proceeds will equal at least two installment payments due on the Compact vacuum cleaner.

15. The price of the Compact vacuum cleaner may be substantially reduced if the purchaser provides respondents with names and addresses of friends who would be interested in respondents' product.

PAR. 6. In truth and in fact:

1. Respondents' "gifts" are not unconditionally free; the purchaser or prospective purchaser must permit a demonstration of respondents' products and/or furnish respondents with a sufficient number of names and addresses of prospective purchasers in order to receive the gift.

2. Respondents do not give free lifetime memberships in the shopping service; free membership is only for one year and thereafter the member must renew his membership by paying $12.50 annually.

3. Members of the shopping service do not enjoy substantial savings in the purchase of goods and products; consequently, substantial savings are not available to defray payments due to respondents.

4. The shopping service is not a wholesale service and members do not purchase items wholesale or at cost prices.

5. The shopping service has fewer than 20,000 members.

6. Lifetime memberships in the shopping service are not sold, therefore the price of a lifetime membership is not $360. The price of membership is $12.50 per year, and must be renewed each year.

7. Respondents are merely franchisees of the shopping service; they do not control or own the service nor do they have any proprietary interest in it.

8. Respondents and their methods of doing business have not been approved by the Better Business Bureau.

9. The shopping service does not purchase in mass quantities but rather fills each member's order through soliciting sources of supply on an individual basis in order to furnish the member with the product that he desires.

10. Respondents' offer of a free membership in the shopping service is available at any time to the purchasers of respondents' products, and is not available only during the initial visit.

11. Respondents' products are not left with the customer on approval; the signed "receipt" is in fact a contract for the purchase of respondents' products.

12. Respondents enforce contracts signed by one spouse and not the other.

13. The telephone number provided by respondents' salesmen is actually the respondents' business telephone number; customers calling that number are informed that they have signed a binding contract and they must perform in accordance with its terms.

14. Respondents' salesmen rarely sell the purchaser's old vacuum cleaner; if the old vacuum cleaner is sold, the proceeds sent to the purchaser rarely if ever equal two payments due on respondents' contract.

15. The price of respondents' product is not reduced substantially even if the purchaser provides respondents with names and addresses of friends who would be interested in respondents' products.

Therefore, the statements and representations as set forth in Paragraph Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of its business respondent

Compact Discount, Inc., has utilized the name "Compact Discount, Inc." on its contracts, stationery and other documents in connection with the sales of vacuum cleaners and other products to consumers in their homes.

PAR. 8. By and through the use of the aforesaid corporate name, respondent Compact Discount, Inc., represents that it is selling its products at discount prices.

PAR. 9. In truth and in fact:

Respondent does not sell its products at discount prices. "Compact" vacuum cleaners are not sold by any other firms in the retail trade area in which respondent Compact Discount, Inc. sells its products. Therefore, respondents' prices do not constitute a reduction or discount from the price at which said merchandise is usually and customarily sold at retail in the trade area in which the representation is made.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight are false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of vacuum cleaners and accessories and other products of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are true, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations by respondents Northeast Discount Corp., Hyman Sindelman, also known as Hy Delman and Theodore

Decker of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. In the course and conduct of its business, respondent Northeast Discount Corp. is engaging and for some time last past has engaged in the collection of debts allegedly due and owing the Compact corporate respondents pursuant to contracts or other agreements relating to the purchase of said respondents' products. In attempting to induce payments of purportedly due or delinquent accounts, respondent Northeast Discount Corp. has sent through the United States mail dunning letters, notices and similar instruments which contain false and misleading statements and representations.

Typical, but not all inclusive of such statements and representations, are the following:

Protect your credit by keeping your account up to date* * *

*   *   *   *   *   *   *

MORE DRASTIC ACTION MUST BE TAKEN to collect this account unless a substantial payment is made within the next *FIVE DAYS* * * *

*   *   *   *   *   *   *

Our association with a National Credit Bureau demands that we report all of our accounts to them that are one month delinquent. This Bureau furnishes credit information to all firms and lending institutions throughout the country.

If substantial payment is not received by us within 5 days, your delinquent account will be turned over to our collection attorneys for litigation * * *

*   *   *   *   *   *   *

If substantial payment is not received by us within 5 days a copy of the enclosed letter will be sent to your job * * *

*   *   *   *   *   *   *

Please let us know if the above person is now in your employ and kindly furnish us with the information requested. The purpose of this information is to proceed with our legal rights to collect an indebtedness incurred by this employee.

We would prefer to have the account paid voluntarily, and will withhold all action for the next 5 days.

Your cooperation in this respect will prove to be beneficial to all concerned * * *

*   *   *   *   *   *   *

We regret that this must be our final notice before placing your delinquent account in the hands of our attorneys—for whatever action they may feel is necessary.

We have tried to settle the matter on a friendly basis, but have not received your cooperation.

Such action would not be to your advantage, as it would involve additional expense and embarrassament which could result from legal proceedings, possible garnishee, etc. It is hoped that you will avoid all this, by sending payment AT ONCE.

If we do not hear from you in five (5) days, the matter will be referred to our attorneys for immediate action.

LAST CHANCE! !

Very truly yours,
NORTHEAST DISCOUNT CORP.
/s/ J. Greene
J. Greene
Credit Department

* * * * * * *

IF YOU ARE SUED * * * on a debt and the Court gives judgment against you, you are in SERIOUS TROUBLE.

AN EXECUTION CAN BE ISSUED AGAINST YOU!

Then an Officer of the Court may seize your goods, attach your wages, bank account or other property.

He may also be instructed to bring YOU and YOUR FAMILY into Court and force you and them to tell UNDER OATH what property you own. This will be EXPENSIVE and EMBARRASSING to you.

In addition, a Judgment hanging over your head will cost you many times the amount of the deft, in loss of credit and respect in your community.

IT'S IMPOSSIBLE TO ESCAPE A JUDGMENT

For a Judgment may be renewed and thus REMAIN IN EFFECT UNTIL PAID—and it may be recorded everywhere.

Your debt will have to be paid some day, so to save expense, loss of credit and embarrassment to you and your family. YOU MUST TAKE CARE OF IT immediately.

PAR. 14. By and through the use of the aforesaid statements and representations and others of similar import not specifically set out herein, respondent Northeast Discount Corp. has represented directly and by implication that:

1. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency.

2. If payment is not made, the respondent Northeast Discount Corp., will take some undisclosed affirmative action to injure the customer's credit rating.

3. If payment is not made within 5 days of the notice, the respondent Northeast Discount Corp. will take more drastic action of an undisclosed nature.

4. If payment is not made within 5 days, the debtor's account will be turned over to collection attorneys for litigation.

5. If payment is not made within 5 days, a letter will be sent to the debtor's employer which, in effect, calls upon the employer to assist in the collection of the debt.

6. If payment is not made, action will be taken to embarrass the debtor and his family and they will experience loss of respect in their community.

7. If payment is not made, it is impossible to escape a judgment because the debtor has no defenses and no opportunity for a trial.

8. If payment is not made, the debtor and his family will be forced into court to testify as to assets and that will prove to be expensive and embarrassing.

9. Respondent Northeast Discount, Inc. maintains a credit department.

PAR. 15. In truth and in fact:

1. Delinquent debtors' names are not transmitted to any credit reporting agency.

2. The respondent Northeast Discount Corp. does not take any affirmative or positive action to injure or affect the debtors' credit ratings.

3. The respondent Northeast Discount Corp. does not take any "drastic action" within five days other than to send further threatening collection letters to debtors.

4. Debtors' accounts are not turned over within five days to collection attorneys for litigation but instead are followed up by further collection letters.

6. Although the respondents threaten to take action to embarrass debtors and their families in their communities, respondents do not take affirmative steps to carry out this threat but make such threats solely for the purpose of harassing and intimidating debtors.

7. Debtors always have the right to a trial and they may be able to establish valid defenses; thus, it is not impossible to escape a judgment.

8. Under customary court procedures debtor-defendants are not required to testify as to assets until supplementary proceedings held only after trial and judgment.

9. Respondent Northeast Discount Corp. does not maintain a credit department.

PAR. 16. In the course and conduct of its business, respondent Northeast Discount Corp. makes the following representation to persons purchasing Compact products on credit:

We have acquired your contract covering your recent Compact purchase * * *

In addition, respondents Compact Electra, Compact Bellerose and

Compact Discount indicate through statements and representations to purchasers that they have negotiated the purchasers' installment contracts to a third party, namely, Northeast Discount Corp.

PAR. 17. By and through the use of the aforesaid statements and representations respondents have represented directly and indirectly that:

1. As a purchaser of retail installment contracts from the other corporate respondents Northeast Discount Corp. is a holder in due course.

2. Respondent Northeast Discount Corp. is an independent corporation having no connection with the other corporate respondents.

PAR. 18. In truth and in fact:

1. Respondent Northeast Discount Corp. does not purchase retail installment contracts from the other corporate respondents or any other firm.

2. Respondent Northeast Discount Corp. is not a holder in due course with respect to the purchasers of respondents' products.

3. Respondent Northeast Discount Corp. and the other corporate respondents have not operated and do not operate as independent, individual corporations but are components of a single business entity operated as an integrated operation by respondent Hyman Sindelman, also known as Hy Delman.

4. Respondent Northeast Discount Corp. was formed and is operated solely for the purpose of collecting debts incurred by purchasers of the respondents' products.

Therefore, the statements, representations and practices as set forth in Paragraphs Thirteen, Fourteen, Sixteen and Seventeen were and are, false, misleading and deceptive.

PAR. 19. In the course and conduct of its business respondent Northeast Discount Corp., and respondent, Theodore Decker, entered into an agreement for the sale of form collection letters by Theodore Decker to Northeast Discount Corp. The agreement provides for the preparation of form collection letters by respondent Theodore Decker, an attorney and member of the bar of the State of New York, under the latter's letterhead showing as his address the address of the corporate respondent including a telephone number of a telephone situated on the premises of the corporate respondent. Said telephone is never answered by respondent Decker but is answered only by employees of respondent Northeast Discount Corp. The form letters are printed at the sole cost and expense of the corporate respondent who has the further discretion of selection of debtors to whom the letters are sent and complete control over the usage of the letters in the collection process. Respondent Theodore Decker's sole undertaking is to sign each such form letter.

Respondent Theodore Decker has made certain statements and representations in the aforementioned letters bearing his letterhead and in notices disseminated by respondent Northeast Discount Corp. through the United States mails to purportedly delinquent debtors or their employers.

Typical, but not all inclusive of such statements and representations, are the following:

Theodore Decker
Atorney at Law
246-16 Jericho Turnpike
Bellerose, L.I., New York 11426

Re: Northeast Discount Corp.

The above account has been placed with me for collection. * * *

Very truly yours,
/s/ Theodore Decker

* * * * * * *

Since my letters to you in which you were advised that I have been retained to prosecute an action against you for the recovery of the above claim, I have investigated further into this matter and have determined that you are fully liable for the amount claimed.

Consequently, unless a satisfactory payment of your debt is received in my office within five (5) days from the date of this letter, I will commence court action against you for the recovery of said amount, together with interest and court costs.

This will be your final notice.

* * * * * * *

I am about to bring action against the above-named employee for monies due my client, Northeast Discount Corp., Bellerose, L. I.

In order to avoid needless effort and expense, which can result in further inconvenience to all concerned, I would appreciate your advising me of the following information. * * *

Thank you for your cooperation in this matter * * *

* * * * * * *

I have no wish to embarrass you unnecessarily, but I must dispose of the matter immediately. I trust you will make satisfactory arrangements without further delay.

* * * * * * *

PAR. 20. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondent Theodore Decker has represented directly and by implication, to debtors or their employers receiving collection letters on the stationery of respondent Decker that.

1. He is an attorney who has offices at 246–16 Jericho Turnpike, Bellerose, Long Island, and he represents the respondent, Northeast Discount Corp., as its collection attorney.

2. The collection letters are sent to debtors pursuant to the direction and control of respondent Theodore Decker.

3. The debtor's account has been placed with respondent, Theodore Decker, as attorney for collection.

4. Respondent, Theodore Decker, has been retained by respondents to prosecute an action against the debtor.

5. Respondent, Theodore Decker, as attorney, has investigated further into the matter and has determined that the debtor is fully liable for the amount claimed.

6. Unless payment is received personally by Mr. Decker in his office within five (5) days from the date of his letter, court action will be commenced by respondent, Theodore Decker, as attorney to recover the amount claimed.

7. The collection letter purportedly sent by respondent Theodore Decker, to the debtor is a final notice before litigation.

8. Further inconvenience to the employer of the debtor will occur if the employer does not cooperate in aiding respondent Decker in collecting the indebtedness from the employee.

9. Respondent, Theodore Decker, will cause embarrassment to the debtor if the debtor does not pay.

PAR. 21. In truth and in fact:

1. Respondent, Theodore Decker, does not maintain an office for the practice of law at 246–16 Jericho Turnpike, Bellerose, New York, said address being that of the corporate respondents, and his sole function is to prepare collection letters and forms for Northeast Discount Corp.

2. The collection letters are sent pursuant to the complete direction and control of the corporate respondent Northeast Discount Corp. who pays for all expenses in connection with their use.

3. The collection of debtors' accounts has never left the control of corporate respondent Northeast Discount Corp. and said corpo-

rate respondent is in direct communication with debtors under the guise and ruse of an attorney's letterhead.

4. Similarly, as in (1), (2) and (3) above, said representation that corporate respondent Northeast Discount Corp. has retained respondent, Theodore Decker, as attorney is a guise and ruse and, in fact, no such retainers are entered into.

5. Respondent Decker makes no independent investigation into the merits of any debt allegedly due to Northeast Discount Corp., his sole function being as hertofore stated.

6. Any payments made by debtors pursuant to demands and threats made upon debtors in letters under the letterhead of Theodore Decker are not received by respondent Decker, but are paid directly to respondent Northeast Discount Corp. which, in fact, controls receipts of monies paid by debtors who mistakenly believe that they are making payments to an attorney. Respondent Decker does not commence court actions if payment is not forthcoming.

7. Collection letters sent on the letterhead of Theodore Decker, Attorney, containing threats that the same are final notices, are, in fact, not final, inasmuch as further and additional threatening collection letters are sent to the same debtor containing the same threat of final notice.

8. The prejudgment letters sent to employers of the debtors are, in effect, idle threats upon such employers because no further inconvenience to employers is caused by respondent Decker.

9. Collection letters sent to debtors are, in effect, mere threats to cause the debtor some undisclosed form of unnecessary embarrassment, since no further action is taken by respondent Decker to cause embarrassment.

PAR. 22. By furnishing the aforesaid form collection letters to the corporate respondent Northeast Discount Corp., respondent Theodore Decker, has placed in the hands of the corporate respondent the means and instrumentalities by which it may, and does mislead members of the consuming public in the respects herein described.

Therefore, the statements, representations and practices as set forth in Paragraphs Nineteen and Twenty hereof were and are false, misleading and deceptive.

PAR. 23. The use by respondents, of the unfair, deceptive and misleading acts and practices described in Count II in connection with respondents' business has enabled respondents unfairly to receive remuneration and financial gain in connection with respondents' other deceptive and unfair sales practices in commerce as set forth in Count I of this complaint. All of respondents' practices are intertwined and mutually supportive so as to comprise a totality of unfair and deceptive practices in commerce.

PAR. 24. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the business of collecting due or delinquent accounts in connection with the sales of their products.

PAR. 25. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are true, and into the payment of alleged debts by reason of said erroneous and mistaken belief.

PAR. 26. The aforesaid acts and practices of respondents, as herein alleged, are inequitable, oppressive, exploitative and cause substantial injury to consumers, and constituted, and now constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 27. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp., Compact Associates, Inc., Hyman Sindelman a/k/a Hy Delman, and Theodore Decker are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their office and principal place of business located at 246–16 Jericho Turnpike, Bellerose, New York.

Respondent Hyman Sindelman, a/k/a Hy Delman, is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

Respondent Theodore Decker is an individual engaged in the practice of law as a member of the bar of the State of New York, with his office and principal place of business located at 250 West 57th Street, New York, New York. In the course and conduct of his practice of law, respondent Theodore Decker entered into a contractual agreement with one or more of the respondents herein in connection with form collection letters involved as the subject matter, in part, of this proceeding.

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

ORDER

I

It is ordered, That respondents Compact Electra Corp., Compact Bellerose, Inc., Compact Discounts, Inc., Northeast Discount

Corp., Compact Associates, Inc., corporations, their successors and assigns and their officers, and Hyman Sindelman, also known as Hy Delman, individually and as an officer of said corporate respondents, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, or distribution of vacuum cleaners or memberships in group purchasing programs or other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing orally, visually, in writing or in any other manner, directly or indirectly that any merchandise is free without clearly revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

2. Representing orally, visually, in writing or in any other manner, directly or indirectly that membership in any group buying program is free; or representing in any manner, the nature of any offer of anything of value to purchasers or prospective purchasers without clearly disclosing all of the terms, conditions and limitations with respect thereto.

3. Representing orally, visually, in writing or in any other manner, directly or indirectly that purchasers of respondents' products will enjoy substantial savings in the purchase of products through any group buying program, or representing, in any manner, the amount of savings available to purchasers of respondents' products as members of any group buying program.

4. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondents' buying program purchases in mass quantities and thereby obtains low prices for its members; representing that products are available at wholesale or cost prices through the group buying program; and representing that respondents own or control the group buying program.

5. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondents' group buying program has about one million members, or any other number of members that is in excess of the actual number of members enrolled in the group buying program.

6. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondents and/or their

methods of doing business are approved by the Better Business Bureau.

7. Representing orally, visually, in writing or in any other manner, directly or indirectly that unless the prospect is enrolled as a purchaser of respondents' products the cost of membership alone in respondents' group buying program is substantial or that said membership is available to the prospective purchaser only if he purchases respondents' products at the first offering.

8. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondents' products are being left at consumers' homes on approval; or that respondents' retail installment contract is only a receipt for goods left at prospective purchasers' homes; or that the contract is not effective without the approval of purchasers' or prospective purchasers' spouses.

9. Representing orally, visually, in writing or in any other manner, directly or indirectly that purchasers' old vacuum cleaners will be sold by respondents or that a specific price will be realized from the sale unless the representation including the specific amount of the sales price is incorporated in the retail installment contract and payment or credit therefor assured by the respondents.

10. Representing orally, visually, in writing or in any other manner, directly or indirectly that the cost to purchasers of respondents' products may be substantially reduced if purchasers provide respondents with names and addresses of individuals who will buy respondents' products.

11. Representing orally, visually, in writing or in any other manner, directly or indirectly that the telephone numbers provided by respondents' salesmen to purchasers are the home telephone numbers of such salesmen which purchasers may call in order to cancel their contracts.

12. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondent Compact Discount, Inc., sells its vacuum cleaners and accessories at a discount, or that its prices for said products constitute a reduction from the prices at which said merchandise is usually and customarily sold at retail in the trade area where the representation is made, or misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise.

13. Using "Discount" or any abbreviation or simulation thereof as part of respondent Compact Discount's trade or corporate name except for the collection of accounts of indebtedness incurred by consumers as a result of sales made to them prior to the effective date of this order; or misrepresenting through the use of a trade or corporate name the nature or character of respondent's business.

14. Making any statements or representations described in Paragraphs 2 and 3 of this order, or furnishing the means and instrumentalities through or by means of which any person or firm may make any statement or representation described in the paragraphs enumerated herein unless the statement or representation is true, and respondents maintain, or cause to be maintained, for a period of three years after the statement or representation and, upon reasonable notice, provide access to the Commission or its representatives for purposes of inspection or copying, full, complete and accurate records which will disclose a factual, documented and verifiable basis in substantiation of the statement or representation, and the period of time during which the statement or representation is made.

II

It is further ordered, That respondents Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp., Compact Associates, Inc., corporations, their successors and assigns and their officers, and Hyman Sindelman, also known as Hy Delman, individually and as an officer of said corporate respondents, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempt to collect, accounts allegedly due and owing pursuant to any contract or other agreement relating to the purchase of any Compact vacuum cleaner or accessory, or any other merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

15. Representing orally, visually, in writing or in any other manner, directly or indirectly that delinquent accounts are referred to bona fide credit reporting agencies.

16. Representing orally, visually, in writing or in any other manner, directly or indirectly that affirmative action will be

taken against an alleged delinquent debtor to injure his credit rating.

17. Representing orally, visually, in writing or in any other manner, directly or indirectly the nature and extent of respondents' debt collection procedures.

18. Representing orally, visually, in writing or in any other manner, directly or indirectly that a delinquent account will be referred to an attorney for the institution of legal proceedings.

19. Representing orally, visually, in writing or in any other manner, directly or indirectly that where payment is not received, alleged delinquent debtors' employers will be contacted prior to judgment.

20. Communicating, or threatening to communicate, or implying the fact of a debt or alleged debt other than to a person who might reasonably be expected to be liable therefor, to any person, including an employer, unless specifically authorized by statute or by written permission of the alleged debtor.

21. Representing orally, visually, in writing or in any other manner, directly or indirectly that where payment is not received, legal action will be instituted which will result in embarrassment to, and loss of respect of the debtor and his family in the community; or employing in collection letters, or in any other form of communication with debtors, any statement, word or phrase which is unfair by reason of it being exaggerative, exploitative or oppressive.

22. Representing orally, visually, in writing or in any other manner, directly or indirectly the legal consequences of nonpayment; or representing orally, visually, in writing or in any other manner, directly or indirectly that the debtor's account has been placed with an attorney for collection.

23. Representing orally, visually, in writing or in any other manner, directly or indirectly that any collection letter or notice is a "final notice" before litigation.

24. Representing orally, visually, in writing or in any other manner, directly or indirectly that respondents maintain a separate department for collection purposes, or misrepresenting in any manner any departmentalization of respondents' business.

25. Using forms, letters or materials printed or written,

which misrepresent, directly or by implication, that a debtor's account has been turned over to an attorney for collection, or that said attorney is actually corresponding with said debtor, or misrepresenting that a collection attorney maintains his law office at the principal place of business of respondents.

26. Using, preparing, furnishing or placing in the hands of others letters, letterheads, forms and other written materials which appear and purport to be letters, letterheads, forms and other written materials utilized by an attorney for collection of debts where such attorney does not have continuous control and supervision over their preparation, use, and processing in the collection of debtors' accounts.

27. Representing orally, visually, in writing or in any other manner, directly or indirectly that a debtor's account has been investigated.

28. Representing orally, visually, in writing or any other manner, directly or indirectly, that a debtor has been found liable for the debt prior to a determination of such liability by a court or other tribunal, except that such representation may be made to a court, or an officer of the court, in connection with court proceedings relative to the indebtedness.

29. Representing orally, visually, in writing or in any other manner, directly or indirectly that Northeast Discount Corp. is a holder-in-due course respecting the commercial paper issued by the other corporate respondents named herein or any other affiliated firm; or that Northeast Discount Corp. purchases or acquires any contract or commercial paper from the other corporate respondents named herein or any other affiliated firm; or misrepresenting in any manner, directly or indirectly the corporate or business relationship existing among the corporate respondents.

30. Failing to include the following statement, captioned by the word "NOTICE" in bold face type, clearly on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

The seller herein agrees not to transfer or assign this contract or the debt evidenced hereby.

31. Contracting for any sale obtained by home solicitation which shall preclude or waive the right of the buyer to cancel

the sale prior to midnight of the third day excluding Sundays and legal holidays after the date of signing the contract.

32. Failing to disclose prior to the time of any home solicitation sale, both orally, and in writing on any conditional sales contract promissory note or other instrument executed by the buyer, that the buyer may rescind or cancel the sale by written notice of cancellation to respondents' address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondents to collect any goods left in the buyer's home and to return any payments received from him. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to, and for a reasonable period following, cancellation; the written disclosure required by this paragraph shall be clearly stated, and headed by the following in bold face type:

NOTICE—BUYER'S RIGHT OF CANCELLATION

Provided, however, That nothing contained in Paragraphs 31 and 32 of this order shall relieve respondent of any contractual obligations required by federal law or that law of the state in which the contract is negotiated. When such obligations are inconsistent, respondent may apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required.

33. Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

34. Making any statements or representation described in Paragraphs 17, 18, 22, 23 and 27 of this order, or furnishing the means and instrumentalities through or by means of which any person or firm may make any statement or representation described in the paragraphs enumerated herein unless the statement or representation is true, and respondents maintain or cause to be maintained for a period of three years after the statement or representation and, upon reasonable notice, provide access to the Commission or its representatives for purposes of inspection or copying, full, complete and accurate records which will disclose a factual, documented and verifiable basis in substantiation of the

statement or representation, and the period of time during which the statement or representation is made.

III

It is further ordered, That the respondent Theodore Decker, an individual, and his agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempt to collect, accounts allegedly due and owing on merchandise or services purchased by consumers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

35. Representing orally, visually, in writing or in any other manner, directly or indirectly, the extent of his debt collection procedures.

36. Representing orally, visually, in writing or in any other manner, directly or indirectly, that where payment is not received the debtors' employers will be contacted prior to judgment.

37. Communicating, or threatening to communicate, or implying the fact of a debt or alleged debt, other than to a person who might reasonably be expected to be liable therefor, to any person, including an employer, unless specifically authorized by statute or by written permission of the alleged debtor.

38. Representing orally, visually, in writing or in any other manner, directly or indirectly, that where payment is not received, legal action will be instituted which will result in embarrassment to, and loss of respect of the debtor and his family in the community; or employing in collection letters, or in any other form of communication with debtors, any statement, word or phrase which is unfair by reason of it being exaggerative, exploitative or oppressive.

39. Representing orally, visually, in writing or in any other manner, directly or indirectly, the legal consequences of nonpayment.

40. Representing orally, visually, in writing or in any other manner, directly or indirectly, that any collection letter or notice is a final notice before litigation.

41. Using, or providing to others for their use, forms, letters or materials printed or written, which misrepresent, directly or by implication, that a debtor's account has been turned over to him for collection as attorney or that he is

actually corresponding with the debtor, or misrepresenting that he maintains his law office at the place of business of his client.

42. Using, preparing, furnishing or placing in the hands of others, letters, letterheads, forms and other written materials which appear and purport to be letters, letterheads, forms and other written materials utilized by him for the collection of debts where he does not have continuous control over their preparation, use and processing in the collection of debtors' accounts.

43. Representing orally, visually, in writing or in any other manner, directly or indirectly that a debtor's account has been investigated.

44. Representing orally, visually, in writing or in any other manner, directly or indirectly, that a debtor has been found liable for the debt prior to a determination of the debtor's liability by a court or other tribunal, except that such representation may be made to a court, or to an officer of the court in connection with court proceedings relative to the indebtedness.

45. Making any statement or representation described in Paragraphs 35, 39, 40, and 43 of this order, or furnishing the means and instrumentalities through or by means of which any person or firm may make any statement or representation described in the paragraphs enumerated herein unless the statement or representation is true, and respondent Theodore Decker maintains or causes to be maintained for a period of three years after the statement or representation and, upon reasonable notice, provides access to the Commission or its representatives for purposes of inspection or copying, full, complete and accurate records which will disclose a factual, documented and verifiable basis in substantiation of the statement or representation, and the period of time during which the statement or representation is made.

IV

It is further ordered, That nothing in this order shall be construed to imply that any past or future conduct of respondents is subject to and complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission, nor shall execution of this or any agreement or order evidence good or bad faith on the part of the respondents.

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies.

It is further ordered, That the respondent corporations shall forthwith distribute copies of this order to each of its operating divisions and to all salesmen.

It is further ordered, That the individual respondents named herein promptly notify the Commission in the event that they discontinue their present business or employment, and become affiliated with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DURA-HAIR INTERNATIONAL, INC.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8830. Complaint, Jan. 12, 1971—Decision, Oct. 2, 1973.*

Consent order requiring a Beverly Hills, Calif., corporation which acquired assets, including patent rights, from the now-bankrupt franchisor of the "Medi-Hair" hair replacement system, to cease representing that the system will restore the customer's hair so well that there will be no need for further attention; to disclose that the system involves the application of wire sutures in the scalp which may cause pain and risk

* For complaint see 80 F.T.C. 627.

of infection; to notify prospective customers to consult with their personal physicians; to advise purchasers that contracts may be cancelled up until the third day; and not to negotiate a customer's note to a finance company prior to midnight of the fifth day.

Appearances

For the Commission: *Paul R. Peterson* and *Gerald E. Wright.*
For the respondent: *pro se.*

DECISION AND ORDER

The Commission having heretofore issued its decision and order in the matter of Medi-Hair International, a corporation, and Jack I. Bauman, individually and as a director of said corporation, on April 21, 1972, which provides that said order shall apply to "successors and assigns" of said order, and that a transferee of all or a substantial part of the business or assets of the corporate respondent shall file promptly with the Commission a written agreement to be bound by the terms of said order, or present to the Commission prior to the transfer any reasons why said order should not apply to such transferee in its existing form; and

Dura-Hair International, Inc., having proposed to acquire a substantial part of the assets of Medi-Hair International, the corporate respondent in Docket 8830; and

Dura-Hair International, Inc., and counsel for the Commission having executed an agreement containing a consent order, an admission by Dura-Hair of the jurisdiction of the Federal Trade Commission pursuant to Sections 5 and 12 of the Federal Trade Commission Act and pursuant to the Medi-Hair order as a transferee of a substantial part of the Medi-Hair assets, a statement that the signing of the agreement does not constitute an admission by Dura-Hair that it has violated the law as alleged in the Medi-Hair complaint (Docket 8830) and does not constitute an admission by Dura-Hair that the facts as stated in the Medi-Hair complaint are true, and waivers and provisions as required by Commission's rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission makes the following jurisdictional findings, and enters the following order.

1. Dura-Hair International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Calif., with its principal office and place of business located at 8383 Wilshire Boulevard, Suite 652, Beverly Hills, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Dura-Hair International, Inc., and the proceeding is in the public interest.

ORDER

It is ordered, That Dura-Hair International, Inc., a corporation, its successors and assigns, and its agents, representatives, and employees (hereinafter collectively referred to as "Dura-Hair"), directly or through any corporation, subsidiary, division, or other device, or through its franchisees, licensees or through its patent licensees, in connection with the advertising, offering for sale, sale, or distribution of the hair replacement system covered by United States Patent 3553737, or other hair replacement product or process involving surgery (hereinafter sometimes referred to as the "System"), in commerce, as "commerce" is defined by the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act do forthwith cease and desist from representing, directly or by implication:

1. That the system does not involve wearing a device or cosmetic which is like a hairpiece or toupee;

2. That after the system has been applied, the hair applied becomes part of the anatomy like natural hair, teeth, and fingernails and has the following characteristics of natural hair:

a. The same appearance in all applications as natural hair, upon normal observation, and upon extreme close-up examination;

b. It may be cared for like natural hair where care involves possible pulling on the hair;

c. The wearer may engage in physical activity and movement with the same disregard for his hair as he would if he had natural hair.

3. That after the system has been applied, the wearer can care for it himself, and will not have to seek professional or

skilled assistance in maintaining the system, and that the customer will not incur maintenance costs over and above the cost of applying the system.

It is further ordered, That Dura-Hair, in advertising or otherwise promoting the system by radio, television, newspapers or periodicals, disclose clearly and conspicuously that the system involves a surgical procedure, requiring the use of a local anesthetic, resulting in the implantatioon of sutures in the scalp, to which hair is affixed.

It is further ordered, That Dura-Hair, in advertising or otherwise promoting the system other than by radio, television, newspapers or periodicals, and in offering for sale, selling or distributing the system, disclose clearly and conspicuously that:

1. The system involves a surgical procedure, requiring the use of a local anesthetic, resulting in the implantation of sutures in the scalp, to which hair is affixed.
2. By virtue of the surgical procedure involving implantation of sutures in the scalp, and by virtue of the sutures remaining in the scalp, there is a risk of discomfort, pain, infection, scarring and other skin disorders.
3. Continuing special care of the system is necessary to minimize the risks referred to in Subparagraph Two of this paragraph, and such care may involve additional costs for medications and assistance.
4. The purchaser is advised to consult with his personal physician about the system before deciding whether to purchase it.

It is further ordered, That Dura-Hair, in connection with the sale of the system, provide prospective purchaser with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order, Subparagraphs One (1) through Four (4) thereof, and that Dura-Hair require that, prior to executing any contract to purchase said system, such prospective purchasers, sign and date the disclosure sheet after the sentence, "I have read the foregoing disclosures and understand what they mean," and that Dura-Hair provide a copy of said disclosure sheet to the customer and retain such signed disclosure sheet for at least three years.

*It is further order*ed, That, in connection with the sale of the system, no contract for application of the system shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the System was executed, and that:

1. Dura-Hair shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of the system, that the purchaser may rescind or cancel any obligation incurred by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

2. Dura-Hair shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Dura-Hair shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day on which said contract for application of the system was executed.

It is further ordered, That Dura-Hair, in connection with the advertising, offering for sale, sale, or distribution of the system, serve a copy of this order upon each present and every future licensee or franchisee, upon each present and every future patent licensee, and upon each physician participating in application of Dura-Hair's system, and obtain written acknowledgement of the receipt thereof; and that Dura-Hair obtain from each present and future licensee or franchisee, and from each present and future patent licensee, an agreement in writing (1) to abide by the terms of this order, and (2) to cancellation of their license or franchise, or patent license, for failure to do so; and that Dura-Hair cancel the license or franchise, or patent license of any licensee or franchisee or patent licensee, that fails to abide by the terms of this order. Dura-Hair shall retain such acknowledgements and agreements for so long as such persons or firms continue to participate in the application or sale of Dura-Hair's system.

It is further ordered, That Dura-Hair, in connection with advertising, offering for sale, sale, or distribution of the system, forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That Dura-Hair notify the Commission at least thirty (30) days prior to any proposed change in said Dura-Hair, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or patent licensees, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That in the event that Dura-Hair merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, Dura-Hair shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided,* That if said Dura-Hair wishes to present to the Commission any reason why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

It is further ordered, That Dura-Hair International, Inc., shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, signed by Dura-Hair, setting in detail the manner and form of their compliance with this order.

IN THE MATTER OF

CHOCK FULL O'NUTS CORPORATION, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8884. Complaint, May 5, 1972—Order & Opinion, Oct. 2, 1973.

Order requiring a New York City franchisor of a counter-type restaurant, among other things to cease combining or conspiring to maintain resale prices and cutting off supplies or services to their franchisee.

Appearances

For the Commission: *Lewis F. Parker, Charles K. Robbins* and *Lawrence Punter.*

For the respondent: *Daniel P. Levitt, Edward N. Costikyan,* and *Stan Mortenson,* of *Paul, Weiss, Rifkind, Wharton & Garrison,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15 U.S.C. Section 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Chock Full O'Nuts Corporation, Inc. (hereinafter sometimes referred to as "Chock" or "respondent"), is a corporation organized and existing under the laws of the State of New York, with its principal offices and place of business at 425 Lexington Avenue, New York, N.Y.

PAR. 2. Respondent is engaged in the franchising or licensing of persons with respect to the operation of a counter-type restaurant bearing the registered trademark and trade name "Chock Full O'Nuts." There are approximately 38 such licensed restaurants in New York and New Jersey. Respondent also owns and operates approximately 50 such restaurants in New York, New Jersey and Pennsylvania. Respondent is engaged in the manufacture and preparation of food products at approximately 6 plant locations in New York, New Jersey and Missouri. These food products, along with various items of restaurant supplies and restaurant equipment purchased from other manufacturers, are furnished to Chock-owned stores and sold to Chock-licensed stores. Respondent reported sales of $43,028,137 for 1969 and $42,229,162 for 1968. Sales of food and supplies by respondent to its licensees totaled $3,192,536 in 1969 and $3,717,095 in 1968.

PAR. 3. In the course and conduct of respondent's business of licensing the use of the Chock trademark and trade-name, of manufacturing and selling food products, and of selling restaurant supplies and restaurant equipment, there is now and has been for several years last past a constant, material and increasing flow of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hampered and restrained by reason of the practices hereinafter alleged, respondent is in substantial competition in commerce with other firms engaged in the manufacture and sale at wholesale of food products, the sale of restaurant supplies and restaurant equipment, the sale of food at retail to the public, and the licensing of trademarks and trade names for use in connection with restaurant businesses; and respondent's licensees are in substantial competition in commerce with respondent, with one another and with other firms and persons engaged in the sale of food at retail to the public.

PAR. 5. In the course and conduct of its business, respondent has engaged and is continuing to engage in the following unfair methods of competition in commerce and unfair acts and practices in commerce, among others, enumerated in this paragraph:

A. COUNT ONE

1. For several years, at least since 1963, respondent has pursued a plan or policy, the purpose of which is to fix, control, establish and maintain the retail prices at which Chock licensees advertise, offer for sale, and sell food products.

2. In furtherance of this policy, respondent has and continues to the present time to engage in one or more of the following acts and practices, but not necessarily limited thereto:

(a) Respondent has furnished and continues to furnish to its licensees printed price inserts and printed price stickers to be placed on menu signs for the purpose of specifying the prices at which food products are offered for sale and sold in the licensees' restaurants;

(b) When furnishing new price inserts to its licensees for the purpose of changing menu prices, respondent has requested and continues to request that the old price inserts be removed from the restaurant and be returned to respondent;

(c) By means of letters and bulletins mailed regularly to its licensees, respondent has instructed and continues to instruct the licensees as to the prices at which food products are to be offered for sale and sold in their restaurants;

(d) Respondent has told and continues to tell its licensees that respondent will set the pricing policy for all restaurants bearing the Chock name, and that all restaurants bearing the Chock name will serve the same food at the same prices;

(e) Respondent has threatened and continues to threaten its licensees with termination of their franchise agreements and loss of the right to operate their restaurants under the Chock name if they sell food products at prices other than those specified by respondent.

B. COUNT TWO

3. For several years, at least since 1963, respondent has pursued a plan or policy, the purpose of which is to require that Chock licensees purchase from respondent a substantial portion of the food products and restaurant supplies used by the licensees in their restaurant businesses.

4. In furtherance of this plan or policy, respondent has included and continues to the present time to include in its license agreements provisions requiring that Chock licensees purchase from respondent all food products sold to the licensees' restaurant customers.

PAR. 6. The above acts and practices have the capacity and tendency to unduly hinder, suppress, lessen and eliminate competition with the following effects, among others:

1. Chock licensees are required to sell food products at prices fixed by respondent.

2. Price competition between Chock licensees, Chock-owned restaurants and other persons or firms operating restaurant businesses in New York and New Jersey has been eliminated.

3. Chock licensees are required to purchase from respondent a substantial portion of their requirements of food products and restaurant supplies, including their total requirements of bakery products, salads, coffee, meats, cheese, flavored syrups, coffee whitener, orange juice, and paper products and serving utensils bearing the "Chock Full O'Nuts" trademark.

4. Competition between respondent and other suppliers of such food products and restaurant supplies has been eliminated.

PAR. 7. The aforesaid acts and practices have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened and eliminated actual and potential competition to the prejudice and injury of the public, and thus constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DAVID H. ALLARD, ADMINISTRATIVE LAW JUDGE

APRIL 9, 1973

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on May 5, 1972, charging the respondent Chock Full O'Nuts Corporation, Inc., with violating the provisions of Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition in commerce, and of unfair acts and practices in commerce.

Hearings were held in New York, New York on November 9, 10, 13, 14 and December 4, 5, 6, 1972 and January 9, 1973. At those hearings, testimony and documents were incorporated into the record in support of the complaint as well as in opposition thereto. This proceeding thus is before the administrative law judge upon the complaint, answer, testimony, and other evidence, proposed findings of fact, conclusions and briefs filed by complaint counsel and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record [1] in this proceeding, together with the proposed findings, conclusions, and briefs submitted by the parties as well as replies, the administrative law judge makes the following findings as to facts, conclusions and order.

FINDINGS OF FACT

1. Respondent Chock Full O'Nuts Corporation, Inc. (hereinafter sometimes referred to as Chock or respondent), is a corporation organized and existing under the laws of the State of New York, with its principal offices and place of business at 425 Lexington Avenue, New York, N.Y. (Comp. par. 1; Ans. par. 1; RX 77A).

2. Respondent Chock Full O'Nuts Corporation, Inc., is engaged in operating as well as in franchising or licensing of persons to operate restaurants bearing the registered trade name "Chock

[1] References to the record are made in parenthesis:
Comp.—Complaint
Ans.—Answer
Tr.—Transcript page
CX—Commission exhibit
RX—Respondent exhibit

Full O'Nuts" (U.S. Patent Office Reg. No. 894,796).[2] Set forth in Appendix 1 are the names, as well as in Appendices 2, 3, 4, and 5, types or samples of the contractual arrangements respondent has with its licensees.

A. As pertinent here,[3] there are 38 restaurants not owned by respondent but licensed by respondent to operate under the "Chock Full O'Nuts" trade name.

(1) 37 are located in the State of New York; 36 of which are located in New York City [22 in the Borough of Manhattan] (RX 77D–E).

(2) One is located in Jersey City, New Jersey (RX 77E).

(3) Previous restaurant experience was not required of Chock licensees. Based on this record, the typical Chock licensee has no prior restaurant experience and thus initially unable to price a menu or know how to purchase. (Tr. 191, 223–25, 239, 254, 263, 275, 325–27, 695). Often the franchise owner was an absentee operator (Tr. 223–25, 254–57, 325–27). For these reasons, it takes a period of from six months to two years for the typical inexperienced licensee to develop the know-how of purchasing all of the products required to run a restaurant on the basis of quality and price as well as the know-how to set competitive retail prices (Tr. 190–92, 261, 265, 303–04, 533, 553–54).

(4) Most of the 38 licensees constitute the membership of the National Association of Food Franchisees, hereinafter sometimes referred to as association (Tr. 638). For that membership, dues are $50 per month (Tr. 708). Three association officials are paid a salary; the president receives $225 per month (Tr. 689). This association is the recognized bargaining agent for franchised restaurants having labor contracts with Local Union 13590 of the United Steel Workers of America (Tr. 639). At least since 1968, the association gives advice to its members in the form of a newsletter[4] (Tr. 639); attempts to secure favorable prices on

[2]This mark has been used in the New York City area to denote restaurant services since at least 1932.

[3] Respondent also owns and operates 45 restaurants under the "Chock Full O'Nuts" name: 35 are located in the Borough of Manhattan in New York City; 5 are located in adjacent boroughs or counties in New York; 3 are located in New Jersey; and 2 in Pennsylvania (RX 77C). One in Pennsylvania apparently was closed prior to trial.

[4] The association's president described the newsletter as "a poop sheet, just to keep our member stores advised of what type of negotiations * * * [the association] may have entered into with Chock Full O'Nuts or any experiments that * * * [the association] may be conducting or anything that is pertinent to the operation of our business." (Tr. 646).

restaurant equipment and other merchandise[5] (Tr. 640); supplies signs to restaurants "whether plastic insert signs or hand-lettered signs for use on * * * walls or windows" (Tr. 640); makes contacts with wholesalers of food products (Tr. 640); and makes contacts with jobbers for restaurant equipment (Tr. 640). Association officers regularly meet with Chock representatives (Tr. 640) to discuss mutual problems such as "cost of merchandise sold by Chock Full O'Nuts to its franchisees" (Tr. 641, 204), menu changes (Tr. 642), prices (Tr. 642, 643).

(5) Association members constantly were attempting to reduce prices for products purchased from Chock and they constantly were trying to persuade Chock to raise the prices it charged in its own restaurants[6] (Tr. 652) largely for the purpose of maintaining price conformity of company-owned and franchised restaurants (Tr. 686, 699). The association was successful in some regards. For example, Chock adjusted the prices it charged licensees on milk and hamburgers (Tr. 693).

(6) Since about April 1968, the association members have felt free to purchase products competitively solely on the basis of quality and price (Tr. 712). That is to say, Chock's distinctive coffee, bakery goods, and sandwich salads are purchased on the integral basis of maintaining the Chock identity; and because of the association's bargaining power, the quality and the price are right. With regard to other more fungible products such as milk, hamburger patties, ice cream and paper products, for example, these licensees feel free "to purchase competitively" (Tr. 712). Some licensees elect to rely on respondent for quality and price as well as the convenience of the delivery of all products during non-business hours.

B. Respondent is also engaged in the manufacture and distribution of coffee.

(1) On a regular monthly basis, respondent blends and roasts about 2.2 million pounds of premium coffee at its Brooklyn, N.Y. plant, of which only a small portion is delivered daily in paper bags to all Chock Full O'Nuts restaurants—owned and fran-

[5] As early as 1968, licensees were buying their paper products from Evans, not from respondent (Tr. 695). Soups, crackers, hamburger meat, corn muffins, butter and cheese, and condiments are also purchased from sources other than Chock (Tr. 693-94).

[6] The association president testified that "We felt that if we raised our prices and if Chock Full O'Nuts did not, then a fellow like myself who is on the corner of, let's say, Seventh Avenue and 57th Street and a company-owned store is one block away, how would it look if I got five or ten cents more for an item and they got five or ten cents less?" (Tr. 686).

chised. The vast preponderance of the bulk is distributed in metal cans through retail grocery establishments located in 13 states and Canada (RX 77D; Tr. 869–70).

(2) "Chock Full O'Nuts—The Heavenly Coffee" is the trademark (U.S. Patent Office Reg. No. 632,806) under which the premium grade coffee is sold. Other trademarks used in conjunction with the marketing of the coffee include "Chock Full O'Nuts" (U.S. Patent Office Reg. No. 894,796 and 784,094) and "Heavenly" (U.S. Patent Office Reg. No. 817,488). These trademarks are also registered in the State of New York where they have been used since 1928 (RX 7, 8).[7]

(3) Delivery of coffee in paper bags is only available to Chock Full O'Nuts restuarants. The coffee is sent to the Secaucus Commissary for subsequent delivery to the restaurants (Tr. 866).

(4) The cost savings per pound is $.09 under the cost if the coffee were delivered in tins (Tr. 1045).

(5) The average shipment of coffee to licensees amounts to about 5,400 pounds per week or about a total of 960 pounds daily (Tr. 1046).

C. Respondent owns and operates a combined bakery and warehouse in Secaucus, N.J., where food items are manufactured daily to be served in all Chock Full O'Nuts restaurants. Among the prepared products are: distinctive [8] baked goods;[9] distinctive spe-

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[7] Respondent also blends and roasts instant coffee in Jamaica, N.Y., and non-premium coffees in Camden, N.J. and St. Louis, Mo. These products are not served in Chock Full O'Nuts restaurants and are not involved in this proceeding (RX 77D; Tr. 866–67).

[8] By "distinctive" the administrative law judge refers to products manufactured by Chock. Virtually all of the products which are distinctively "Chock" products are so by virtue of 30 or 40 years of identification with Chock. They are products that the public long has associated with Chock and that the public long have come to rely upon for consistency and dependability, both with regard to taste and quality. The adjective "distinctive" is used because here we are dealing with the need to describe the quality, texture and taste of food products. in fact, this is not something susceptible of precise verbalization, or of mathematical precision or certainty.

[9] Examples of the baked goods are:

Dutch Apple Pie
Cocoanut Cream Pie
Huckleberry Cream Pie
Peach Cream Pie
Strawberry Cream Pie
Chocolate Cream Pie
Lemon Cream Pie
Whole Wheat Doughnuts
Chocolate Brownies
Hamburger Rolls
White Bread
Whole Wheat Raisin Bread
Danish Coffee Cake
Pound Cake
Chocolate Layer Cake
Cocoanut Cake
Maple Walnut Cake

(RX 77C)

cial salad sandwich spreads;[10] hamburger patties;[11] and certain beverages (RX 77C; Tr. 945).

(1) Some of these products, such as whole wheat doughnuts, pound cake, marble pound cake, danish coffee cake, iced supreme coffee cake, chocolate cake and brownies are or have been marketed under the "Chock Full O'Nuts" trademark in retail grocery stores (RX 77G, 21–24).

(2) A number of standard food items such as condiments, crackers and rye bread come from various suppliers. Chock warehouses these products at its Secaucus Commissary from whence they are delivered to company-owned or licensed restaurants (RX 77C).

(3) Other items such as milk, ice cream, and paper goods, when purchased by respondent, are drop-shipped to company-owned or licensed restaurants by the supplier (CX 144A–B).

(4) Where items of this nature are purchased by an individually licensed restaurant or by the National Association of Food Franchisees [an organization whose membership is made up almost entirely of Chock licensees], that individual restaurant or the association would arrange for the drop-shipment of deliveries.

D. Deliveries to all Chock Full O'Nuts restaurants, company-owned as well as licensed, are made from respondent's Secaucus Commissary on a regularly scheduled daily basis during non-business hours with products divided into two categories: refrigerated and non-refrigerated (Tr. 941, 958).

(1) This flexible system has been developed in order to be able to adjust constantly to the varying distribution needs of the individual restaurants (Tr. 942).

(2) Quality control by respondent's personnel as well as independent testing is constantly in force (Tr. 959, 961).

E. Chock has developed a distinctive marketing concept and mode of restaurant service, which includes a common architectural design, generally standardized menu and to a large extent, distinctive food products (RX 77A). See also Appendix 6.

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[10] Examples are:

Chopped Ham & Egg Salad	Egg Salad	
Chicken Salad	Corned Beef Salad	
Tuna Fish Salad		(RX 77C)
Shrimp Salad		

[11] It is uncontroverted on this record that Chock hamburgers are "spicier" than the ordinary hamburger (Tr. 834). However, there is no substantial evidence of record to substantiate a finding that this factor results in Chock hamburgers being distinctive. It also appears that licensees purchase hamburger from sources other than Chock without objection from Chock (Tr. 176).

(1) Restaurants operated under the "Chock Full O'Nuts" name have a uniform exterior and interior appearance generally corresponding to RX 57–59 and CX 4D.

(2) The exterior Chock Full O'Nuts signs and menu boards displayed on the licensed premises are the property of Chock and are leased to the licensees for a monthly rental fee (RX 77F–G).

(3) These Chock Full O'Nuts restaurants are best described as of the "fast food type," accommodating on the average from 50 to 60 persons for sit-down counter service at any one time and additional customers are provided for at designated "carry-out" areas. The typical customer remains in the restaurant only about 15 minutes (RX 78, 57–59; CX 4D).

(4) Chock restaurants do not have kitchens or chefs. As found earlier, Chock personnel make nightly deliveries from the Commissary or warehouse in refrigerated and regular trucks of the food items needed for service the next day. Entering the restaurants and placing the food items in the appropriate storage areas without the necessity of any individual restaurant employee being present and without interruption of normal business hours is the accepted means of provisioning restaurants (RX 78A; Tr. 940–42, 820–23, 834).

(5) Hot foods such as coffee, soups and hamburgers, are maintained in that state in service areas visible to the customers. Chock features and advertises the fact that no person actually touches Chock food items at any stage of their preparation or service; one Chock slogan is "Hands never touch the food you eat." (RX 78A, 68, 69; CX 4D).

(6) Rather than using individual customer menus, the restaurants display at least one and usually two or more large plastic menu boards (40½" × 56"). These are visible to all customers. The menu boards, distinctive in design (Patent Office Reg. 864,-352), list four categories of food items—soups, sandwiches, desserts and beverages. The boards may be altered to reflect additional categories, such as a luncheon platter. The menu boards, as shown in RX 60, accommodate plastic inserts, each of which identifies a single food item offered for sale that particular day and its price. The inserts are removable to reflect menu and price changes (RX 77F, 78B, 3, 59, 60).

(7) Certain standard items are offered every day: these include Chock Full O'Nuts coffee, orange drink, Diet Freeze, whole wheat doughnuts, nutted cheese sandwiches and hamburgers. See RX 51.

Other categories of food items such as special salad sandwiches, pies, layer cakes and soups appear every day, but the particular item rotates daily. For example, on Mondays, the special salad sandwich may be tuna salad; the pie, cocoanut; and the cake, maple walnut. On Tuesday, the special salad sandwich may be chicken salad; the pie, apple crumb; and the cake, chocolate layer. The special salad sandwich, pie and cake offered on any particular day will be the same in all Chock restaurants (RX 78B; CX 104–10).

(8) With the exception of the chinaware mugs used in some restaurants to serve coffee to sit-down customers, virtually all utensils, plates, bowls, and cups are of disposable paper or plastic. Examples are included in the record: RX 80A–N.

(9) Except for the Chock signs and menu boards, which are rented to licensees, Chock owns no interest in its licensees' facilities—site, store, fixtures, etc. (RX 77F–G).

(10) These licensee-owned facilities, in fact, are suitable to conduct fast-food counter-service type restaurants on an unaffiliated basis or under the name of some other fast-food chain.

F. Respondent's public image and reputation over a substantial period of time has become associated with wholesome, high quality food, reasonable prices, quick service and cleanliness (CX 3D, 4D, 6C, 83A; Tr. 839). For many years, respondent has advertised these facts in newspapers, magazines, and other materials (RX 31–51). For example, respondent's advertising emphasizes:

(1) That the coffee served in Chock restaurants and sold in retail groceries is a "premium" coffee blended from the "very best coffee beans grown anywhere in the world" (RX 32A–B), and that its taste justifies the premium price (RX 34, 35).

(2) That Chock does its own baking (RX 25) and that the distinctive baked goods served in Chock restaurants and sold frozen in retail groceries are made with "the same ingredients your grandmother used," contain "no glycerides, no preservatives, never an artificial color or flavor," and use "fresh milk, top quality eggs, Grade AA butter, pure flavors." (RX 21–24, 25, 27, 32A–B, 36–41, 63–64, 66–67; Tr. 831).

(3) That Chock's "Diet Freeze" chocolate drink is "99% fat free," made with "imported chocolate," enriched with a substantial percentage of daily vitamin and mineral requirements, and contains neither cyclamates nor [since 1972] saccharin (RX 44, 45, 71; CX 146A–B; Tr. 831).

(4) That human hands do not touch the foods and drinks served at Chock restaurants at any stage of their preparation or service (RX 46–47, 69; CX 4D–E; Tr. 849).

(5) That in the fall of 1972, a survey [12] was conducted by an independent professional research organization establishing that:

a. 85.2 percent of the persons who patronized company-owned and licensed restaurants bearing the Chock name believe that people eat at Chock restaurants because they know that each and every one serves food of the same quality and taste. 80.5 percent consider this factor "important" in their own decision to patronize Chock restaurants (RX 55A).

b. 86.7 percent believe that people who order coffee at Chock restaurants expect to be served Chock's own brand of coffee and not some other brand. 69.4 percent consider this fact "important" in their own decision to patronize Chock restaurants (RX 55E).

c. 82.9 percent believe that people who order salad sandwiches in Chock restaurants expect that the salad sandwich mixes have been freshly prepared by Chock and are of consistently high quality. 82.2 percent consider this factor "important" in their own decision to patronize Chock restaurants (RX 55G).

d. 82.9 percent believe that people who order baked goods in Chock restaurants expect that the baked goods have been made fresh daily by Chock. 79.3 percent consider this factor "important" in their own decision to patronize Chock (RX 55F).

G. Chock's program of licensing restaurants did not begin until 1963. By 1966, there were 51 licensees, compared with only 34 company-owned restaurants (CX 4D). In 1968, Chock announced that no new licensees would be granted (CX 6C). Only three have been granted since 1968, each for restaurants formerly operated by Chock licensees. (Compare the "X" type licensees listed in RX 77I, with the list of terminated licensees, CX 11C–E). In March

[12] (a) The survey was conducted by a professional organization experienced in administration of consumer surveys, in accordance with standards and criteria generally accepted within the profession (Tr. 776–811).

(b) The sample, more than 2500 customers polled over a four-day period at four company-owned and four licensed Chock restaurants in Manhattan, where 57 of the 83 Chock restaurants are located, was adequate and reasonable (RX 55; Tr. 791–93, 810–11).

(c) The questionnaire was drafted fairly to develop the limited categories of information sought (Tr. 700–802).

(d) No evidence was adduced by complaint counsel to discredit the form of questionnaire used, the sampling techniques employed, or the validity and reliabiltiy of the results obtained.

(e) Testimony, including that from complaint counsel's own witnesses, corroborated the survey's central findings regarding consumer expectations (Tr. 377, 697, 922, 820).

1967 (CX 40A), and again in April 1971 (CX 73), Chock offered to release from its licensing agreement any licensee who requested such a release (CX 40C; RX 73). At its height, the licensing program, including sales to licensees and royalties, generated only 8 percent of Chock's revenues (CX 6C).

(1) Chock's revenues from all sources have ranged from $42.2 million in fiscal 1963 (CX 1C) to $51.8 million in fiscal 1971 (CX 142E). Sales by company-owned restaurants have increased from $14.6 million in 1969 to $15.3 million in 1971, while estimated sales by the licensed restaurants (not included in Chock's revenues) declined from $9.2 million in 1969 to $8.3 million in 1971 (CX 143).

(2) Chock's sales to licensees of its own food products declined from $2.4 million in fiscal 1968 to $1.2 million in fiscal 1972; sales of supplies, from $438,000 in 1968 to $189,000 in 1972; sales of non-Chock food items, from $853,000 in 1968 to $826,000 in 1972 (RX 77J).

(3) In royalties charged to its licensees, based upon 3 percent of their total retail sales, Chock's earnings declined from $303,686 in fiscal 1968 to $275,544 in 1969, $250,987 in 1970, $248,433 in 1971, and $244,899 in 1972 (RX 77J).

3. In the course and conduct of Chock's business of franchising the use of the "Chock Full O'Nuts" trademark, as described earlier, of manufacturing and selling food products and restaurant supplies from its Secaucus, N.J. commissary and warehouse, there is now and has been for several years, a constant and material flow of commerce in interstate commerce.

A. Chock's restaurants, both company-owned and franchised, are located in three states: New York, New Jersey and Pennsylvania (Finding 2a).

B. All food products which Chock manufactures and sells to its licensees have been manufactured at its Secaucus, N.J. plant since 1967, and delivered from there to licensees who are located in other states (Tr. 945, 978; RX 77C). This includes its coffee, which, although produced in New York, is transported to the Secaucus commissary for redistribution to the licensees (Tr. 866).

C. Chock advertises, on a continuing basis, its owned and licensed restaurants in newspapers whose circulation extend beyond state boundaries (RX 30, 43, 44, 45, 46, 47, 48, 49, 50, 65, 68, 69; CX 146A–B).

D. The Chock service mark and trademarks are registered "in commerce" with the United States Patent Office (RX 2–6).

4. Chock is in substantial competition in commerce with other firms engaged in the manufacture and sale of food at retail to the public. (Comp. par. 4; Ans. par. 4; Finding 3).[13]

Alleged Price Fixing

5. As indicated in Appendices 1, 4, and 5, only 12 of Chock's 38 licensees entered into agreements that, on their face, tend to show that Chock even has the right to specify retail prices. For Chock suggested prices and licensees made their decision based on their experience and Chock's recommendation (Tr. 263). Count I is limited to these particular instances.[14] However, there is no evidence of record to show that Chock treated the 12 licensees differently than the other 26,[15] or that the provisions were ever enforced or that they played any meaningful role in pricing practices. The mere existence of these agreements, then, would appear to be of little practical significance.[16]

A. One such holder of a Type No. 3 Agreement was an absentee operator without prior restaurant experience in 1967. This licensee indicated that it was his policy to try to sell for prices higher

[13] No affirmative evidence of record was adduced by complaint counsel to support the allegations in the complaint that "respondent is in substantial competition in commerce with other firms engaged in the manufacture and sale at wholesale of food products, the sale of restaurant supplies and restaurant equipment, * * * and the licensing of trademarks and trade names for use in connection with restaurant businesses; and respondent's licensees are in substantial competition in commerce with repondent, with one another and with other firms and persons engaged in the sale of food at retail to the public." The complaint shall be accordingly conformed to the proof adduced by complaint counsel.

[14] Paragraph 10 of the Type No. 3 Agreement [Appendix 4] provides that the licensee "agrees to sell said products at the same prices as restaurants operated by Chock." Paragraph 11 requires them to "have the same daily menu and at the same prices that are in effect at stores operated by Chock." Paragraph 38 of the Type No. 4 Agreement [Appendix 5] gives Chock the right to "regulate the retail sale price of all such products."

[15] With regard to the single licensee located in New Jersey, the record contains no evidence regarding the extent to which the Jersey City licensee observed or rejected Chock's suggested resale prices. No inference of price-fixing can be drawn from the bare fact that he was party to a Type No. 3 franchise agreement in light of the fact that other Type No. 3 licensees testified that they felt free within a few months of becoming Chock licensees, to charge whatever prices they wished, that they have continued independent pricing for years, and that they have done so without reprisal or criticism from Chock (Tr. 531, 345). Additionally, such an inference would be without factual foundation because of the fact of reduced competition which licensees located in "peripheral" areas [areas outside of Manhattan] have always felt. They have, as the record shows, felt more free to charge prices that might differ from those charged in other Chock restaurants (CX 22D; Tr. 683–85).

[16] Since these franchise agreements, on their face, tend to show illegal price fixing, parties to the agreements would be well advised to revise the agreements to reflect the existing practices as soon as practicable.

than Chock's "whenever possible" (Tr. 354–55), and that he did so without complaint from Chick (Tr. 354–55). When this licensee and others complained to Chock about the low prices Chock charged in its own stores, Chock responded with business arguments that they, [the licensees] would lose customers if they raised prices (Tr. 339–41). At the same time, no one reminded this particular licensee of any contractual obligation to observe Chock's prices. When he disregarded Chock's business advice and did raise his own prices, there were no complaints or threats from Chock to terminate his license (Tr. 365–66). The licensee acknowledges that in April of 1969, he was charging prices that differed from Chock's, that Chock knew it, and that he never received any complaint (Tr. 351–55).

B. Another Type No. 3 licensee testified that within nine or ten months of opening his restaurant in May 1967 [or January 1968] he had begun to set resale prices different than those charged by Chock (Tr. 531, 551–52). First, he manually changed the Chock-supplied menu inserts (Tr. 531). Then, when he asked Chock for menu board inserts reflecting his own prices, he was told that he would have to provide his own (Tr. 532–34). No one at Chock pointed to his alleged contractual obligation to observe Chock's prices, nor did complaints follow when he obtained from the association and began to use menu board inserts reflecting his own price decisions (Tr. 535, 586, 596). The record makes it clear beyond doubt that from at least early 1968, whatever price restrictions existed in franchise agreements, simply were not enforced, and that the association had made it easy for any licensee to charge whatever prices he wanted (Tr. 535, 586, 588–89, 596).

6. Of greater significance is the fact that Chock engaged in a policy of suggesting through menu board inserts, price bulletins, policy statements, and advertising, the retail prices for all Chock Full O'Nuts restaurants—company-owned as well as those operated by licensees.

A. Chock's menu board inserts were readily and freely altered by any licensee who wished to charge a different price, and some did modify the inserts to reflect their own individual price decisions (RX 77F). Moreover, the record contains photographs of inserts modified as to price by licensees (RX 15, 15A, 16A, 16B).

B. By early 1968, the association—entirely independent of Chock—was providing menu board inserts bearing whatever price any licensee wished to charge (Tr. 686). The existence of this service was known to the licensees, who also knew that others were charging whatever prices they wished without reprisal from Chock (Tr. 588–89, 686–90).

C. There is no evidence of record as alleged in Count I, that Chock's alleged reclamation of menu board inserts with outdated information played any role in any licensee's pricing decisions.

D. In November 1971, Chock ceased to supply menu board inserts to any licensee except upon explicit request (RX 77F).

7. A summary of the record on pricing shows that [17]

A. By early 1968, at the latest, Chock's licensees were exercising total freedom over their own prices, subject only to consumer resistance and other natural laws of the marketplace.

B. As to earlier years, there is no evidence of record relating to pricing practices of Chock or its licensees in the period 1963–1965, during which time only Type No. 1 and Type No. 2 Agreements containing no alleged price-fixing provision were in effect (RX 77G).

C. As to the in-between years of 1966 and 1967, the record does not indicate the extent to which there was price uniformity, and it suggests only that new licensees during that period tended to follow Chock's price suggestions as a result of inexperience, not because of any legal necessity or undue pressure to do so.

D. In no instance between 1963 and the present, did any licensee receive any threat of cancellation of his agreement or any other threat of reprisal solely because of his pricing decisions. Chock knew of the prices charged by its licensees because it was necessary to maintain a check on the prices charged by licensees in order to determine royalties due. Royalties are calculated on the basis of gross retail sales (Tr. 173–76; CX 34, 35).

E. Contemporaneous documents reveal that Chock did not believe it had the power or right to control its licensees' prices:

(1) Relevant contemporaneous internal Chock documents characterize Chock's prices as "suggested" (CX 35A; RX 76).

(2) Chock officials dealing with licensees were instructed to explain that Chock had power only to "recommend" prices, and that if a licensee wanted to charge different prices "we can't stop him." (RX 12).

[17] There is no affirmative evidence of record as to whether the alleged "price competition between Chock licensees, Chock-owned restaurants and other persons or firms operating restaurant businesses in New York and New Jersey has been eliminated."

(3) Although Chock desired to keep prices uniformly low (see CX 40), it has acted only unilaterally to achieve this objective, and has not resorted to any concerted activity with respect to prices.

COUNT II

Requirement Agreements

8. At least since 1963, Chock requires its licensees to purchase a substantial portion of the food products used by such licensees in their restaurant businesses. (Comp. par. 5B; Count Two, 3; Ans. par. 5; Tr. 69).

A. The food products required to be purchased are those that are "distinctive" Chock products. They are products long associated with Chock Full O'Nuts company-owned restaurants in New York City. Essentially, they are coffee, baked goods, special salad sandwich spreads and certain beverages such as the "Diet Freeze" chocolate drink. See Findings 2B, 2C and footnotes thereto.

B. As found earlier (see Findings 2A(3)), a great variance existed in the restaurant experience factor of Chock licensees. This, in large measure, explains why the variety and volume of food products that each licensee purchased from Chock always varied greatly over and above the "distinctive Chock products." Keeping in mind the advantages of a single source for delivery during off-business hours, one licensee has purchased milk from a supplier of his own selection since 1963 (Tr. 916).[18] But, this same licensee, to the time of trial of this matter in late 1972, purchases virtually all of his other products from Chock because of the delivery convenience factor (Tr. 917). Another licensee has purchased a cola drink from a source other than Chock for years (Tr. 609). Another has purchased soups (Tr. 196). As found earlier, other licensees began to purchase products—food and non-food—other than distinctive Chock food products, as they gained confidence in their restaurant business judgment. Early 1968, was the approximate period of this maturing of judgment (Tr. 176, 193–98, 317, 395–96, 536–46, 598, 676–77).

C. Chock was aware of the fact that its licensees were purchasing non-Chock produced items from various suppliers (RX 76). There is no evidence of record that Chock threatened any action against these licensees as a result of these purchases. The record

[18] This witness emphatically testified that "Nobody ever forced me to buy any products." (Tr. 916).

clearly shows that Chock's licensees have complete and total freedom to purchase competitively except in those circumstances where the licensee would be attempting to purchase a substitute for Chock's distinctive food products (Tr. 710–12, 626–27, 916).

D. Neither the franchise agreements nor any other evidence of record show agreements or any other scintilla of evidence requiring licensees to purchase non-food items, such as restaurant equipment or restaurant supplies from Chock (CX 17A–20J; RX 1).

E. Paper products or supplies appear to be the principal non-food category. The record shows that these products have been purchased freely by licensees from sources other than Chock since at least early 1968—the period by which most licensees developed the experience to operate their restaurants with some mature, independent business judgment. See Findings 2A(3). (Tr. 197–98, 451, 536, 599, 694–95; CX 87I, 141–42, 197–98, 267, 266, 347; RX 76).

F. No affirmative evidence of record was adduced regarding the allegation that "Competition between respondent and other suppliers of such food products and restaurant has been eliminated." The record, moreover, as indicated in the findings above would show that, indeed, competition exists between respondent and other suppliers of food products—other than distinctive Chock food products—as well as between respondent and other suppliers of restaurant supplies on the basis of price, quality and service.

CONCLUSIONS

1. The record does not establish with substantial and credible evidence that Chock has a plan or policy, the purpose of which is to fix, control, establish and maintain the retail prices at which Chock licensees advertise, offer for sale, and sell food products or that Chock licensees are required to sell food products at prices fixed by respondent.[19]

2. At least since 1963, Chock has pursued a plan or policy, the purpose of which is to maintain the quality and uniformity of distinctive Chock products used in Chock restaurants—company-owned as well as those licensed by Chock. The maintenance of quality and uniformity, in these circumstances, is a legitimate

[19] The administrative law judge reaches this conclusion on the pragmatic basis of evaluating the performance of respondent on the whole record as well as the practices developed therein rather than taking the technical and legalistic approach urged by complaint counsel.

business purpose, both for licensor and licensees. Among the distinctive food products are coffee, bakery products and salad sandwich spreads.[20] These are products to which the public long has identified with Chock Full O'Nuts restaurants.

3. The record does not establish that the plan foreclosed a substantial part of any relative line of commerce.

4. The record does not establish that the franchise agreements here assailed are "tying agreements," or even "akin to a tying agreement," as alleged by complaint counsel.[21] For a "tying agreement" theory necessarily must possess, as an essential factual predicate, the combination of "two separate products" into a single mandatory unit. Thereunder, the purchaser, here the licensee, would be forced to take a product that he does not want because the seller, here Chock, would require him to do so as the price obtaining a desired second product over which Chock would have sufficient market power. *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 507 (1969).

5. The record fails to establish with substantial evidence that licensees purchase distinctive Chock food products they do not want as the price they must pay to obtain use of the Chock trademark. Stated otherwise, the record shows that licensees are motivated by sound business reasons to purchase these distinctive food products. For these licensees are aware, and this record clearly establishes, the dynamic impact of Chock Full O'Nuts product uniformity, particularly with regard to quality, has to their total sales as a Chock Full O'Nuts restaurant. There is not a scintilla of evidence which would even tend to show that any purpose of the limited requirement agreements here was to suppress competition in any material form or that they were de-

[20] There was little evidence of record with regard to Chock's "Diet Freeze" chocolate drink, orange drink, coffee whitener (Melloream). Even complaint counsel recognize the rather insubstantial nature of this volume. Hamburger is not on the administrative law judge's list of "distinctive" food products. While the record will support a finding that Chock hamburger is different, the difference is more apparent than real. In the judgment of the administrative law judge, this record will not support a factual foundation to establish legal significance to Chock hamburgers in contrast to ordinary hamburgers even if the Chock hamburgers are more "spicy" [apparently containing more salt and pepper] (Tr. 955–56).

[21] *Siegal* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), is relied upon heavily by complaint counsel. However, that case is easily distinguished. First, the Court emphasized that the "tied products" there—mixes, cooking equipment and packaging—were "common articles (which the public does not and has no reason to connect with the trademark)." 448 F.2d at 49. Indeed, the main food items served to customers were *not* required to be purchased from *Chicken Delight*. Second, Chicken Delight did not itself manufacture the "tied" items but purchased them from others. 448 F.2d at 48, n. 5. Third, Chicken Delight's only motive was to maximize sales of the "tied products" because that was its sole source of revenue. 448 F.2d at 46. Fourth, Chicken Delight had power to exact prices higher than market value. 448 F.2d at 47.

signed with that motivation in mind. Nor will the record support any showing that Chock's motive was to maximize its franchise sales. Chock essentially is in the restaurant business and its interests in licensees is the integrity and preservation of Chock Full O'Nuts restaurants as the public has come to know them.

6. Moreover, the requisite market power of the alleged tying product [apparently Chock's trademark] has not been established of record. And, Chock's trademark would have to satisfy the market dominance test of *Times-Piscayune Publishing Co.* v. *United States*, 345 U.S. 594, 608–609 (1953) and *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Yet, there is no evidence of record concerning the economic leverage which might be attributable, as a matter of fact, to the Chock Full O'Nuts trademark. *Kugler* v. *AAMCO Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972), *affirming* 337 F. Supp. 872, 873–876 (D. Minn. 1971).[22] No data, moreover, was introduced concerning the size and nature of the restaurant industry or of its fast food segment, the availability of competing trademarks on similar or better terms, the relative ease of entry into the business, or the boundaries of the geographic market.

7. Apart from antitrust criteria, Chock's franchise agreements requiring the licensees to purchase Chock's distinctive food products is not, on this record, shown to be an unfair trade practice. This record shows that Chock manufactures these distinctive products as a direct result of the inability of other suppliers to do so with reliable consistency and uniformity. Because of the quality and uniformity achieved by Chock over a period of years, members of the public who patronize its restaurants in New York City, where virtually all of the restaurants are located, for example, have come to do so, in large part, because they believe they will be served the same distinctive food products, prepared fresh daily by Chock, that they associate with its name. In short, Chock's purchase restriction has "a lawful main purpose" within the meaning of *Carvel Corp.*, 68 F.T.C. 128 (1965).[23]

8. As the owner of a valuable trademark, Chock has an affirm-

[22] In contrast to affirmative factfinding, complaint counsel cite *Susser* v. *Carvel*, 332 F.2d 505, 513 (2d Cir. 1964, *cert. dismissed*, 381 U.S. 125 (1965), for the proposition that sufficient economic power "should be presumed in cases involving a trademark license or franchise package." This reliance would appear to be misplaced. *Kugler, supra; Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 452 F.2d 1095, 1100 (6th Cir. 1971).

[23] See also the Federal Trade Commission, Report of Ad Hoc Committee on Franchising, 20–21 (1969), and Ward, *Supplier-Dealer Relations: Prospects for Antitrust Enforcement*, 1971, New York State Bar Assn., Antitrust Lay Symposium, 34, 43–44, n. 41.

ative duty to the public to assure the public that all products sold under its trademark are what the products purport to be. *Baker* v. *Simmons*, 307 F.2d 458, 469 (1st Cir. 1962).

9. The Federal Trade Commission has jurisdiction of and over respondent as well as the subject matter of this proceeding.

10. For the reasons set forth above, the administrative law judge has determined that the complaint must be dismissed.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice, however, to the right of the Commission to issue a new complaint or take such further or other action against respondent at any time in the future as may be warranted by the then existing circumstances.[24]

APPENDIX I

Following are the names and addresses of Chock Full O'Nuts' present franchisees, and the type of agreement into which each has entered. Type 1 agreements were negotiated in 1963; Type 2, in 1964 and 1965; Type 3, in 1966–1968; Type 4, in 1967–1970; Type X, in 1972 (RX 77G–I).

LRW Restaurant Inc. (2)
44 Beaver St., Manhattan, N.Y.

266 Food Corp. (3)
266 Canal St., Manhattan, N.Y.

Botadio Enterprises, Inc (2)
91 Fifth Ave., Manhattan, N.Y.

Rubinstein Bros. Milk Bar, Inc. (1)
52 E. 14th St., Manhattan, N.Y.

Kalinus Food Store, Inc. (2)
330 Seventh Ave., Manhattan, N.Y.

Husar Foods, Inc. (3)
1220 Broadway, Manhattan, N. Y.

Bornar Food Shop, Inc. (2)
269 W. 34th St., Manhattan, N.Y.

461 Restaurant Corp. (3)
461 Park Ave. So., Manhattan, N.Y.

Varform Food Shop, Inc. (2)
485 Seventh Ave., Manhattan, N.Y.

620 Eight Ave. Corp. (2)
620 Eight Ave., Manhattan, N.Y.

169 Broadway Corp. (4)
565 W. 169th St., Manhattan, N.Y.

Excell Foods Corp. (2)
519 Lexington Ave., Manhattan, N.Y.

500 Lenox Ave. Restaurant Inc. (1)
500 Lenox Ave., Manhattan, N.Y.

Rubinstein Food Shop (1)
1630 Broadway, Manhattan, N.Y.

Meyrle Lee Restaurant Corp. (4)
1627 Broadway, Manhattan, N.Y.

Ro-Lo Restaurant (3)
2369 Broadway, Manhattan, N.Y.

1855 Food Corp. (3)
1855 Broadway, Manhattan, N.Y.

Cajo Foods, Inc. (2)
205 West 57th St., Manhattan, N.Y.

[24] Particularly if respondent does not amend as soon as practicable, the Type No. 3 and 4 Agreements in accordance with the technical requirements of the law and the facts of record here developed, and if respondent, in fact, were to require its licensees to purchase food products other than the distinctive Chock Full O'Nuts coffee, bakery goods and salad sandwich spreads.

56 West 57th Street Corp. (2)
56 West 57th St., Manhattan, N.Y.

W. M. B. Foods, Inc. (2)
627 West 181st St., Manhattan, N.Y.

Rubenstein Bros. Milk Bar, Inc. (2)
451 Fulton St., Brooklyn, N.Y.

Bay Parkway Pharmacy, Inc. (3)
2201 86th St., Brooklyn, N.Y.

Goldfrank, Inc. (3)
538 Fulton St., Brooklyn, N.Y.

Benorsid Restaurant Inc. (3)
1562 Flatbush Ave., Brooklyn, N.Y.

31 July Corp. (3)
96-35 Queens Blvd., Rego Park, N.Y.

Solmae Foods, Inc. (2)
1611 Kings Highway, Brooklyn, N.Y.

Laurie Food Shop, Inc. (2)
85-24 5th Ave., Brooklyn, N.Y.

941 Flatbush Inc. (1)
941 Flatbush Ave., Brooklyn, N.Y.

Marje Food Corp. (x)
2190 White Plains Rd., Bronx, N.Y.

Kenmart Foods, Inc. (2)
165-01 Jamaica Ave., Jamaica, N.Y.

River Ave. Foods, Inc. (2)
51 East 161 St., Bronx, N.Y.

Valport & Felman, Inc. (2)
12 East Fordham Rd., Bronx, N.Y.

493 Nostrand Inc. (2)
493 Nostrand Ave., Brooklyn, N.Y.

160 Jamaica Ave. Corp. (2)
160-13 Jamaica Ave., Jamaica, N.Y.

Almis Food Shop, Inc. (2)
2899 Third Ave., Bronx, N.Y.

Weld Enterprises, Inc. (3)
30 Journal Square, Jersey City, N.J.

Dave-Mar Food Corp. (x)
82-01 Roosevelt Ave.,
Jackson Heights, N.Y.

APPENDIX 2

Type No. 1
CHOCK FULL O'NUTS
FRANCHISE AGREEMENT
(CX 17)

AGREEMENT made the 17 day of September, 1963, by and between CHOCK FULL O'NUTS CORPORATION, a New York Corporaton, having its principal office at 425 Lexington Avenue, New York 17, New York (hereinafter referred to as "CHOCK") and Rubinstein Bros. Milk Bar, Inc. ___________ with offices at 52 East 14th Street, New York City, New York (hereinafter referred to as "LICENSEE")

W I T N E S S E T H :

WHEREAS, CHOCK is engaged in the business of operating a certain counter type of restaurant in the city of New York, Newark, New Jersey, and Philadelphia, Pennsylvania, under the name of "CHOCK FULL O'NUTS" and manufactures and sells coffee, doughnuts, and other food products used in connection with the operation of said restaurants; and

WHEREAS, said restaurants have been operated and the products of CHOCK sold under the registered trademark and trade name "CHOCK FULL O'NUTS" and trademark "CHOCK FULL O'NUTS, THE HEAVENLY COFFEE"; and

WHEREAS, CHOCK, by reason of its maintenance of high standards of quality, quick service, cleanliness and limited menu at popular prices, has built up over a period of years a substantial demand for the sale of its products; and

WHEREAS, the goodwill symbolized by the trademark and trade name, "CHOCK FULL O'NUTS" is of incalculable value to CHOCK; and

WHEREAS, the LICENSEE is desirous of establishing a "CHOCK FULL O'NUTS" restaurant, similar in type to the restaurants presently operated by CHOCK, in order to be able to immediately capitalize on the goodwill of said trademark and trade name and has submitted a proposal to operate such type of restaurant under this agreement at the following premises (hereinafter called "the premises");

52 East 14th Street
New York City, New York

and

WHEREAS, it is the desire and intent of both parties that the said restaurant shall be constructed, maintained and operated under similar high high standards;

NOW, THEREFORE, the parties hereby, in consideration of the mutual agreements herein contained, and promises herein expressed, do hereby agree as follows:

1. CHOCK agrees to make recommendations to the LICENSEE with respect to the construction, design and equipment of the necessary store front, fixtures and appurtenances for the establishment of a restaurant similar to the type presently maintained by CHOCK.

2. CHOCK agrees to co-operate with the LICENSEE and to furnish advice on sales pattern, storage controls, sanitation services and the keeping of accurate records.

3. CHOCK agrees to assist in the preparation of basic plans and specifications for the restaurant to be built at the premises for the purpose of assuring that the standards of construction and design shall remain similar to the CHOCK restaurants. Before commencing construction and/or making any alterations in the premises, all contracts, plans and specifications shall be submitted to CHOCK for written approval. Permits and licenses for construction and operation to be obtained by LICENSEE.

4. LICENSEE acknowledges that CHOCK, by reason of its maintenance of high standards of quality of product and service at restaurants operated by it, has built up over a period of years a reputation which would be severely damaged, to its financial detriment, if restaurants using its name "CHOCK FULL O'NUTS," but operated by others under a franchise agreement similar to this, were not maintained and operated in accordance with such high standards. Similarly CHOCK would be severely damaged if the products served in the operation of the restaurants were of lesser quality than those served in restaurants operated under the name "CHOCK FULL O'NUTS," LICENSEE further acknowledges that the judgment as to whether or not such high standards are being so maintained in this restaurant should be and is solely and properly vested in CHOCK. In the event that, in the sole judgment of CHOCK, the LICENSEE shall not maintain and operate the restaurant in accordance with CHOCK'S standards or maintain the quality of products sold in accordance with CHOCK'S standards, CHOCK may terminate this agreement as hereinafter provided.

5. The supervisory personnel at CHOCK shall have the right to enter upon the premises at any reasonable hours for the purpose of examining

the same, conferring with the LICENSEE'S employees, inspecting and checking merchandise, furnishings, equipment and operating methods, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with the terms of this agreement.

6. LICENSEE acknowledges that by reason of large sales in "CHOCK FULL O'NUTS" restaurants and in various non-restaurant retail outlets, and extensive consumer advertising, the trademark "CHOCK FULL O'NUTS" has become particularly associated with coffee and doughnuts sold and manufactured by CHOCK under the trademark "CHOCK FULL O'NUTS" and the goodwill symbolized by the trademark "CHOCK FULL O'NUTS" in connection with these products is of substantial value. Licensee further acknowledges that the public expects to obtain the well-known "CHOCK FULL O'NUTS" coffee and doughnuts at "CHOCK FULL O'NUTS" restaurants. Therefore, in order to provide the public with the products it identifies with the trademark "CHOCK FULL O'NUTS," LICENSEE shall purchase from CHOCK all of its requirements of coffee and doughnuts for sale to restaurant customers at or from the premises, and CHOCK will sell to LICENSEE "CHOCK FULL O'NUTS" coffee and doughnuts to meet such requirements, subject to strikes, lockouts, government restrictions, war, or acts of God. Similarly, LICENSEE will purchase all of its requirements of any other products manufactured or sold by CHOCK which by reason of extensive sales, advertising, or otherwise, have, in CHOCK's judgment, become so identified with the trademark "CHOCK FULL O'NUTS" that only the furnishing of the said products manufactured and/or sold by CHOCK would provide consumers with the "CHOCK FULL O'NUTS" products they expect and are entitled to receive. LICENSEE shall pay for such products prices from time to time fixed by CHOCK within one week from the date of delivery at the premises.

7. LICENSEE will purchase from CHOCK all of its requirements of those products and supplies manufactured and/or sold by CHOCK which are listed in Schedule A attached hereto, as said list may be added to or subtracted from by CHOCK. LICENSEE shall pay therefore prices from time to time fixed by CHOCK within one week from the date of delivery at the premises. In the event that LICENSEE desires to purchase any of said items listed in Schedule A from other suppliers, LICENSEE shall give to CHOCK notice of such desire and LICENSEE may so purchase said items, provided that such products and supplies meet CHOCK's standards of quality for each of such products. To assure itself of the continuance of the high standards of quality of food and/or supplies to be used in restaurants bearing the "CHOCK FULL O'NUTS" name and in order to determine if such supplier can and will continue to meet said standards, CHOCK may establish whatever requirements for both LICENSEE and/or said supplier as it deems necessary, including, but not limited to, inspections of supplier's plant and product. If CHOCK concludes that said supplier is satisfactory, it shall so notify LICENSEE and LICENSEE may commence purchasing food from said supplier within two weeks after such notification and may continue such purchases so long as CHOCK'S standards, as they may be modified from time to time, are maintained.

8. The LICENSEE is bound to sell only goods which conform to CHOCK'S standards. The LICENSEE will not sell under the name of CHOCK FULL

O'NUTS or otherwise at or from the premises any products, other than those above described in paragraphs 6 and 7, *supra*, and will not sell at or from the above described premises any products manufactured or sold by others, unless CHOCK shall have given written approval. LICENSEE agrees to have the same daily menu that is maintained by CHOCK stores. LICENSEE further agrees not to permit the use of any of the products or containers bearing the trademark CHOCK FULL O'NUTS for any purpose except in connection with sales from the franchised premises.

9. So long, and only so long, as this agreement shall remain in full force and effect, the LICENSEE agrees to use said premises exclusively for a restaurant under the name of CHOCK FULL O'NUTS, and may use on said premises in a manner approved by CHOCK the trade name, trademarks, designs, advertising, menu signs, and form of structure used by CHOCK. The LICENSEE acknowledges the validity and the ownership in CHOCK of said trade names, trademarks, designs, forms and combination of color and structure, and agrees that upon termination of this agreement for any cause whatsover, the permission to use the same as aforesaid and all interest therein whatsoever shall cease and be at an end.

10. CHOCK agrees to supply the LICENSEE with menu signs and strips bearing the trademark of CHOCK, which shall at all times remain the property of CHOCK under a separate rental agreement. At its own expense, the LICENSEE will prominently display in and upon the land and buildings advertising signs of CHOCK FULL O'NUTS of such nature, form, color, number, location and size, and containing such material as CHOCK shall approve and/or require in writing; and the LICENSEE will not display in or upon the said premises, or elsewhere, any sign or advertising display of any kind, or advertise in any media, without the written approval of CHOCK of said displays or advertising. The LICENSEE agrees to display, at a prominent part of the premises to be designated by CHOCK, a sign or signs to be furnished by CHOCK, which will indicate that the premises are operated under a franchise agreement with CHOCK FULL O'NUTS CORPORATION, and will contain such other language as may be required by CHOCK. CHOCK, or its authorized agents, may at any time enter upon said premises and remove any signs of advertising material which it deems objectionable.

11. The LICENSEE shall deliver to CHOCK monthly statements of sales and other moneys received from the operation of all business at the above described premises within ten (10) days after the end of each month, and within thirty (30) days following the end of each succeeding full year of the term of this agreement a statement of annual gross sales which shall be certified to by the LICENSEE and by a certified public accountant. The LICENSEE shall keep at the premises true and accurate records and accounts which shall show all sales made and all gross receipts from the business upon and within the above described premises. Said books and accounts shall be available to CHOCK, and its authorized agents, for inspection at all reasonable times.

12. The LICENSEE agrees to pay to CHOCK on the 10th day of the month following each full month of operation three (3%) percent of the gross receipts, which gross receipts shall include the selling price of all the merchandise of any sort whatsoever sold in, upon or from any part of the

above described premises. In no event, however, shall such gross receipts be less than the projected retail price on the basis of the purchases from CHOCK, allowing the LICENSEE, however, five (5%) percent of such projected retail price to cover any differentiation between the purchases by the LICENSEE and the resultant gross receipts.

13. By reason of CHOCK's long experience in operating its unique restaurants under the name "CHOCK FULL O'NUTS" it has found that certain low to moderate retail prices are required in order to attract sufficient numbers of customers to its stores and to maintain its image and goodwill. CHOCK will make available to LICENSEE the benefits of its valuable experience in connection with pricing and recommends that LICENSEE comply with said prices for LICENSEE'S own benefit in the operation of its business. LICENSEE may, however, choose not to follow such suggestions and recommendations.

14. LICENSEE shall:

(a) Operate and maintain the restaurant and all installations on the premises strictly in accord with the standards prescribed from time to time by CHOCK, which shall have the right in its sole discretion to modify the same from time to time.

(b) Employ sufficient personnel for the proper operation of the restaurant and require employees to conduct themselves courteously, decorously and in a manner to promote the best interest of the parties.

(c) Not permit the use of any part of the premises for purposes or functions objected to by CHOCK.

(d) Use its best efforts in connection with the operation of the restaurant business on the premises.

(e) Continuously operate the business at the premises upon such days and during such hours as CHOCK shall determine.

(f) Maintain in first-class condition by periodic painting, repairs and decorations, the interior and exterior of the restaurant and the premises as directed by CHOCK.

(g) Not attempting to induce any person employed by CHOCK to quit such employment.

(h) Comply with all laws and regulations whether Federal, State or local.

(i) Maintain in full force and effect, in companies approved by CHOCK, minimum insurance as follows:

(i) Property damage insurance in the amount of $25,000.

(ii) Public liability insurance in the amount of $1,000,000 in respect of any one accident or disaster and $500,000 in respect of injuries to any one person.

All policies shall be in form and substance satisfactory to CHOCK. CHOCK shall be named as an insured in all policies and the originals or certificates thereof shall be delivered to CHOCK and shall be prepaid. CHOCK shall have the right to require increased limits of such insurance or additional types of insurance when it deems such to be necessary.

Each policy shall contain a provision that it may not be cancelled nor may any material change be made in the terms thereof until the expiration of ten (10) days after notice of intention to cancel or change has been delivered to CHOCK.

(j) Use only such printed material, including letterheads, checks, invoices, menus, table tents and signs, and only such display and other material for advertising, promotional, operating or other purposes, as CHOCK recommends from time to time.

(k) Make no use of the trademark and trade name "CHOCK FULL O'NUTS" except in connection with the restaurant, and in accordance with this agreement.

(l) After the termination of this agreement not to use or display the trademark and trade name "CHOCK FULL O'NUTS" or any mark, name, or device confusingly similar thereto, in any manner or way or in connection with any products or services, whether in connection with the operation of restaurant or otherwise, and in particular, buy not by way of limitation, not in connection with products offered at the restaurant or on any china, silverware or other items of personal property.

15. So long as this agreement shall remain in force and effect, the LICENSEE Corporation will not, except with the written consent of CHOCK, engage in any business the same as or similar to the business covered by this agreement at any place other than the premises.

16. So long as this agreement shall remain in force and effect, the LICENSEE will not, without the consent in writing of CHOCK, mortgage, pledge, or otherwise assign as security the premises or any part thereof, or the equipment or furnishings located and used therein or any interest which the LICENSEE may have in any part thereof.

17. So long as this agreement shall remain in force and effect, the LICENSEE will not sell, transfer, assign, lease or sublet any interest in the said premises or any part thereof, or in the business thereon conducted, without the prior written consent of CHOCK.

18. If (i) any monies payable by LICENSEE to CHOCK shall not be paid as and when due and payable, and if such nonpayment shall continue for 10 days after service upon LICENSEE by CHOCK of written notice specifying the unpaid item; or (ii) there shall be any failure or omission in the full and faithful performance and observance of any of the terms, conditions and limitations of this agreement on LICENSEE'S part to be performed or observed (other than the payment of monies) and if such failure or omission shall not be remedied to the satisfaction of CHOCK upon demand; or (iii) there shall be filed by or against LICENSEE in any court pursuant to any statute, either of the United States or any state, a petition in bankruptcy or for reorganization or for the appointment of a receiver or trustee for all or a major portion of the property of LICENSEE, or LICENSEE shall be adjudicated a bankrupt or insolvent within the meaning of insolvency in either bankruptcy proceedings or equity proceedings, or shall make a general assignment for the benefit of creditors or, as debtor, take the benefit of the provisions of any solvency act, whether now or hereinafter enacted; or (iv) ownership, operation or control of the restaurant business conducted on the premises shall be transferred, passed to or devolved, whether by operation of law or otherwise, upon anyone other than LICENSEE herein named except as in this agreement permitted; or (v) the restaurant or premises shall be abandoned or vacated, then CHOCK, at its option, may serve upon LICENSEE written notice that this agreement and the unexpired term hereof shall cease and expire on a date not less than ten (10) days after the date of such notice, and thereupon and

upon the expiration of the time limit in such notice this agreement and the term hereof, shall wholly cease and expire in the same manner and with the same effect (except as to LICENSEE'S liability) as if the date fixed in such notice were the date herein prescribed for the expiration of the term of this agreement.

19. Unless terminated as provided in this agreement, this agreement shall remain in effect for 10 years from the date hereof; and shall thereafter be automatically extended for further periods of 10 years, unless at least thirty (30) days before the expiration of any year term, notice of intention to terminate is given in writing by one party to the other. However, commencing two (2) years after the date of the execution of this agreement LICENSEE may terminate this agreement upon sixty (60) days written notice to CHOCK, but CHOCK may then at its option, terminate the agreement at any time prior to said sixty (60) days, upon giving LICENSEE ten (10) days notice to such effect.

Upon the termination of this agreement for any cause, the LICENSEE will immediately discontinue the use of all trade names, trademarks, signs, forms of advertising indicative of CHOCK FULL O'NUTS, or the business or products thereof, and if the LICENSEE shall fail to remove said signs, then CHOCK shall have the right to enter upon the premises and remove same.

20. No waiver by CHOCK of any rights or remedies under this agreement, shall be deemed to have occurred unless embodied in writing signed by an officer of CHOCK.

21. This instrument contains the entire agreement between the parties, and any executory agreement hereafter made shall be ineffective to change, modify, discharge, or affect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

22. In the event of a breach or threatened breach by FRANCHISE of any of the terms, conditions or limitations of this agreement, CHOCK shall have the right to invoke any remedy allowed at law or in equity, whether or not other remedies are herein provided. All rights and remedies given to CHOCK under this agreement and those allowed in like case, at law or in equity, are distinct, separate and cumulative and no one of them whether or not exercised by CHOCK shall be deemed to be an exclusion of any of the others.

23. Any notice, statement, demand or other communication or exhibit required or permitted to be delivered or served or given by either party hereto to the other shall be delivered or served or given and shall be deemed to have been duly delivered to served or given, only if mailed in any general or branch United States Post Office situated in the city of New York or in enclosed in a registered or certified postpaid envelope addressed to the respective party at its address below (provided that each party shall be entitled to change such address by notice duly given pursuant to this paragraph):

(a) Notices to CHOCK shall be given to CHOCK at 425 Lexington Avenue, New York 17, New York.

(b) Notices to LICENSEE shall be given to LICENSEE at 52 East 14th Street, New York City, New York.

The words "registered or certified mail" as herein used shall require the sender to register or certify the same with the post office at the time of the mailing thereof only, and on such registration or certification the sender shall have fully completed the sender's duties hereunder and no further act or thing shall be required to be done or performed by the sender.

24. In no event shall this agreement be deemed to create a partnership or joint venture between CHOCK and LICENSEE in respect to the operation of the restaurant or in respect to CHOCK business or in any other respect whatsoever, or to impose upon CHOCK any liability in connection with the operation of the restaurant, or to render CHOCK responsible for any debts or obligations or LICENSEE or to give CHOCK any proprietary interest in the restaurant.

25. Should any part of this agreement for any reason be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this agreement without including therein any such part, parts, or portion which may, for any reason be hereafter declared invalid.

26. This agreement shall inure to the benefit of the successors and assigns of CHOCK. The interest of this agreement in the LICENSEE is personal and shall not be assigned, transferred or divided in any manner by the LICENSEE, and if the said LICENSEE is a corporation, it is understood and agreed that the shares of capital stock of said corporation shall not be sold, pledged, transferred or assigned, so as to change the controlling interest therein, without the written consent of CHOCK.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

CHOCK FULL O'NUTS CORPORATION
By ______________________________
RUBINSTEIN BROS. MILK BAR, INC.

APPENDIX 3

Type No. 2

CHOCK FULL O'NUTS
Reg. U.S. Pat. Off.

FRANCHISE AGREEMENT
(CX 18)

Agreement made the 25th day of November, 1964, by and between CHOCK FULL O'NUTS CORPORATION, a New York Corporation, having its principal office at 425 Lexington Avenue, New York 17, New York (hereinafter referred to as "CHOCK") and 3 MAIN ST. INC., a New York Corporation, having its principal place of business c/o Seymour Mann, M.D. 32 Lincoln Avenue, Tuckahoe, New York,

(hereinafter referred to as "LICENSEE").

Witnesseth That

WHEREAS, CHOCK is engaged in the business of operating a unique counter type of restaurant in the City of New York; Newark, New Jersey; and Philadelphia, Pennsylvania; under the name of "CHOCK FULL O'NUTS" and produces, manufactures, and sells food products used in connection with the operation of said restaurants; and

WHEREAS, said restaurants have been operated and the products of CHOCK sold under the registered trademark and trade name "CHOCK FULL O'NUTS"; and

WHEREAS, CHOCK, by reason of its maintenance of high standards of quality, cleanliness and limited menu at popular prices, has built up over a period of years a substantial demand for the sale of its products; and

WHEREAS, the goodwill sumbolized by the trademark and trade name, "CHOCK FULL O'NUTS" is of incalculable value to CHOCK and

WHEREAS, the LICENSEE is desirous of establishing a "CHOCK FULL O'NUTS" restaurant similar in type to the 40 restaurants presently operated by CHOCK in order to be able to capitalize on the goodwill of said trademark and trade name, and has submitted a proposal to operate such type of restaurant under this agreement at the following premises (hereinafter called "the premises"): 3 Main Street, Yonkers, New York.

WHEREAS, it is the desire and intent of both parties that the said restaurant shall be constructed, maintained and operated under similar high standards;

NOW, THEREFORE, the parties hereby, in consideration of the mutual agreements herein contained, and premises herein expressed, do hereby agree as follows:

1. LICENSEE agrees that the construction, design, equipment, store front, fixtures and appurtenances of the restaurant shall be similar to the type presently maintained by CHOCK.

2. CHOCK agrees to co-operate with the LICENSEE and to furnish advice on sales pattern, storage controls, sanitation services and the keeping of accurate records.

3. CHOCK agrees to assist in the preparation of basic plans and specifications for the restaurant to be built at the premises for the purpose of assuring that the standards of construction and design shall remain similar to the CHOCK restaurants. Before commencing construction and/or making any alterations in the premises, all contracts, plans and specifications shall be submitted to CHOCK for written approval. Permits and licenses for construction and operation to be obtained by LICENSEE.

4. LICENSEE acknowledges that CHOCK, by reason of its maintenance of high standards of quality of products and service at restaurants operated by it, has built up over a period of over 40 years, a reputation which would be severely damaged if restaurants using its name "CHOCK FULL O'NUTS" were not maintained and operated in accordance with such high standards. Similarly CHOCK would be severely damaged if the products served in the operation of the restaurant were of lesser quality than those served in restaurants operated under the name "CHOCK FULL O'NUTS." LICENSEE further acknowledges that the judgment as to whether or not such high standards are being so maintained in this restaurant should be and is solely and prop-

erly vested in CHOCK. In the event that, in the sole judgment of CHOCK, the LICENSEE shall not maintain and operate the restaurant in accordance with CHOCK'S standards, or maintain the quality of products sold in accordance with CHOCK'S standards, CHOCK may terminate this agreement as hereinafter provided.

5. The supervisory personnel of CHOCK shall have the right to enter upon the premises at any reasonable hours for the purpose of examining the same, conferring with the LICENSEE'S employees, inspecting and checking merchandise, furnishings, equipment and operating methods, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with the terms of this agreement.

6. LICENSEE acknowledges that by reason of large sales over a period of many years in "CHOCK FULL O'NUTS" restaurants and in non-restaurant retail outlets, and the expenditure of millions of dollars in consumer advertising, the name "CHOCK FULL O'NUTS" has become particularly associated with food products produced and sold by "CHOCK FULL O'NUTS," and the goodwill connected with the name of "CHOCK FULL O'NUTS" in connection with these products is of substantial value. LICENSEE further acknowledges that the public expects to obtain the well known "CHOCK FULL O'NUTS" food products in restaurants bearing its name. In order to provide the public with the products of CHOCK, LICENSEE shall purchase from CHOCK all of the products which are produced by CHOCK for sale to restaurant customers at or from the premises, and CHOCK will sell to LICENSEE such products subject to strikes, lockouts, government restrictions, war, or acts of God.

7. LICENSEE shall pay for said products prices from time to time fixed by CHOCK within one week from the date of delivery at the premises.

8. LICENSEE agrees to have the same daily menu that is maintained by CHOCK stores. LICENSEE further agrees not to permit the use of any of the products produced by "CHOCK FULL O'NUTS" or containers bearing the name "CHOCK FULL O'NUTS" for any purpose except in connection with sales made directly from the franchised premises.

9. So long and only so long, as this agreement shall remain in full force and effect, the LICENSEE agrees to use said premises exclusively for a restaurant under the name of "CHOCK FULL O'NUTS," and may use on said premises in a manner approved by CHOCK the trade name, trademarks, designs, advertising, menu signs, and outside signs used by CHOCK. The LICENSEE acknowledges the validity and the ownership in CHOCK of said trade names, trademarks, designs, forms and combination of color and structure, and agrees that upon termination of this agreement for any cause whatsoever, the permission to use the same as aforesaid and all interest therein whatsoever shall cease and be at an end.

10. CHOCK agrees to supply the LICENSEE with menu signs and a plaque for each outside sign, bearing the trademark of CHOCK, which shall at all times remain the property of CHOCK under a separate rental agreement. At its own expense, the LICENSEE will prominently display in and upon the land and buildings, advertising signs of CHOCK FULL O'NUTS of such nature, form, color, number, location and size, and containing such material as CHOCK shall approve and/or require in writing; and the LICENSEE will not display in or upon the said premises or elsewhere, any

sign or advertising display of any kind, or advertise in any media, without the written approval of CHOCK of said displays or advertising.

11. The LICENSEE agrees to display at prominent parts of the premises to be designated by CHOCK, signs to be furnished by CHOCK, which will indicate that the premises are operated under a franchise agreement with CHOCK FULL O'NUTS CORPORATION, and will contain such other language as required by CHOCK.

12. CHOCK, or its authorized agents, may at any time enter upon said premises and remove any signs or advertising material which it deems objectionable.

13. The LICENSEE shall deliver to CHOCK monthly statements of sales and other monies received from the operation of all business at the above described premises within ten (10) days after the end of each month; and within thirty (30) days following the end of each succeeding full year of the term of this agreement a statement of annual gross sales which shall be certified to by the LICENSEE and by a certified public accountant. The LICENSEE shall keep at the premises true and accurate records and accounts which shall show all sales made and all gross receipts from the business upon and within the above described premises. Said books and accounts shall be available to CHOCK, and its authorized agents, for inspection at all times.

14. The LICENSEE agrees to pay to CHOCK on the 10th day of the month following each full month of operation three (3%) percent of the gross receipts, which gross receipts shall include the selling price of all the merchandise of any sort whatsoever sold in, upon or from any part of the above described premises.

15. By reason of CHOCK'S long experience in operating its unique restaurants under the name of "CHOCK FULL O'NUTS" it has found that certain low to moderate retail prices are required in order to attract sufficient numbers of customers to its stores and to maintain its image and goodwill. CHOCK will make available to LICENSEE the benefits of its valuable experience in connection with pricing and recommends that LICENSEE comply with said prices in the operation of its business.

16. LICENSEE shall:

(a) Operate and maintain the restaurant and all installations on the premises strictly in accord with the standards prescribed from time to time by CHOCK, which shall have the right in its sole discretion to modify the same from time to time.

(b) Employ sufficient personnel for fast service of its patrons at all times.

(c) Require its employees to conduct themselves decorously and be courteous to all customers at all times.

(d) Not permit the use of any part of the premises for purposes or functions objected to by CHOCK.

(e) Use its best efforts in connection with the operation of the business.

(f) Continuously operate the business at the premises upon such days and during such hours as CHOCK shall direct.

(g) Maintain in first-class condition by periodic painting, repairs and decorations, the interior and exterior of the restaurant and the premises.

(h) Not attempt to induce any person employed by CHOCK to quit such employment.

(i) Comply with all laws and regulations whether Federal, State or local.

(j) Maintain in full force and effect, in companies approved by CHOCK, minimum insurance as follows:

(i) Property damage insurance in the amount of $25,000.

(ii) Public liability insurance in the amount of $250,000 in respect of any one accident or disaster, and $500,000 in respect of injuries to any one person, covering liability of all kinds, including claims on account of foreign substances in or spoilage of food or drink.

All policies shall be in form and substance satisfactory to CHOCK. CHOCK shall be named as an insured in all policies and the originals or certificates thereof shall be delivered to CHOCK and shall be prepaid. CHOCK shall have the right to require increased limits of such insurance or additional types of insurance when it deems such to be necessary.

(k) Use only such printed material, including letterheads, checks, invoices, menus, table tents and signs, and only such display and other material for advertising, promotional, operating or other purposes, as CHOCK recommends from time to time.

(l) Make no use of the trademark and trade name "CHOCK FULL O'NUTS" except in connection with the restaurant, and in accordance with this agreement.

(m) After the termination of this agreement not use or display the trademark and trade name "CHOCK FULL O'NUTS" or any mark, name, or device confusingly similar thereto, in any manner or way or in connection with any products or services, whether in connection with the operation of a restaurant or otherwise. In particular, but not by way of limitation, not in connection with products offered at the restaurant or on any china, silverware or other items of personal property.

17. So long as this agreement shall remain in force and effect, the LICENSEE will not, either individually, or as a partner, or as a participant in any corporation, except with the written consent of CHOCK, engage in any business the same as or similar to the business covered by this agreement at any place other than the premises.

18. (a) So long as this agreement shall remain in force and effect, the LICENSEE will not, without the consent in writing of CHOCK, mortgage, pledge, or otherwise assign as security the premises or any part thereof, or the equipment or furnishings located and used therein or any interest which the LICENSEE may have in any part thereof.

(b) So long as this agreement shall remain in force and effect, the LICENSEE will not sell, transfer, assign, lease or sublet any interest in the said premises or any part thereof, or in the business thereon conducted, without the prior written consent of CHOCK.

19. If (i) any monies payable by LICENSEE to CHOCK shall not be paid as and when due and payable, and if such nonpayment shall continue for 10 days after service upon LICENSEE by CHOCK of written notice specifying the unpaid item; or (ii) there shall be any failure or omission in the full and faithful performance and observance of any of the terms, conditions and limitations of this agreement on LICENSEE'S part to be performed or observed (other than the payment of monies) and if such failure or omission shall not be remedied to the satisfaction of CHOCK upon demand; or (iii) there shall be filed by or against LICENSEE in any court pursuant

to any statute, either of the United States or any state, a petition in bankruptcy or for reorganization or for the appointment of a receiver or trustee for the property of LICENSEE, or LICENSEE shall be adjudicated bankrupt or insolvent within the meaning of insolvency in either bankruptcy proceedings or equity proceedings, or shall make a general assignment for the benefit of creditors, or, as debtor, take the benefit of the provisions of any solvency act, whether now or hereinafter enacted; or (iv) ownership, operation or control of the restaurant business conducted on the premises shall be transferred, passed to or devolved, whether by operation of law or otherwise, upon anyone other than LICENSEE herein named except as in this agreement permitted; or (v) the restaurant or premises shall be abandoned or vacated, then CHOCK, at its option, may serve upon LICENSEE written notice that this agreement and the unexpired term hereof shall cease and expire ten (10) days after the date of such notice, and thereupon and upon the expiration of the time limit in such notice this agreement and the term hereof, shall wholly cease and expire in the same manner and with the same effect (except as to LICENSEE'S liability) as if the date fixed in such notice were the date herein prescribed for the expiration of the term of this agreement.

20. Unless terminated as provided in this agreement, this agreement shall remain in effect until March 31, 1975, with two renewal terms of five (5) years of each.

21. Upon the termination of this agreement, the LICENSEE will immediately discontinue the use of all trade names, trademarks, signs, forms of advertising, indicative of CHOCK FULL O'NUTS, or the business or products thereof, and CHOCK shall enter upon the premises forthwith and remove same.

22. No waiver by CHOCK of any rights or remedies under this agreement, shall be deemed to have occurred unless embodied in writing signed by the President or Chairman of the Board of CHOCK.

23. This instrument contains the entire agreement between the parties, and any executory agreement hereafter made shall be ineffective to change, modify, discharge, or affect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

24. In the event of a breach or threatened breach by LICENSEE of any of the terms, conditions or limitations of this agreement, CHOCK shall have the right to invoke any remedy allowed at law or in equity, whether or not other remedies are herein provided. All rights and remedies given to CHOCK under this agreement and those allowed in like case, at law or in equity, are distinct, separate and cumulative and no one of them whether or not exercised by CHOCK shall be deemed to be an exclusion of any of the others.

25. Any notice, statement, demand or other communication or exhibit required or permitted to be delivered or served or given by either party hereto to the other, shall be deemed to have been duly delivered to, served or given, only if mailed in any general or branch United States Post Office situated in the City of New York or in Westchester County, enclosed in a registered or certified postpaid envelope addressed to the respective party at its address below (provided that each party shall be entitled to change such address by notice duly given pursuant to this paragraph):

(a) Notices to CHOCK shall be given to CHOCK at 425 Lexington Avenue, New York 17, New York.

(b) Notices to LICENSEE shall be given to LICENSEE at c/o Seymour Mann, M.D., 32 Lincoln Avenue, Tuckahoe, New York.

26. In no event shall this agreement be deemed to create a partnership or joint venture between CHOCK and LICENSEE in respect to the operation of the restaurant or in respect to CHOCK business or in any other respect whatsoever, or to impose upon CHOCK any liability in connection with the operation of the restaurant, or to render CHOCK responsible for any debts or obligations of LICENSEE or to give CHOCK any proprietary interest in the restaurant.

27. Should any part of this agreement for any reason be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this agreement without including therein any such part, parts, or portion which may, for any reason be hereafter declared invalid.

28. This agreement shall inure to the benefit of the successors and assigns of CHOCK. The interest of this agreement in the LICENSEE is personal and shall not be assigned, transferred, or divided in any manner by the LICENSEE, and if the said LICENSEE is a corporation, it is understood and agreed that the shares of capital stock of said corporation shall not be sold, pledged, transferred or assigned, so as to change the controlling interest therein, without the written consent of CHOCK.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

CHOCK FULL O'NUTS CORPORATION
By________________________
President

3 MAIN ST. INC.
By________________________
President

APPENDIX 4

Type No. 3

CHOCK FULL O'NUTS
Reg. U.S. Pat. Off.

FRANCHISE AGREEMENT
(CX 19)

Agreement made the 25th day of May, 1966, by and between CHOCK FULL O'NUTS CORPORATION, a New York Corporation, having its principal office at 425 Lexington Avenue, New York, New York (hereinafter referred to as "CHOCK") and BAY PARKWAY PHARMACY, INC., a New York corporation, with offices at 2201 86th Street, Brooklyn, New York (hereinafter referred to as "LICENSEE").

Witnesseth That:

WHEREAS, CHOCK is engaged in the business of operating and licensing a unique type of restaurant under the name of "CHOCK FULL O'NUTS" and produces, manufactures, and sells food products and supplies in connection with the operation of said restaurants; and

WHEREAS, said restaurants have been operated and the products of CHOCK sold under the registered trademark and trade name "CHOCK FULL O'NUTS"; and

WHEREAS, CHOCK, by reasons of its maintenance of high standards of quality, immaculate cleanliness and menu at popular prices, has built up over a period of years a substantial demand for the sale of its products; and

WHEREAS, the goodwill symbolized by the trademark and trade name "CHOCK FULL O'NUTS" is of incalculable value to CHOCK; and

WHEREAS, the LICENSEE is desirous of establishing a "CHOCK FULL O'NUTS" restaurant similar to the restaurants presently operated and licensed by CHOCK in order to be able to capitalize on the goodwill of said trademark and trade name, and has submitted a proposal to operate such type of restaurant under this agreement at the following premises (hereinafter called "the premises"): 2201 86th Street, Brooklyn, New York __________; and

WHEREAS, it is the desire and intent of both parties that the said restaurant shall be constructed, maintained and operated under similar high standards;

NOW, THEREFORE, the parties hereby, in consideration of the mutual agreements herein contained, and premises herein expressed, do hereby agree as follows:

1. LICENSEE agrees that the construction design, equipment, store front, fixtures and appurtenances of the restaurant shall be almost identical to the type presently maintained by CHOCK. LICENSEE agrees to enter into an agreement with a contractor or one of the contractors designated by CHOCK for the preparation of basic plans and specifications and the construction of the restaurant to be built at the premises. Before commencing construction and/or making any alterations in the premises, the basic plans and specifications shall be submitted to CHOCK for written approval. All permits and licenses for the operation of the restaurant are to be obtained by LICENSEE. LICENSEE agrees to purchase its equipment from suppliers designated by CHOCK. LICENSEE agrees that CHOCK shall have no liability whatsoever in connection with any causes of action accruing to or against LICENSEE which arise out of said agreements with the contractor or suppliers designated by CHOCK.

2. LICENSEE hereby expressly agrees to make all payments on invoices and statements rendered to LICENSEE, and on purchases of fixtures and equipment, promptly in accordance with the terms thereof and any failure on the part of the LICENSEE so to do shall be deemed to be a substantial breach of this franchise agreement and shall give CHOCK the right to terminate this franchise agreement as hereinafter provided.

3. LICENSEE (or if LICENSEE is a corporation, the principals of LICENSEE) and managers designated by LICENSEE shall spend six weeks in a training program as prescribed by CHOCK. The LICENSEE also agrees

to hire the number of other personnel specified by CHOCK and such personnel shall spend two weeks in a training program as prescribed by CHOCK. Any and all expenses and compensation of said trainees shall be paid by LICENSEE.

4. LICENSEE acknowledges that by reason of substantial sales over a period of many years in "CHOCK FULL O'NUTS" restaurants, and the expenditure of millions of dollars in consumer advertising, the name "CHOCK FULL O'NUTS" has become particularly associated with food products sold by CHOCK, and the goodwill connected with the name "CHOCK FULL O'NUTS" in connection with these products is of substantial value. LICENSEE further acknowledges that the public expects to obtain food products identical with those sold in restaurants operated by CHOCK. In order to provide the public with the products sold by CHOCK, LICENSEE agrees to purchase from CHOCK all of the products sold to LICENSEE'S restaurant customers at or from the premises, and CHOCK will sell to LICENSEE such products subject to strikes, lockouts, government restrictions, war, or acts of God.

5. LICENSEE shall pay for said products prices from time to time fixed by CHOCK within one week from the date of delivery.

6. LICENSEE acknowledges that CHOCK, by reason of its maintenance of high standards of equality of product and service at restaurants operated by it, has built up over a period of over 40 years, a reputation which would be severely damaged if restaurants using its name "CHOCK FULL O'NUTS" were not maintained and operated in accordance with such high standards. Similarly CHOCK would be severely damaged if the products served in the operation of the restaurant were not identical with those served in restaurants operated under the name "CHOCK FULL O'NUTS." LICENSEE further acknowledges that the judgment as to whether or not such high standards are being so maintained in this restaurant is solely vested in CHOCK. In the event that, in the sole judgment of CHOCK, the LICENSEE shall not maintain and operate the restaurant in accordance with CHOCK'S standards, CHOCK may terminate this agreement as hereinafter provided.

7. LICENSEE acknowledges that, subject only to the license hereinabove given and received, CHOCK is the owner of all proprietary rights now held and all future rights to the license and methods produced and hereafter produced as heretofore described, and the good will now and hereafter thereto attached and that any and all material and information now and hereafter provided and/or revealed or given to LICENSEE under the said agreement and pursuant to this agreement constitute trade secrets of CHOCK, and that a confidential relationship exists between CHOCK and the LICENSEE and these items, without limiting the foregoing, constitute trade secrets of CHOCK, revealed in confidence hereunder and that no right is given or acquired to use or duplicate this system or method or any portion thereof elsewhere than at the location specified in the premises hereof subject to the terms of this agreement. LICENSEE covenants and agrees to keep and respect the covenants hereunder reposed, and in violation thereof this License Agreement shall be terminated and cancelled, and that damages shall be recovered in a court of competent jurisdiction.

8. During the effective term of this agreement, CHOCK will not operate and maintain nor will CHOCK grant to any individual, association, firm or

corporation, any franchise or license to construct, maintain or operate a similar establishment within an area bounded as follows: On the North by the south side of 82nd Street; on the East by the west side of Bay 34th Street; on the South by the south side of Shore Parkway and on the West by the east side of Bay 26th Street and the east side of 20th Avenue.

9. The supervisory personnel of CHOCK shall have the right to enter upon the premises at all times for the purpose of examining the premises, conferring with the LICENSEE'S employees, inspecting and checking merchandise, equipment and operating methods, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with the terms of this agreement.

10. By reason of CHOCK'S long experience in operating its unique restaurants under the name of "CHOCK FULL O'NUTS" it has found that certain low to moderate retail prices are required in order to attract sufficient numbers of customers to its stores and to maintain its image and goodwill. LICENSEE acknowledges that it would be injurious to the business of CHOCK and its LICENSEES if LICENSEE were to sell said products at prices different than the prices charged by CHOCK and its LICENSEES. LICENSEES agree to sell said products at the same prices as restaurants operated by CHOCK.

11. LICENSEE agrees to have the same daily menu and at the same prices that are in effect at stores operated by CHOCK. LICENSEE further agrees not to permit the use of any of the products sold to LICENSEE by CHOCK or containers bearing the name "CHOCK FULL O'NUTS" for any purpose except in connection with restaurant sales made directly at the franchised premises.

12. So long and only so long as this agreement shall remain in full force and effect, the LICENSEE agrees to use said premises exclusively for a restaurant under the name of "CHOCK FULL O'NUTS," and may use on said premises in a manner approved by CHOCK the trade name, trademarks, designs, advertising, menu signs, and outside signs used by CHOCK. The LICENSEE acknowledges the validity and the ownership in CHOCK of said trade names, trademarks, designs, forms and combination of color and structure, and agrees that upon termination of this agreement for any cause whatsoever, the permission to use the same as aforesaid and all interest therein whatsoever shall cease and be at an end.

13. CHOCK agrees to supply the LICENSEE with menu signs and a plaque for each outside sign, bearing the trademark of CHOCK which shall at all times remain the property of CHOCK under a separate rental agreement. The LICENSEE will prominently display in and upon the premises such signs and advertising displays which shall from time to time be supplied to LICENSEE by CHOCK, and LICENSEE agrees to remove said advertising displays when directed by CHOCK. The LICENSEE will not advertise in any media without the written approval of CHOCK. All advertising displays used in the premises shall be supplied to LICENSEE by CHOCK and LICENSEES will be charged by CHOCK for the said signs. Under no circumstances shall LICENSEE display any sign in and upon the premises which is not supplied by CHOCK. All signs and advertising displays to be installed by LICENSEE at its expense.

14. The LICENSEE agrees to display at prominent parts of the premises to be designated by CHOCK, signs to be furnished by CHOCK, which will indicate that the premises are operated under a franchise agreement with CHOCK FULL O'NUTS CORPORATION, and will contain such other language as required by CHOCK.

15. The LICENSEE shall deliver to CHOCK monthly statements of sales and other monies received from the operation of all business at the above described premises within ten (10) days after the end of each month; and within thirty (30) days following the end of each succeeding full year of the term of this agreement a statement of annual gross sales which shall be certified to by the LICENSEE and by a certified public accountant. The LICENSEE shall keep at the premises true and accurate records and accounts which shall show all sales made and all gross receipts from the business upon and within the above described premises. The accounts, books, records and tax returns of LICENSEE, so far as the same pertain to the business transacted under the provisions of this agreement, shall be open to the inspection, examination and audit by CHOCK and its authorized representatives at all times. Any such inspection, examination and audit shall be at CHOCK'S cost and expense unless the same is either necessitated by LICENSEE'S failure to prepare and deliver its statement of gross receipts or operation statement, or to keep and preserve records as hereinabove provided, or such inspection discloses that any such statement made and delivered by LICENSEE is in error to an extent of two percent (2%) or more, in either of which events such cost and expense shall be borne and paid by LICENSEE upon demand.

16. LICENSEE agrees that all registers used in the said premises shall be purchased from the National Cash Register Company—model, accessories thereto, and color to be designated by CHOCK. All registers must be sealed with a CHOCK imprint in order to prevent tampering and reduction of total sales. All overrings, refunds, merchandise sold to employees at reduced prices, must be entered and recorded on a separate form provided to the LICENSEE by CHOCK, which form must be submitted to CHOCK with the monthly reports. It shall be deemed a default of this agreement if LICENSEE tampers with any of the cash registers, fails to register sales, or in any other way attempts to or conceals the amount of his sales from CHOCK.

17. The LICENSEE agrees to pay to CHOCK on the 10th day of the month following each full month of operation three (3%) percent of the gross receipts, which gross receipts shall include the selling price of all the merchandise of any sort whatsoever sold in, upon or from any part of the above described premises.

18. LICENSEE shall:

(a) Operate and maintain the restaurant and all installations on the premises strictly in accord with the standards prescribed from time to time by CHOCK. CHOCK shall have the right in its sole discretion to modify the same from time to time.

(b) Employ sufficient personnel for fast service of its patrons at all times.

(c) Require its employees to conduct themselves and be dressed in a dignified manner and be courteous to all customers at all times.

(d) Not permit the use of any part of the premises for purposes or functions objected to by CHOCK.

(e) Use its best efforts in connection with the operation of the business.

(f) Continuously operate the business at the premises upon such days and during such hours as CHOCK shall direct.

(g) Maintain in first-class condition by periodic painting, repairs and decorations, the interior and exterior of the restaurant and the premises. CHOCK shall have the right, in its sole discretion, to require LICENSEE to perform such painting, repairs and decorations.

(h) Not attempt to induce any person employed by CHOCK to quit such employment, and shall not employ, or seek to employ, any person who at the time, is employed, or at any time six (6) months prior thereto, has been employed by CHOCK or any of its Licensees.

(i) Comply with all federal, state or local laws and regulations.

(j) Maintain in full force and effect, in companies approved by CHOCK, minimum insurance as follows:

(i) Property damage insurance in the amount of $25,000.

(ii) Public liability insurance in the amount of $250,000 in respect of any one accident or disaster, and $500,000 in respect of injuries to any one person covering liability of all kinds, including claims on account of foreign substances in or spoilage of food or drink.

All polices shall be in form and substance satisfactory to CHOCK. CHOCK shall be named as an insured in all policies, including fire insurance policies, and the originals or certificates thereof shall be delivered to CHOCK and shall be prepaid. CHOCK shall have the right to require increased limits of such insurance or additional types of insurance when it deems such to be necessary.

(k) Not use the trademark and trade name "CHOCK FULL O'NUTS" on letterheads, checks, invoices, and the like.

(l) Not use or display after the termination of this agreement, the trademark and trade name "CHOCK FULL O'NUTS" or any mark, name, or device confusingly similar thereto in any manner or way or in connection with any products or services, whether in connection with the operation of a restaurant or otherwise. In particular, but not by way of limitation, not in connection with products ocered at the restaurant or on any china, silverware or other items of personal property.

19. LICENSEE shall not

(a) during the effective term of this agreement; and

(b) for a period of two (2) years after the termination of this agreement, regardless of the cause of termination, within a radius of twenty-five (25) miles of said premises, or any CHOCK restaurant or franchise restaurant,

directly or indirectly acquire any financial or beneficial interest in any business, including any interest in corporations, partnerships, trusts, unincorporated associations and joint ventures, which operate a restaurant or luncheonette, other than the location covered by this license, and other than any business which was engaged in or acquired prior to the date of this agreement. The foregoing restrictions and limitations shall, if LICENSEE is a corporation, or if, with the consent of CHOCK, the rights of the LICENSEE hereunder are assigned to a corporation (without limiting the generality of the foregoing), apply to activities of all stockholders, officers, directors, managing agents, subsidiaries and affiliates of LICENSEE, or such corporate assignee, and to any corporation in which the stockholders of LICENSEE or such corporate assignee are owners of stock. Said restrictions and limitations shall also apply to members of the immediate famliy of LICENSEE and to the immediate family of individuals having an interest in LICENSEE.

20. (a) So long as this agreement shall remain in force and effect, the LICENSEE will not, without the consent in writing of CHOCK, mortgage, pledge, or otherwise assign as security the premises or any part thereof, or the equipment or furnishing located and used therein or any interest which the LICENSEE may have in any part thereof.

(b) So long as this agreement shall remain in force and effect, the LICENSEE will not sell, transfer, assign, lease or sublet any interest in the said premises or any part thereof, or in the business thereon conducted, without the prior written consent of CHOCK.

21. If (a) any moneys payable by LICENSEE to CHOCK shall not be paid as and when due and payable, and if such nonpayment shall continue for 10 days after service upon LICENSEE by CHOCK or written notice specifying the unpaid items; or (b) there shall be any failure or omission in the full and faithful performance and observance of any of the terms, conditions and limitations of this agreement on LICENSEE'S part to be performed or observed (other than the payment of monies) and if such failure or omission shall not be remedied to the satisfaction of CHOCK upon demand; or (c) there shall be filed by or against LICENSEE in any court pursuant to any statute, either of the United States or any state, a petition in bankruptcy or for reorganization or for the appointment of a receiver or trustee for the property of LICENSEE which is not vacated within a period of twenty (20) days, or LICENSEE shall be adjudicated bankrupt or insolvent within the meaning of insolvency in either bankruptcy proceedings or equity proceedings, or shall make a general assignment for the benefit of creditors, or, as debtor, take the benefit of the provisions of any solvency act, whether now or hereinafter enacted; or (d) ownership, operation or control of the restaurant business conducted on the premises shall be transferred, passed to or devolved, whether by operation of law or otherwise, upon anyone other than LICENSEE herein named except as in this agreement permitted; or (e) the restaurant or premises shall be abandoned or vacated, then CHOCK, at its option, may serve upon LICENSEE written notice that this agreement and the unexpired term hereof shall cease and expire forthwith, and thereupon and upon the expiration of the time limit, this agreement and the term hereof, shall wholly cease and expire in the same manner and with the same effect (except as to LICENSEE'S liability) as if the date of receipt of such notice were the date herein prescribed for the expiration of the term of this agreement.

22. If this agreement shall be terminated by virtue of the giving of notice by CHOCK to LICENSEE as provided in paragraph 21 hereof, LICENSEE agrees that LICENSEE will not, without the written consent of CHOCK first had and obtained, remove any furniture, equipment and other chattels (hereinafter referred to as "personal property") from the premises for a period of ten (10) days after receipt of such notice of termination. If this agreement shall be terminated for any cause whatsoever, LICENSEE hereby gives and grants to CHOCK the unrestricted right and option for and during a period of ten (10) days following receipt of such notice of termina-

tion to purchase either by itself, a subsidiary corporation, or a person or corporation designated in writing by CHOCK, such personal property, and LICENSEE shall receive and agrees to accept in payment for such personal property and the transfer by LICENSEE of the right of possession of the said premises LICENSEE'S original net cash investment in such personal property, less straight line depreciation of such personal property over the initial term of the lease to said premises, not exceeding twenty-one years. If the said personal property is subject to any mortgages or liens of any kind, the unpaid principal balance of any such mortgages or liens shall be deducted from the amount of any payment to be made hereunder; provided however, if such mortgages or liens exceed the amount of the payment to be made hereunder, LICENSEE hereby agrees to pay such excess to the purchaser of such personal property.

23. The lease between the LICENSEE and the Landlord of the said premises must contain the following clause:

> Landlord and Tenant hereby agree that the premises demised herein shall be used for the operation of a CHOCK FULL O'NUTS restaurant and for no other purpose. In the event that the franchise agreement between the Tenant and CHOCK FULL O'NUTS CORPORATION (hereinafter referred to as "CHOCK") is terminated for any reason whatsoever, Tenant agrees to assign this lease, at the option of CHOCK to either CHOCK, a subsidiary of CHOCK, or to a person or corporation designated by CHOCK, and Landlord hereby consents to the assignment of this lease. Notice of the exercise of the option by CHOCK shall be given by registered mail, upon Landlord and Tenant within ten (10) days after termination of the said franchise agreement for any cause whatsoever. In the event that CHOCK does not exercise its option within the said ten (10) day period following termination of the franchise agreement with Tenant, then, and in such event, this provision shall be null and void. However, Landlord hereby acknowledges that it recognizes that in the event that CHOCK does not exercise said option Tenant has agreed with CHOCK that Tenant will immediately discontinue the use of all trade names, trademarks, symbols, signs of advertising indicative of CHOCK FULL O'NUTS or the business or products thereof and that CHOCK has the right to enter upon the premises forthwith and remove same. Tenant has also agreed with CHOCK in such case to make or cause to be made such removal of or changes in the said premises as CHOCK shall direct so as to effectively distinguish the premises from their former appearance and from any other CHOCK FULL O'NUTS restaurant, and if Tenant shall upon request by CHOCK fail or omit to make or cause such changes to be made, then CHOCK shall have the right to enter the Tenant's premises forcibly, if necessary, without being guilty of trespass and without any tort and shall have the right to make or cause to be made such changes at the Tenant's expense. Landlord admits knowledge of the said provisions in the agreement made between Tenant and CHOCK and consents hereby to CHOCK's enforcement of same. Landlord also hereby agrees that in the event that possession of the said premises reverts to Landlord or is transferred to another tenant, CHOCK shall have the same right to enforce said provisions made between it and Tenant against the

Landlord, its successors and assigns, and any other tenants that may hereafter possess this property. Landlord and Tenant agree that CHOCK shall be deemed to be a third party beneficiary hereof and that this provision shall not be modified, amended or cancelled without the written consent of CHOCK first obtained.

24. In the event that CHOCK does not elect to exercise the said option referred to in pararaph 22 of this agreement within the said ten (10) day period, upon the termination of such ten (10) day period LICENSEE will immediately discontinue the use of all trade names, trademarks, symbols, signs, forms of advertising indicative of CHOCK FULL O'NUTS, or the business or products thereof, and CHOCK shall enter upon the premises forthwith and remove same. LICENSEE agrees, so far as LICENSEE may lawfully do so, to make or cause to be made such removals of or changes in the said premises as CHOCK shall direct so as to effectively distinguish the premises from their former appearance and from any other CHOCK FULL O'NUTS restaurant; and if the LICENSEE shall, upon request, fail or omit to make or cause such changes to be made, then CHOCK shall have the right to enter upon LICENSEE'S premises, forcibly, if necessary, without being guilty of tresspass or any tort, and without prejudice to CHOCK'S other rights and remedies, and shall have the right to make or cause to be made such changes at the LICENSEE'S expense, and the LICENSEE shall remove and deliver to CHOCK, at their depreciated value, all of the paper products and other articles bearing the name CHOCK FULL O'NUTS.

25. Unless terminated as provided in this agreement, this agreement shall remain in effect for the term of the lease and all renewals thereof, but not to exceed twenty-one years from the date hereof.

26. No waiver by CHOCK of any rights or remedies under this arrangement shall be deemed to have occurred unless embodied in writing signed by the President or Chairman of the Board of CHOCK.

27. This instrument contains the entire agreement between the parties, and any executory agreement hereafter made shall be ineffective to change, modify, discharge, or affect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

other remedies are herein provided. All rights and remedies given to CHOCK under this agreement and those allowed in like case, at law or in equity, are distinct, separate and cumulative and no one of them whether or not exercised by CHOCK shall be deemed to be an exclusion of any of the others.

29. Any notice, statement, demand or other communication or exhibit required or permitted to be delivered or served or given by either party hereto to the other, shall be deemed to have been duly delivered to, served or given, only if mailed in a registered or certified postpaid envelope addressed to the respective party at its address below (provided that each party shall be entitled to change such address by notice duly given pursuant to this paragraph):

(a) Notices to CHOCK shall be given to CHOCK at 425 Lexington Avenue, New York, New York 10017.

(b) Notices to LICENSEE shall be given to LICENSEE at 2201 86th Street, Brooklyn, New York.

30. In no event shall this agreement be deemed to create a partnership or joint venture between CHOCK and LICENSEE in respect to the operation of the restaurant or in respect to CHOCK business or in any other respect whatsoever, or to impose upon CHOCK any liability in connection with the operation of the restaurant, or to render CHOCK responsible for any debts or obligations of LICENSEE or to give CHOCK any proprietary interest in the restaurant.

31. Should any part of this agreement for any reason be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this agreement without including therein any such part, parts, or portion which may, for any reason, be hereafter declared invalid.

32. This agreement shall inure to the benefit of CHOCK and its successors and assigns. The interest of this agreement in the LICENSEE is personal and shall not voluntarily, or by operation of law or otherwise, be assigned, transferred, or divided in any manner by the LICENSEE or anyone on its behalf, and if the said LICENSEE is a corporation, it is understood and agreed that the shares of capital stock of said corporation shall not voluntarily, or by operation of law or otherwise, be sold, pledged, transferred or assigned, without the written consent of CHOCK, and the stock certificates representing the capital stock of LICENSEE shall bear a legend setting forth the intent hereof, and all changes of officers or directors of LICENSEE shall be reported to CHOCK by registered mail. However, in the event of the death of LICENSEE, rights and obligations of the deceased LICENSEE shall inure to the benefit of the heirs of the deceased LICENSEE, who, in the sole opinion of CHOCK, shall be deemed capable of performing the duties and obligations required under this agreement. In the event the LICENSEE shall be an individual and shall die leaving no heir capable, in the sole opinion of CHOCK, of performing all the obligations set forth above, then his estate or legal representative shall have the right to sell the operation to a responsible bona fide purchaser acceptable to CHOCK, and who shall agree in writing with CHOCK to assume and honor this franchise agreement.

33. Upon termination of this agreement, whether by reason of lapse of time, default in performance, or other cause or contingency, LICENSEE agrees thereupon that LICENSEE will not (a) thereafter operate or do business in any name or in any manner that may tend to give the general public the impression that this agreement is still in force; (b) make use or avail itself of any of the trade secrets of CHOCK; (c) construct or equip or aid or assist any person or persons in the construction or equipping of any premises incorporating the distinctive features of equipment layout which CHOCK has originated and developed and which are identifying characteristics of premises operated by CHOCK or its Licensees.

34. This agreement shall be governed by the laws of the State of New York.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

CHOCK FULL O'NUTS CORPORATION
By______________________________

BAY PARKWAY PHARMACY, INC.
By______________________________
Pres.

(See Rider attached to this agreement)

RIDER TO FRANCHISE AGREEMENT:

35. In the event it becomes necessary for CHOCK to institute any action at law or in equity against LICENSEE to secure or protect CHOCK'S rights under this agreement, CHOCK shall be entitled to recover in any judgment entered therein in its favor such reasonable attorneys' fees as may be allowed by the court, together with such court costs and damages as provided by law.

36. LICENSEE covenants and agrees that in the event CHOCK shall, without fault on its part, be made or becomes a party to any suit by reason of this Agreement or by any act or omission by LICENSEE hereunder, then LICENSEE shall pay all costs and expenses, including attorneys' fees incurred by or imposed on CHOCK by or in connection with such litigation.

APPENDIX 5

Type No. 4

CHOCK FULL O'NUTS

FRANCHISE AGREEMENT

(CX 20)

AGREEMENT made the 19th day of December, 1967, by and between CHOCK FULL O'NUTS CORPORATION, a New York Corporation, having its principal office at 425 Lexington Avenue, New York, New York (hereinafter referred to as "CHOCK") and ARNOLD SILVERSTEIN and HENRY SEALINE, c/o Leonard Kolleeny, 515 Madison Avenue, New York, New York,

(hereinafter referred to as "LICENSEE").

WITNESSETH THAT:

WHEREAS, CHOCK is engaged in the business of operating and licensing a unique type of restaurant under the name of "CHOCK FULL O'NUTS" and produces, manufactures, and sells food products and supplies in connection with the operation of said restaurants; and,

WHEREAS, said restaurants have been operated and the products of CHOCK sold under the registered trademark and trade name "CHOCK FULL O'NUTS;" and,

WHEREAS, CHOCK, by reason of its maintenance of high standards of quality, immaculate cleanliness and menu at popular prices, has built up over a period of years a substantial demand for the sale of its products; and,

WHEREAS, the goodwill symbolized by the trademark and trade name "CHOCK FULL O'NUTS" is of incalculable value to CHOCK; and, WHEREAS, the LICENSEE is desirous of establishing a "CHOCK FULL O'NUTS" restaurant similar to the restaurants presently operated and licensed by CHOCK in order to be able to capitalize on the goodwill of said trademark and trade name, and has submitted a proposal to operate such type of restaurant under this agreement at the following premises (hereinafter called "the premises") a 565 West 169th Street, Borough of Manhattan, City of New York; and,

WHEREAS, it is the desire and intent of both parties that the said restaurant shall be constructed, maintained and operated under similar high standards;

NOW, THEREFORE, the parties hereby, in consideration of the mutual agreements herein contained, and premises herein expressed, do hereby agree as follows:

1. LICENSEE agrees that the construction and design of the structure, equipment, store front, fixutres and appurtenances of the restaurant shall be almost identical to the type presently specified by CHOCK. LICENSEE agrees to enter into an agreement with one of the contractors designated by CHOCK for the preparation of basic plans and specifications and the construction of the restaurant to be built at the premises. Before commencing construction and/or making any alterations in the premises, the basic plans and specifications shall be submitted to CHOCK for written approval. LICENSEE agrees that no alteration or construction will commence without receipt by LICENSEE of such written approval. All permits and licenses for the operation of the restaurant are to be obtained by LICENSEE. LICENSEE agrees to purchase the equipment from suppliers designated by CHOCK. LICENSEE agrees that CHOCK shall have no liability whatsoever in connection with any causes of action accruing to or against LICENSEE which arise out of the said agreements with the contractor or suppliers designated by CHOCK.

2. LICENSEE hereby expressly agrees to make all payments on invoices and statements rendered to LICENSEE, and on purchases of fixtures and equipment, promptly in accordance with the terms thereof and any failure on the part of the LICENSEE so to do shall be deemed to be a substantial breach of this franchise agreement and shall give CHOCK the right to terminate this franchise agreement as hereinafter provided.

3. LICENSEE and/or the designated manager shall spend at least six weeks in a training program as prescribed by CHOCK. The LICENSEE also agrees to hire the number of other personnel specified by CHOCK and such personnel shall spend at least two weeks in a training program as prescribed by CHOCK. Any and all expenses and compensation of said trainees shall be paid by LICENSEE.

4. LICENSEE acknowledges that by reason of substantial sales over a period of many years in "CHOCK FULL O'NUTS" restaurants, and the expenditure of millions of dollars in consumer advertising, the name "CHOCK FULL O'NUTS" has become particularly associated with food products sold by CHOCK, and the goodwill connected with the name of "CHOCK FULL O'NUTS" in connection with these products is of substantial value. In order to be sure that the public is provided with exactly the same quality products sold by CHOCK, LICENSEE agrees to purchase from CHOCK or its nominees all of the products sold to LICENSEE'S restaurant

customers at or from the premises and CHOCK will sell to LICENSEE such products subject to strikes, lockouts, government restrictions, war, or acts of God.

5. LICENSEE shall pay for said products within seven days from the date of invoice at prices from time to time fixed by CHOCK. LICENSEE agrees that all amounts remaining unpaid following the expiration of thirty days shall bear interest at the rate of 1 per cent per month, and CHOCK shall have the right to apply all payments received first to interest due hereunder and the balance to the reduction of outstanding invoices.

6. LICENSEE acknowledges that CHOCK, by reason of its maintenance of high standards of quality of product and service at restaurants operated by it, has built up over a period of over forty years, a reputation which would be severely damaged if restaurants using the name "CHOCK FULL O'NUTS" were not maintained and operated identically in accordance with such high standards. LICENSEE further acknowledges that the judgment as to whether or not such high standards are being so maintained in this restaurant is solely vested in CHOCK. In the event that, in the sole judgment of CHOCK, the LICENSEE shall not maintain and operate the restaurant in accordance with CHOCK'S standards, CHOCK may terminate this agreement as hereinafter provided.

7. LICENSEE acknowledges that, subject only to the license hereinabove given and received, CHOCK is the owner of all proprietary rights now held and all future rights to the license and methods produced and hereafter produced as heretofore described, and the goodwill now and hereafter thereto attached and that any and all material and information now and hereafter provided and/or revealed or given to LICENSEE under the said agreement and pursuant to this agreement constitute trade secrets of CHOCK, and that a confidential relationship exists between CHOCK and the LICENSEE and these items, without limiting the foregoing, constitute trade secrets of CHOCK revealed in confidence hereunder and that no right is given or acquired to use or duplicate this system or method or any portion thereof elsewhere than at the location specified in the premises hereof subject to the terms of this agreement. LICENSEE covenants and agrees to keep and respect the covenants hereunder reposed, and in violation thereof this License Agreement shall be terminated and cancelled, and that damages shall be recovered in a court of competent jurisdiction.

8. The supervisory personnel of CHOCK shall have the right to enter upon the premises at all times for the purpose of examining the premises, conferring with the LICENSEE'S employees, inspecting and checking merchandise, equipment, and operating methods, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with the terms of this agreement.

9. LICENSEE further agrees not to permit the use of any of the products sold to LICENSEE by CHOCK or containers bearing the name "CHOCK FULL O'NUTS" for any purpose except in connection with restaurant sales made directly to consumers at the franchise premises.

10. So long and only so long as this agreement shall remain in full force and effect, the LICENSEE agrees to use said premises exclusively for a restaurant under the name of "CHOCK FULL O'NUTS," and may use on said premises in a manner approved by CHOCK the trade name, trademarks,

designs, advertising, menu signs, and outside signs used by CHOCK. The LICENSEE acknowledges the validity and the ownership in CHOCK of said trade names, trademarks, designs, forms and combination of color and structure, and agrees that upon termination of this agreement for any cause whatsoever, the permission to use the same as aforesaid and all interest therein whatsoever shall cease and be at an end.

11. CHOCK agrees to supply the LICENSEES with menu signs and other signs, bearing the trademark of CHOCK which shall at all times remain the property of CHOCK under a separate rental agreement. The LICENSEE will prominently display in and upon the premises such signs and advertising displays which shall from time to time be supplied to LICENSEE by CHOCK, and LICENSEE agrees to remove said advertising displays when directed by CHOCK. The LICENSEE will not advertise in any media without the written approval of CHOCK. All advertising displays used in the premises shall be supplied to LICENSEE by CHOCK and LICENSEES will be charged by CHOCK for the said signs. Under no circumstances shall LICENSEE display any sign in and upon the premises which is not supplied by CHOCK. All signs and advertising displays are to be installed by LICENSEE at its expense.

12. LICENSEE shall deliver to CHOCK monthly statements of sales and other moneys received from the operation of all business at the above described premises within ten days after the end of each month; certified to by the LICENSEE and by a cerified public accountant. The LICENSEE shall keep at the premises true and accurate records and accounts which shall show all sales made and all gross receipts from the business upon and within the above described premises. The accounts, books, records and tax returns of LICENSEE, so far as the same pertain to the business transacted under the provisions of this agreement, shall be open to the inspection, examination and audit by CHOCK and its authorized representatives at all times. Any such inspection, examination and audit shall be at CHOCK'S cost and expense unless the same is either necessitated by LICENSEE'S failure to prepare and deliver its statement of gross receipts or operation statement, or to keep and preserve records as hereinabove provided, or such inspection discloses that any such statement made and delivered by LICENSEE is in error to an extent of 2 per cent or more, in either of which events such cost and expense shall be borne and paid by LICENSEE upon demand, and, in which case, CHOCK shall have the right to terminate this agreement.

13. LICENSEE agrees that all registers used in the said premises shall be purchased from the National Cash Register Company—model, accessories thereto, and color to be designated by CHOCK. All registers must be sealed with a Chock imprint in order to prevent tampering and reduction of total sales. All overrings, refunds, merchandise sold to employees at reduced prices, must be entered and recorded on a separate form provided to the LICENSEE by CHOCK, which form must be submitted to CHOCK with the monthly reports. It shall be deemed a default of this agreement if LICENSEE tampers with any of the cash registers, fails to register sales, or in any other way attempts to or conceals the amount of his sales from CHOCK.

14. The LICENSEE agrees to pay to CHOCK on the 10th day of the

month following each full month of operation 3 per cent of the gross receipts, which gross receipts shall include the selling price of all the merchandise of any sort whatsoever sold in, upon or from any part of the above described premises. In no event, however, shall such gross receipts be less than the projected retail price on the basis of the purchases from CHOCK.

15. LICENSEE shall:

(a) Operate and maintain the restaurant and all installations on the premises strictly in accord with the standards prescribed from time to time by CHOCK. CHOCK shall have the right in its sole discretion to modify the same from time to time.

(b) Employ sufficient personnel for fast service of its patrons at all times.

(c) Require its employees to wear the uniform prescribed by CHOCK and be courteous to all customers at all times.

(d) Not permit the use of any part of the premises for purposes or functions objected to by CHOCK.

(e) Use its best efforts in connection with the operation of the business.

(f) Continuously operate the business at the premises upon such days and during such hours as CHOCK shall direct.

(g) Maintain in first class condition by periodic painting, repairs and decorations, the interior and exterior of the restaurant and the premises. CHOCK shall have the right, in its sole discretion, to require LICENSEE to perform such painting, repairs and decorations.

(h) Not attempt to induce any person employed by CHOCK to quit such employment, and shall not employ, or seek to employ, any person who at the time, is employed, or at any time six (6) months prior thereto, has been employed by CHOCK or any of its licensees.

(i) Comply with all federal, state or local laws and regulations.

(j) Maintain in full force and effect, in companies approved by CHOCK and with an agent or agents designated by CHOCK minimum insurance, as follows:

(i) Property damage insurance in the amount of $25,000.

(ii) Public liability insurance in the amount of $250,000 in respect of any one accident or disaster, and $500,000 in respect of injuries to any one person covering liability of all kinds, including claims on account of foreign substances in or spoilage of food or drink.

All policies shall be in form and substance satisfactory to CHOCK, CHOCK shall be named as an insured in all policies, including fire insurance policies which shall insure CHOCK'S personal property located on said premises, and the originals or certificates thereof shall be delivered to CHOCK and shall be prepaid. CHOCK shall have the right to require increased limits of such insurance or additional types of insurance when it deems such to be necessary.

(k) Not use the trademark and trade name "CHOCK FULL O'NUTS" on letterheads, checks, invoices, and the like, unless it clearly indicates that LICENSEE is a franchisee of CHOCK.

(l) Not use or display after the termination of this agreement, the trademark and trade name "CHOCK FULL O'NUTS" or any mark, name, or device confusingly similar thereto in any manner or way in connection with any products or services, whether in connection with the operation of a restaurant or otherwise. In particular, but not by way of limitation, not in connection with products offered at the restaurant or on any china, silverware, or other items of personal property.

17. (a) So long as this agreement shall remain in force and effect, the LICENSEE will not, without the consent in writing of CHOCK, mortgage, pledge, or otherwise assign as security the premises or any part thereof, or the equipment or furnishings located and used therein or any interest which the LICENSEE may have in any part thereof.

(b) So long as this agreement shall remain in force and effect, the LICENSEE will not sell, transfer, assign, lease or sublet any interest in the said premises or any part thereof, or in the business thereon conducted, without the prior written consent of CHOCK.

18. If (a) any moneys payable by LICENSEE to CHOCK shall not be paid as and when due and payable, and if such nonpayment shall continue for ten days after service upon LICENSEE by CHOCK of written notice specifying the unpaid items; or (b) there shall be any failure or omission in the full and faithful performance and observance of any of the terms, conditions, and limitations of this agreement on LICENSEE'S part to be performed or observed (other than the payment of moneys) and if such failure or omission shall not be remedied to the satisfaction of CHOCK upon demand; or (c) there shall be filed by or against LICENSEE in any court pursuant to any statute, either of the United States or any state, a petition in bankruptcy or for reorganization or for the appointment of a receiver or trustee for the property of LICENSEE which is not vacated within a period of twenty days, or LICENSEE shall be adjudicated bankrupt or insolvent within the meaning of insolvency in either bankruptcy proceedings or equity proceedings, or shall make a general assignment for the benefit of creditors, or, as debtor, take the benefit of the provisions of any solvency act, whether now or hereinafter enacted; or (d) ownership, operation or control of the restaurant business conducted on the premises shall be transferred, passed to or devolved, whether by operation of law or otherwise, upon any one other than LICENSEE herein named except as in this agreement permitted; or (e) the restaurant or premises shall be abandoned or vacated, or the lease for the premises is terminated for any reason whatsoever, then CHOCK, at its option, may serve upon LICENSEE written notice that this agreement and the unexpired term hereof shall cease and expire forthwith, and thereupon this agreement and the term hereof, shall wholly cease and expire in the same manner and with the same effect (except as to LICENSEE'S liability) as if the date of receipt of such notice were the date herein prescribed for the expiration of the term of this agreement.

19. If this agreement shall be terminated by virtue of the giving of notice by CHOCK to LICENSEE as provided in paragraph 18 hereof, LICENSEE agrees that LICENSEE will not, without the written consent of CHOCK first had and obtained, remove any furniture, equipment and other chattels (hereinafter referred to as "personal property") from the premises for a period of thirty days after receipt of such notice of temination. If this agreement shall be terminated for any cause whatsoever, LICENSEE hereby gives and grants to CHOCK the unrestricted right and option for and during a period thirty days following receipt of such notice of termination to purchase either by itself, a subsidiary corporation, or a person

or corporation designated in writing by CHOCK, such personal property, and LICENSEE shall receive and agrees to accept in payment for such personal property and the transfer by LICENSEE of the right of possession of the said premises LICENSEE'S original net cash investment in such personal property, less straight line depreciation of such personal property over the initial term of the lease to said premises, not exceeding fifteen years. If the said personal property is subject to any mortgages or liens of any kind, the unpaid principal balance of any such mortgages or liens shall be deducted from the amount of any payment to be made hereunder; provided, however, if such mortgages or liens exceed the amount of the payment to be made hereunder, LICENSEE hereby agrees to pay such excess to the purchaser of such personal property.

20. The Landlord of the premises, LICENSEE and CHOCK hereby agree that the premises shall be used for the operation of a CHOCK FULL O'NUTS restaurant and for no other purpose. In the event that the franchise agreement between LICENSEE and CHOCK is terminated for any reason whatsoever, LICENSEE agrees to assign this lease, at the option of CHOCK to either CHOCK, a subsidiary of CHOCK, or to a person or corporation designated by CHOCK, and Landlord hereby consents to the assignment of this lease. Notice of the exercise of the option by CHOCK shall be given by registered mail, upon Landlord and LICENSEE within thirty days after termination of the said franchise agreement for any cause whatsoever. In the event that CHOCK does not exercise its option within the said thirty-day period following termination of the franchise agreement with LICENSEE, then, and in such event, this provision shall be null and void.

21. In the event that CHOCK does not elect to exercise the said option referred to in paragraph 19 of this agreement within the said thirty-day period, upon the termination of such thirty-day period LICENSEE will immediately discontinue the use of all trade names, trademarks, symbols, signs, forms of advertising indicative of CHOCK FULL O'NUTS or the business or products thereof and CHOCK shall enter upon the premises forthwith and remove same. LICENSEE agrees, so far as LICENSEE may lawfully do so, to make or cause to be made such removals or of changes in the said premises as CHOCK shall direct so as to effectively distinguish the premises from their former appearance and from any other CHOCK FULL O'NUTS restaurant; and if the LICENSEE shall upon request, fail or omit to make or cause such changes to be made, then the Landlord of the premises and LICENSEE agree that CHOCK shall have the right to enter upon the premises, forcibly if necessary, without being guilty of trespass or any tort, and without prejudice to CHOCK'S other rights and remedies, and shall have the right to make or cause to be made such changes at the LICENSEE'S expense, and the LICENSEE shall remove and deliver to CHOCK, at their depreciated value, all of the paper products and other articles bearing the name CHOCK FULL O'NUTS; provided, however, that CHOCK shall only be required to pay for such products and articles as are then currently in use.

22. Unless terminated as provided in this agreement, this agreement shall remain in effect for the term of the lease and all renewals thereof, but not to exceed twenty-five years from the date hereof.

23. No waiver by CHOCK of any rights or remedies under this agreement shall be deemed to have occurred unless embodied in writing signed by the President or Chairman of the Board of CHOCK.

24. This instrument contains the entire agreement between the parties, and any executory agreement hereafter made shall be ineffective to change, modify, discharge, or affect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

25. In the event of a breach or threatened breach by LICENSEE of any of the terms, conditions or limitations of this agreement, CHOCK shall have the right to invoke any remedy allowed in law or in equity, whether or not other remedies are herein provided. All rights and remedies given to CHOCK under this agreement and those allowed in like case, at law or in equity, are distinct, separate and cumulative and no one of them whether or not exercised by CHOCK shall be deemed to be an exclusion of any of the others.

26. Any notice, statement, demand or other communication or exhibit required or permitted to be delivered or served or given by either party hereto to the other, shall be deemed to have been duly delivered to, served or given, only if mailed in a registered or certified postpaid envelope addressed to the respective party at its address below (provided that each party shall be entitled to change such address by notice duly given pursuant to this paragraph):

(a) Notices to CHOCK shall be given to CHOCK at 425 Lexington Avenue, New York, N.Y. 10017.

(b) Notices to LICENSEE shall be given to LICENSEE at c/o Leonard Kolleeny, Esq., 515 Madison Avenue, New York, New York.

27. In no event shall this agreement be deemed to create a partnership or joint venture between CHOCK and LICENSEE in respect to the operation of the restaurant or in respect to CHOCK business or in any other respect whatsoever, or to impose upon CHOCK any liability in connection with the operation of the restaurant, or to render CHOCK responsible for any debts or obligations of LICENSEE or to give CHOCK any proprietary interest in the restaurant.

28. Should any part of this agreement for any reason be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this agreement without including therein any such part, parts, or portion which may, for any reason, be hereafter declared invalid.

29. This agreement shall inure to the benefit of CHOCK and its successors and assigns. The interest of this agreement in the LICENSEE is personal and shall not voluntarily, or by operation of law or otherwise be assigned, transferred, or divided in any manner by the LICENSEE or anyone on its behalf, and if the said LICENSEE is a corporation, it is understood and agreed that the shares of capital stock of said corporation shall not voluntarily or by operation of law or otherwise, be sold, pledged, transferred or assigned, without the written consent of CHOCK, and the

stock certificates representing the capital stock of LICENSEE shall bear a legend setting forth the intent hereof, and all changes of officers or directors of LICENSEE shall be reported to CHOCK by registered mail. However, in the event of the death of LICENSEE, rights and obligations of the deceased LICENSEE, who, in turn, in the sole opinion of CHOCK, shall be deemed capable of performing the duties and obligations required under this agreement. In the event the LICENSEE shall be an individual and shall die leaving no heir capable, in the sole opinion of CHOCK, of performing all the obligations set forth above, then his estate or legal representative shall have the right to sell the operation to a responsible bona fide purchaser acceptable to CHOCK, and who shall agree in writing with CHOCK to assume and honor this franchise agreement.

30. Upon termination of this agreement, whether by reason of lapse of time, default in performance, or other cause or contingency, LICENSEE agrees thereupon that LICENSEE will not (a) thereafter operate or do business in any name or any manner that may tend to give the general public the impression that this agreement is still in force; (b) make use or avail itself of any of the trade secrets of CHOCK; (c) construct or equip or aid or assist any person or persons in the construction or equipping of any premises incorporating the features or equipment layout and which are identifying characteristics of premises operated by CHOCK or its Licensees.

In the event it becomes necessary for CHOCK to institute any action at law or in equity against LICENSEE to secure or protect CHOCK'S rights under this agreement, CHOCK shall be entitled to recover in any judgment entered therein in its favor such reasonable attorneys' fees as may be allowed by the court, together with such court costs and damages as provided by law.

32. LICENSEE covenants and agrees that in the event CHOCK shall, without fault on its part, be made or becomes a party to any suit by reason of this agreement or by any act or omission by LICENSE hereunder, then LICENSEE shall pay all costs and expenses, including attorneys' fees, incurred by or imposed on CHOCK by or in connection with such litigation.

33. This agreement shall be governed by the laws of the State of New York.

34. LICENSEE agrees that prior to the authorization by CHOCK of the opening of the restaurant, CHOCK shall be presented with proof satisfactory to CHOCK, that the LICENSEE has paid all bills rendered to it by all contractors, vendors and suppliers.

35. LICENSEE shall deliver to CHOCK a balance sheet dated as at one week prior to the proposed commencement of business of LICENSEE'S franchise restaurant within three days prior to such proposed commencement date. LICENSEE shall deliver to CHOCK, within sixty days after the end of each fiscal year of the LICENSEE, statements of income and surplus of its operation for such fiscal year, together with a balance sheet dated as at the end of such fiscal year, setting forth in each case in comparative form figures for the preceding fiscal year. All such financial statements shall be in reasonable detail and satisfactory scope to CHOCK and shall be certified by a certified public accountant. On or before the 25th day of each month, LICENSEE shall submit to CHOCK a complete profit and loss statement for the previous month's operation in form satisfactory to CHOCK.

36. LICENSEE agrees that it shall not maintain or permit vending machines of any type whatsoever in the restaurant without the express written consent of CHOCK.

37. LICENSEE agrees to deposit with CHOCK thirty days prior to the proposed opening of the restaurant a sum sufficient to pay all contractors and subcontractors, suppliers or others, whose bills remain unpaid in whole or in part. Said sum or sums to be used to pay said creditors prior to opening. It is specifically agreed by LICENSEE that the said restaurant shall not be permitted to open unless all such creditors have been paid in full or the said deposit has sufficient funds to pay said creditor or creditors in the event of a dispute between LICENSEE and said creditors.

38. By reason of CHOCK'S long experience in operating its restaurants, it has found that certain low to moderate retail prices are required in order to attract sufficient numbers of customers to its stores and to maintain its image and goodwill. LICENSEE acknowledges that it would be injurious to the business of CHOCK and its licensees if LICENSEE were to sell said products at prices different than the prices charged by CHOCK and its licensees. LICENSEE agrees that CHOCK shall (a) determine what products are to be offered for sale by LICENSEE; (b) regulate the retail sale price of all such products, and (c) determine the daily menu of LICENSEE.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

CHOCK FULL O'NUTS CORPORATION
By:____________________
Gaylord M. LaMond, President

L.S.

____
Arnold Silverstein

L.S.

____
Henry Sealine

APPENDIX 6
(CX 27E)

PUBLICITY

In the March issue of McCall's Magazine, under a column headed, "The Unabashed Diner" by Ralph Schoenstein, some very interesting references were made to Paul Golub's store at 205 W. 57th Street. It is reprinted here with permission of McCall's to whom we express our grateful acknowledgement:

McCall's New York

THE UNABASHED DINER

An appraisal of New York restaurants BY RALPH SCHOENSTEIN

New Yorkers, who have tired of saumon fume, champignons a le grecque and other tasty luncheon tidbits may have overlooked a good thing. The yummy midtown area, a succulent strip that embraces run-of-the-mill joints like Four Seasons and Caravelle and 21, is also chock full of overlooked little eateries where neither tie or credit card is de rigueur, where neither palate nor purse can take offense. Although none of them yet has a liquor license, they are almost always in good standing with the Board of Health.

Diagnonally across from Carnegie Hall at 57th Street and Seventh Avenue, is a chic little bistro, Chock Full O'Nuts, that glows with speed and cleanliness. Every three minutes a new patron gets a chance to enjoy a 45¢ nutted cheese sandwich on raison bread or 30¢ peach cream pie or a 55¢ hamburger. All are served by waitresses in blue who fly to you and, with a prophylactic flourish, put the spoon on the rim of your cup, never letting it touch the counter.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

I. BACKGROUND

The complaint in this matter charges that respondent has engaged in unfair methods of competition in commerce and unfair acts and practices in commerce, and in particular that it has engaged in illegal price fixing and tying arrangements. After hearings, the administrative law judge rendered his initial decision, in which he ordered the complaint dismissed. Complaint counsel have appealed.

The administrative law judge found himself confronted on the one hand by evidence of agreements, illegal on their face, and on the other by evidence that enforcement of these agreements had been lax in recent years (although the contracts were not abrogated). He chose to dismiss the complaint, "without prejudice, however, to the right of the Commission to issue a new complaint." A footnote explained:

> Particularly, if respondent does not amend as soon as practicable, the Type No. 3 and 4 Agreements in accordance with the technical requirements of the law * * * * (I.D. 20 [p. 595 herein]).[1]

The administrative law judge quite correctly sensed that there was something plainly illegal about the agreements between re-

[1] The following abbreviations will be used throughout:

RX — Respondent's Exhibit
CX — Commission Exhibit
I.D. — Initial Decision
Tr. — Transcript of Hearings
RPF — Respondent's Proposed Findings
CPF — Complaint Counsel's Proposed Findings
CB — Complaint Counsel's Appeal Brief
RB — Respondent's Appeal Brief

spondent and its licensees but he concluded that evidence that respondent had been in recent years less than vigilant in enforcing its illegal agreements warranted sparing it the indignity of a cease and desist order requiring it to comply with the law. This was error.

The initial decision consists of 20 pages of text, and appendices. The first 12 pages involve generally "Findings of Fact." With some exceptions, these findings are accurate and some of them have been embodied in our own analysis of the case, with appropriate citations to the record. However, the judge's refusal to take seriously the "technical requirements of the law" renders his legal analysis of the problem, and certain factual-legal conclusions interspersed throughout the opinion, of limited value to us upon review. Most critically, the judge dealt cursorily in his opinion with evidence presented by respondent as part of its affirmative defense to the charge of illegal tying. This was, perhaps, because the judge concluded that complaint counsel had failed to demonstrate the elements of a tying agreement in the first place. However, since this latter conclusion was erroneous, we find it necessary to make our own evaluation of the record with respect to critical evidentiary issues. (See pp. 23 ff. *infra* [pp. 646–55 herein]). For these reasons the initial decision in this case will be vacated and the following findings of fact and conclusions of law substituted therefor.

The following facts are essentially undisputed: Respondent Chock Full O'Nuts Corporation, Inc. (hereinafter for the most part "Chock"), is engaged in operating and licensing others to operate restaurants bearing the registered trade-name "Chock Full O'Nuts." At the time of trial there were 38 Chock restaurants licensed by respondent to operate under its trade name, of which 37 were located in the state of New York (36 in New York City) and one in Jersey City, New Jersey. (RX 77D–E)[2]

Respondent also owns and operates 45 restaurants under the "Chock Full O'Nuts" banner, of which 40 are located in New York. (RX 77A)

Chock restaurants have a generally similar exterior and interior appearance. The restaurants accommodate an average of 50

[2] RX 77 and 78 consist of stipulations between complaint counsel and respondents. These exhibits were, for reasons unknown, omitted from the bound record presented to the Commission after trial. The Division of Legal and Public Records subsequently obtained a copy of RX 77 and 78 from counsel for respondent and showed it to complaint counsel, who made no objection. The findings for which these exhibits are cited in our opinion were included in the initial decision, and objected to by neither party on appeal.

to 60 persons (though some have more than 200 seats) for sit-down counter service at any one time, with "carry-out" areas to service additional customers. (RX 78, 57–59; CX 4D) The restaurants contain neither kitchens nor chefs. Chock personnel make nightly deliveries from respondent's Secaucus commissary (discussed at greater length hereinafter) in refrigerated and unrefrigerated trucks, of various food items needed for service the following day. (Tr. 940–42, 820–23) Foods such as coffee, soups, and hamburgers are prepared in service areas visible to customers. (RX 78A) Instead of using individual customer menus, restaurants display one or more large plastic menu boards (40½" x 56") visible to all customers. The patented menu boards list four categories of food items—soups, sandwiches, desserts, and beverages and may be altered to reflect additional categories. The menu boards accommodate plastic inserts, each identifying a single food item and its price. The inserts are removable to reflect menu and price changes. (RX 77F, 78B, 60)

Certain foods are offered for consumption every day, including Chock Full O'Nuts coffee, orange drink, Diet Freeze, whole wheat doughnuts, nutted cheese sandwiches and hamburgers. Other categories of foods, *i.e.*, salad sandwiches, pies, and cakes, are represented every day, but the particular representative in each category varies. Thus tuna salad sandwich, cocoanut pie, and maple walnut cake on Monday may yield to chicken salad sandwich, apple crumb pie, and chocolate layer cake on Tuesday. The same combination will, however, be available in all Chock restaurants. (RX 78B; CX 104–110)

With slight exceptions, all utensils, plates, bowls and cups used to serve food in Chock restaurants are of disposable paper or plastic. (RX 80A–N)

Except for Chock signs and menu boards, which are rented to licensees, Chock owns no interest in its licensees' restaurants. (RX 77F–G) It charges licensees a royalty fee equal to 3 percent of total retail sales. Chock's license royalties were $224,899 in 1972. (RX 77J)

Respondent owns and operates a combined bakery and warehouse in Secaucus, New Jersey, in which certain food items to be served in Chock restaurants are manufactured daily. These include various baked goods,[3] salad sandwich spreads,[4] hamburger patties, and certain beverages. (RX 77C; Tr. 945) Some of the baked goods, in addition to being sold in Chock restaurants, are marketed in retail grocery stores under the "Chock Full O'Nuts" trademark. (RX 77G, 21–24) [5]

Various other food items which are served in Chock restaurants, such as condiments, crackers and rye bread, are supplied by independent suppliers to the Secaucus commissary, which then ships them to company-owned or licensed restaurants. (RX 77C)

Still other items, among them milk, ice cream, and paper goods, to the extent they are purchased by Chock for resale, are drop-shipped to company-owned or licensed restaurants by the supplier. (CX 144A–B)

Respondent also manufactures and distributes coffee. Its Brooklyn, New York plant roasts about 2.2 million pounds of premium coffee monthly, of which the bulk is distributed in metal cans through retail grocery establishments under various trademarks, including "Chock Full O'Nuts—The Heavenly Coffee," "Chock Full O'Nuts," and "Heavenly." The rest is delivered in paper bags to owned and licensed Chock restaurants for sale. (RX 77D; Tr. 869–70; RX 6–8)

Chock's sales of its own products to its licensees were $1,152,-651 in fiscal 1972; sales of supplies were $188,693, and sales of non-Chock food items were $825,584. The corresponding figures in 1968 were $2,426,253, $437,932, and $852,911. (RX 77J) [6]

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[3] Baked goods include pies (Dutch apple, cocoanut cream, huckleberry cream, peach cream, strawberry cream, chocolate cream, lemon cream), cakes (Danish coffee, pound, chocolate layer, cocoanut, maple walnut), white and whole wheat raisin bread, whole wheat doughnuts, hamburger rolls, and chocolate brownies.

[4] Salad spreads include chopped ham and egg, chicken, tunafish, shrimp, egg, and corned beef.

[5] These include whole wheat doughnuts, pound cake, markle pound cake, Danish coffee cake, iced supreme coffee cake, chocolate cake, and brownies.

[6] Following is a list of products sold by Chock to some or all of its licensees as reported to the Commission during its investigation:

List of products sold to franchisees manufactured by Chock:

Dutch Apple Pie	White Bread	Hamburgers
Cocoanut Cream Pie	Whole Wheat Raisin Bread	Sliced Cheese for Cheeseburgers
Huckleberry Cream Pie	Danish Coffee Cake	Chocolate Syrup
Peach Cream Pie	Pound Cake	Coffee
Strawberry Cream Pie	Chocolate Layer Cake	Orange Syrup
Chocolate Cream Pie	Cocoanut Layer Cake	Orange Juice
Lemon Cream Pie	Chopped Ham & Egg Salad	Rye Bread
Butterscotch Brownies	Chicken Salad	Franks—containers for soup
Chocolate Brownies	Tuna Fish Salad	Chicken—containers for soup
Whole Wheat Doughnuts	Shrimp Salad	Melloream
Frankfurter Rolls	Egg Salad	(CX 12)
Hamburger Rolls	Corned Beef Salad	

(CX 12)

List of products sold to franchisees not manufactured by Chock:

Food Products

No Specifications	*Chock Specifications*
Milk	Nutted Cheese
French Fries	Frankfurters

II. PRICE-FIXING

In agreements signed between Chock and approximately 20 of its franchisees since 1963, the franchisees acknowledged

> that it would be injurious to the business of CHOCK and its LICENSEES if LICENSEE were to sell said products at prices different than the prices charged by CHOCK and its LICENSEES. (CX 19B, Par. 10; CX 10–11)

The franchisees further agreed "to sell said products at the same prices as restaurants operated by Chock" (CX 19B, Par. 10) and "to have the same daily Menu at the same prices that are in effect at stores operated by Chock." (CX 19B, Par. 11) In agreements between Chock and two additional licensees, the licensees agreed:

> * * * that it would be injurious to the business of CHOCK and its licensees if LICENSEE were to sell said products at prices different than the prices

(Continued from previous page)

No Specifications	*Chock Specifications*
Shortening for French Fries	English Muffins
Milk Shake Mix	Vegetable Soup Mix
Sugar	Crackers for Soup
Coca Cola	Chicken Noodle Soup Mix
Tab	Clam Chowder Mix
Clams	Tomato Soup Mix
Thyme	Green Pea Soup Mix
Mustard	Mustard Packets
Relish	Ketchup Packets
Ketchup	Mayonnaise Packets
	Sugar Packets
	Grape Jelly Packets
	Marmalade Packets
	Pepper
	Butter

Non-Food Products

No Specifications	*Chock Specifications*
Half Cut Napkins	Holder Napkins
Straws	Bags, 3, 5 & 10 lb.
Bags, 25 lb.	Paper Pie Plates
Paper Pie Wedges	Wax Paper 6x10; 10x12; 7x12
Mustard Cups	6 oz. containers
Plastic Knives, Spoons & Forks	Coffee Mugs
Serv-a-Wax Paper	10 oz. containers
Wood Spoons	Soup Bowls
Refuse Bags	Teaspoons
Paper Towels	Soupspoons
Toilet Tissue	Forks
Wood Coffee Stirrers	
Coffee Urn Brushes	
Pump Brushes	
Magic Cleanser	
Metal Glo Polish	
Non-Skid Powder	
Washing Powder	
Aluminum Foil	
French Fry Bags	
Glasses	

(CX 13A–B)

charged by CHOCK and its licensees. LICENSEE agrees that CHOCK shall * * * (b) regulate the retail sale price of all such products. * * * (CX 20J, Par. 38)

Twelve of the agreements described above were in effect at the time of the trial in this matter. (RX 77G–I)

These franchise contracts, on their face, are illegal agreements to fix prices between Chock and its licensee-competitors. Agreements to fix prices, whether vertical or horizontal (and these agreements are both), are illegal *per se. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940); *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U.S. 373, 408 (1911); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152–3 (1968).

A great deal of energy was needlessly expended by both sides at trial in efforts to demonstrate whether, and to what extent, Chock had endeavored to enforce the illegal price-fixing provisions, and whether, and to what extent, licensees had adhered, or felt obliged to adhere, to the agreements they had made.

It is clear that Chock did attempt strenuously to enforce the agreements at least into 1967. The high point in complaint counsel's argument on this point appears to have been reached with a letter dated March 28, 1967, from Chock's board chairman, Mr. William Black, to all franchisees warning:

In conclusion, I must advise you that *we* will set the policy for all stores bearing the name "Chock full O'Nuts"—that all stores bearing that name will serve the same food at the same prices.

If any franchisee doesn't care to go along, and feels that he can do better on his own, please call * * * (our house counsel), and he will arrange a release for you. (CX 40C)[7]

Evidence from earlier periods suggests similarly insistent demands for adherence to the price-fixing agreements, involving both lowering and raising of prices. A notification to franchisees dated October 14, 1965, for instance, informed them:

Our company-owned stores are increasing the price of the Nutted Cheese Sandwich and the Orange Drink * * *. We expect you to do the same. (CX 36)

Chock contends that following 1967 it abandoned its efforts to enforce compliance with what it characterizes as admittedly "improper" contract provisions, and that franchisees did not consider

[7] The administrative law judge said of this exhibit only that "In March 1967 (CX 40A) * * *. Chock offered to release from its licensing agreement any licensee who requested such a release. (CX 40C; RX 73)" (I.D. 11 [pp. 586–87 herein]).

themselves bound thereafter to adhere to them. The administrative law judge accepted Chock's contention.

We find it unnecessary to evaluate at length the respective arguments of the parties on this point except to note that whatever may have been Chock's opinion concerning its capacity to enforce the price-fixing provisions of its contracts, it did not, at least prior to the institution of Commission proceedings, officially inform its licensees that the price-fixing provisions of their agreements were invalid, nor did it, prior to the trial on this matter in 1972–73, abrogate these palpably illegal contracts. Rather, Chock continued to suggest prices to its licensees,[8] leaving them to infer from their own experience and successful disobedience of others, that adherence was no longer required. Under these circumstancs we find Chock's "abandonment" defense quite unconvincing, and believe that an order is appropriate to insure eradication and nonrepetition of acts and practices in existence at the time of trial and/or prior thereto. See *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F. 2d 523, 531 (5th Cir. 1963); *Guziak* v. *Federal Trade Commission,* 361 F. 2d 700, 704 (n. 6) (8th Cir. 1966).

> It is the "contract, combination * * * or conspiracy in restraint of trade or commerce" which §1 of the Sherman Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.[9]

The mere existence of a duly executed, binding contract to fix prices between competitors (or between licensor and independent licensee), however lightly its obligations may be regarded at various times by various parties, is inevitably a threat to competition. Whatever current practice may be, there is always some danger that one of the parties will seek enforcement of the agreement, or that the other will feel obliged to adhere. In this case there was evidence that some licensees did charge the same prices as Chock stores, and while this may well be in large measure

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[8] Examples of language used to suggest prices are the following:
"On Wednesday, February 24, 1971, we will introduce a Cherry Crumb Pie * * *.
"The Cherry Crumb Pie will sell for 30¢ per slice."
(CX 98
"Beginning on Monday, February 8, 1971, there will be an increase of five cents in the sellin price of the following items: * * *." (CX 97

These announcements were sent to Chock-owned units as well as licensees, and it could argued that as to licensees the announcements were merely notifications of the prices th would be charged by company-owned units. They are nonetheless a poor way to abandon a p gram of price-fixing.

[9] *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 275 n. 59 (1940).

ascribable to competitive conditions, it is hard to envision the quantum of proof that could convince one that it was not also due in some measure to the continued existence of a written contract to maintain price equality.

Chock appears to argue that while its agreements were in themselves "improper" (counsel's understandable euphemism for illegal) it nonetheless was not shown to be engaging at the time of the complaint in "a plan or policy, the purpose of which is to fix, control, establish and maintain the retail prices at which Chock licensees advertise, offer for sale, and sell food products," as alleged in the complaint.

While the complaint in this matter did not list Chock's contracts specifically as one of the elements evidencing the price-fixing charge, it was clearly sufficient to provide respondent with notice of the nature of the charges against it and an opportunity to defend against them,[10] and we therefore find entry of an order prohibiting price-fixing appropriate under the circumstances of this case.

We similarly reject Chock's contention that the agreements to fix prices were not in interstate commerce. Chock argues that all those franchisees shown to have been involved in price-fixing activities were located in the State of New York and hence not "in commerce" as that term is used in the Federal Trade Commission Act. It does appear that the New Jersey licensee was party to

Agreements between Chock and certain of its franchisees, in a contract containing illegal price-fixing provisions. (RX 77) Moreover, Chock takes much too narrow a view of commerce. Chock is an interstate operation, having one franchisee and a large commissary in New Jersey and company-owned restaurants in New Jersey and Pennsylvania. Many of the products which were the subject of the price-fixing arrangements were shipped daily from New Jersey to New York for immediate resale subject to the illegal agreements. We think that agreements to fix the ɔrices at which goods shipped from New Jersey on Tuesday for ale in New York on Wednesday shall be sold are agreements in nterstate commerce, at least when the party transporting the oods across state lines is also a party to the price fix. See *Sun Oil 'o.* v. *Federal Trade Commission,* 350 F.2d 624, 637 (7th Cir. 965).

[10] The complaint's enumeration of practices pursued in fixing prices was, by its express ms, not exhaustive, and Chock was obviously apprised early in the proceedings that the ılity of its franchise agreements was under challenge. Moreover, the Notice Order attached he complaint would have required Chock to amend its contracts in conformity with the law.

For the above reasons, an order prohibiting price-fixing will be entered.

III. TYING AGREEMENTS

Agreements between Chock and certain of its franchisees, in effect at the time of these proceedings, specify variously that

* * * LICENSEE agrees to purchase from CHOCK all of the products sold to LICENSEE'S restaurant customers at or from the premises, and CHOCK will sell to LICENSEE such products subject to strikes, lockouts, government restrictions, war, or acts of God. [CX 19, p. 3 (10 in effect); RX 77G–I]

* * * LICENSEE agrees to purchase from CHOCK or its nominees all of the products sold to LICENSEE'S restaurant customers at or from the premises and CHOCK will sell to LICENSEE such products subject to strikes * * *.

5. LICENSEE shall pay for said products within seven days from the date of invoice at prices from time to time fixed by CHOCK. [CX 20, p. 3 (2 in effect); RX 77G–I]

* * * LICENSEE shall purchase from CHOCK all of the products which are produced by CHOCK for sale to restaurant customers at or from the premises * * *. [CX 18, p. 3 (19 in effect); RX 77G–I]

* * * LICENSEE shall purchase from CHOCK all of its requirements of coffee and doughnuts for sale to restaurant customers at or from the premises * * *. Similarly, LICENSEE will purchase all of its requirements of any other products manufactured or sold by CHOCK which by reason of extensive sales, advertising, or otherwise have, in CHOCK'S judgment, become so identified with the trademark "CHOCK FULL O'NUTS" that only the furnishing of the said products manufactured and/or sold by CHOCK would provide consumers with the "CHOCK FULL O'NUTS" products they expect and are entitled to receive. [CX 17, p. 5 (4 in effect); RX 77G–I]

Violation of the purchase restrictions outlined above renders the franchisee in breach of his agreement, and is, by terms of the contract, grounds for termination of his right to operate as a licensee of Chock and display the Chock trademark.

In determining whether any or all of the above contractua purchasing restrictions constitute unlawful tying arrangemen under Section 5 of the Federal Trade Commission Act as alleg by complaint counsel, we must consider four questions:

A. Does the arrangement in question involve two or more d tinct items, one of which (the tying product) may be obtai only if the other(s) is also purchased?

B. Is the tying item invested with sufficient economic powe restrain competition in the tied product(s)?

C. Is a "not insubstantial" amount of commerce affected b arrangement?

D. If A–C may be answered affirmatively, thereby establishing the elements of a *per se* violation, is respondent able to demonstrate by way of affirmative defense that the tie-in is necessary to ensure the quality of its products, or that no less restrictive means than the tie-in may be used to ensure such quality?

A. "Two Product" Test

Despite the administrative law judge's conclusion that the facts of this case did not meet the "two product" test, we think clearly that they do. In the years since our decision in *Carvel Corp.*, 68 FTC 128 (1965), it has come to be generally recognized that a franchise license, including the right to use a trademark, may constitute a separable "tying product" when its availability is conditioned upon purchase of other ("tied") items from the franchisor or his economically related designee. *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corporation,* 463 F.2d 1002 (5th Cir. 1972), *cert. denied,* 409 U.S. 1086 (1972); *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. denied,* 301 U.S. 125 (1965); *Seligson* v. *The Plum Tree,* Civ. No. 71–1998 (D.C. E.D. Pa., July 19, 1973); 1973–2 *Trade Cases* ¶74,644.

In this day and age of fast-food franchising, the franchise license, embodying the provision of know-how and establishment of uniform standards of *quality,* is clearly separable from the myriad of particular items which may be sold by each franchisee. The Ninth Circuit's analysis in *Chicken Delight, supra,* is relevant in this regard:

> 'he historical conception of a trade-mark as a strict emblem of source of ıe product to which it attaches has largely been abandoned. The burgeon- g business of franchising has made trade-mark licensing a widespread nmercial practice and has resulted in the development of a new rationale trademarks as representations of product quality * * *.
>
> * * sale of a franchise license, with the attendant rights to operate a ness in the prescribed manner and to benefit from the goodwill of the e name, in no way requires the forced sale by the franchisor of some or f the component articles. Just as the quality of a copyrighted creation ıt by a tie-in be appropriated by a creation to which the copyright does late (citations omitted) so here attempts by tie-in to extend the trade- protection to common articles (which the public does not and has no to connect with the trademark) simply because they are said to be ıl to production of that which is the subject of the trademark cannot ıntitrust scrutiny.

* * * The relevant question is not whether the items are essential to the franchise, but whether it is essential to the franchise that the items be purchased from Chicken Delight. (pp. 48–49)

Respondent appears to concede that its franchise license is a product separate from at least certain items, such as fungible food and paper products, sold and used by licensees (though it denies illegal tying with respect to these on other grounds, *infra*). Respondent contends, however, that various products manufactured by Chock itself, such as "Chock Full O'Nuts Coffee," baked goods, hamburgers, and salad sandwich spreads are inseparable from the franchise license pursuant to which they are sold.

The mere fact that respondent may itself manufacture certain products used in the operation of its franchises does not render them inseparable from the franchise licenses under which they are sold. More is involved here than the sale by a retailer of a manufacturer's product, to which display or licensing of the manufacturer's trademark might be viewed as merely ancillary, and from which it might be viewed as inseparable. Chock is clearly engaged in two businesses—the franchising (and operation) of restaurants, and the manufacture of food. Its franchise license, as in *Chicken Delight*, embodies not only the display of a trademark, but numerous attendant rights to operate a restaurant business according to detailed specifications, and to benefit from the goodwill of the trademark that derives from the particular sort of restaurant in which those specifications result. And, unlike *Chicken Delight*, Chock obviously treats the license as a separate product of independent value, charging licensees a flat fee plus a percentage of total sales for the right to hold it.

Under these circumstances and existing precedent, we find tha the Chock trademark license is a product separate from the foo products and supplies sold in Chock restaurants, and that tl "two-product" test is thus satisfied.

B. Market Power

Similarly, it is clear that Chock possessed the requisite pc in the tying product, its trademark license. The legal *presum* of economic power long accorded to patented or copyrighted [see *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962) ; *U* *States* v. *Paramount Pictures*, 334 U.S. 131, 158 (1948) ; *In* *tional Salt Co.* v. *United States*, 332 U.S. 392, 395–96 (has been logically extended to encompass trademarks *Siegel* v. *Chicken Delight, Inc.*, *supra*. As the Court ther

> Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for this presumption, but the fact that such a barrier does exist. Accordingly we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark. (P. 50)

The same reviewing Court noted in unequivocal language:

> The District Court ruled, however, that Chicken Delight's unique registered trade-mark, in combination with its demonstrated power to impose a tie-in, established as a matter of law the existence of sufficient economic power to bring the case within the Sherman Act.
>
> We agree. [448 F. 2d 43, 49 (9th Cir. 1971)] [11]

C. Substantiality of Commerce Affected

It is also clear that a substantial amount of commerce is involved in the contracts here at issue. Chock's sales to its licensees exceeded $2 million in fiscal 1972, including $1,152,651 in Chock food products, $825,584 in non-Chock-produced food products, and $188,693 in supplies. Comparable 1968 figures were $2,426,-253, $852,911, and $437,932. By case law standards, the amounts involved here are not insubstantial. *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495, 502 (1969).

Respondents argue that with respect to certain distinctive

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[11] It is not disputed that the Chock trademark license is a highly valuable possession. According to the testimony of one franchisee:

Q. When did you first become a Chock franchisee?

A. About ten years ago. We had a little coffee shop at the corner of 50th Street and Broad-ay. It was called Old Dutch Coffee Shop, and we didn't do too well. When I heard Chock ming in franchising, we took the first one.

* * * * * * *

'. What was involved in converting that restaurant from, converting that Old Dutch into :k?

It was almost on the same principle. We put different counters in, and we put the Chock signs in * * *.

What was the effect upon your sales in converting from an Old Dutch Coffee Shop to Full of Nuts?

Old Dutch was doing between $1,800 or $2,000 a week. As soon as we put the Chock sign :e we did $4,500 to $5,000 a week and more than that later on.

'd the same thing at 14th Street. We had a milk bar at 52 East 14th Street about a year first store at 50th Street; we converted that into a Chock, and we used to do four or y and went up to a thousand or $1,200 a day at 14th Street.

* * * * * * *

vhat do you attribute the increase of sales?

he name of Chock Full of Nuts. (Tr. 914–15)

ere are obviously other fast food trademark licensors in New York City, just as other trademark licensors competing with Chicken Delight and other purveyors of movies competing in *Loew's*, *supra*, Chock's unique registered trademark and ıpose the challenged tying arrangements, are sufficient to establish the requisite :.

Chock-producted items as the salad sandwich spreads, coffee and baked goods, no *foreclosure* of competition was shown for the reason that no showing was made by complaint counsel that anyone else would have been willing to undertake distribution of such goods to Chock franchisees given the volume and necessity to customize the product (although other manufacturers were generally conceded to be capable of such production). The point at issue here seems not ever to have been expressly resolved in a litigated case. We can find no case that has held an illegal tie-in not to exist because of absence of proof of a willing competitor in the *tied* product, but neither can we find a case in which such competition in the tied product has in fact been absent. Thus, for instance, in *Advance Business Systems and Supply Company* v. *SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cited by complaint counsel for the proposition that "[w]henever a tie-in is successful, competition is inevitably curtailed," (at p. 60) the court nonetheless found that there were competitors for the sale of the tied goods, and that they suffered probable loss of sales, although it is not clear from the opinion whether this finding was necessary to the court's determination of a legal liability.[12]

In the instant case, it is evident that competitors do exist for many of the items covered by the terms of the challenged contracts, those items that may be classified as relatively "fungible" such as milk, ice cream, hot dogs, and the like. Chock has, in fact, begun to permit its licensees to purchase these items from any reputable supplier (CX 84A–B), although the contracts challenged in this case have not been amended to reflect this and Chock thus retains the contractual right to insist on compliance With respect to certain distinctive Chock items the situation somewhat different. Obviously, complaint counsel could not dem onstrate the existence of others actually manufacturing the pr ucts in question for the simple reason that Chock's restrict agreements established it as the sole manufacturer of such p ucts. Chock, however, would require complaint counsel to de strate that some other manufacturer would at least be inter in, or ready to compete in the sale of tied items if give opportunity by a Commission order. This complaint coun not show. For its own part, Chock did not show that it ha any effort of its own to locate willing alternative supplier tied products.

[12] Of course it would be necessary for plaintiff to show damages from the tie.

We reject the notion that in order to challenge an agreement calling for the tying of numerous products to a franchise agreement it is necessary that a separate suit must be brought each time a competitor for a particular tied item is found, because only at that point may a violation with respect to that particular tied product be then deemed to have occurred. If there are, indeed, no competitors willing to supply Chock franchisees with various Chock items, it is hard to see what purpose it serves to tie the purchase of such items to the franchise agreement except that of eliminating possible future competition. The danger is that changed circumstances will render it profitable for a manufacturer to compete in the market for a particular tied product, and that the tying agreement will then take its illegal toll. Our duty under Section 5 of the Federal Trade Commission Act is to halt violations of the antitrust laws in their incipiency, *Federal Trade Commission* v. *Brown Shoe*, 384 U.S. 316, 322 (1966); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394–95 (1953). Where, as here, a broadly drawn agreement ties the purchase of numerous food items to a franchise agreement, and competitors exist for certain of those items though possibly not for others, we believe that a basis exists for proscribing the tie-in with respect to all items, both those as to which no doubt would exist as to the Sherman Act violation, and those as to which the violation may be merely incipient.[13]

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[13] Provided, of course, that the other requisites for a violation exist, as discussed herein. We ote that the facts of this case are somewhat unique in that the number of products tied by hock to its franchisee licenses is quite large. In a case involving one or a few products, it viously behooves the government, as a matter of sound enforcement policy if not law, to centrate its enforcement efforts on tying agreements as to which it is clear that competitors er to compete for sales of the tied product exist. Where, however, numerous items are ined, as to some of which willing competitors clearly exist and as to others of which the ence of willing competitors is unproven, we believe our duty under such circumstances is nsider all the tied items. Apart from whether or not "foreclosure" in the sense defined by is a necessary element to a tying violation where only one product is involved, it is clear e Commission, having found a violation with regard to the tying of some products, may n order that prohibits the tying of other similar products, if this is reasonably related purpose of eliminating the violation found. See *Federal Trade Commission* v. *Colgate-e Co.*, 380 U.S. 374, 395 (1964); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. (1952); *Niresk Industries* v. *Federal Trade Commission*, 278 F.2d 337, 342–43 (7th t. *denied*, 364 U.S. 883 (1960). Here, it is evident that Chock has illegally tied the of numerous food items to its franchises. Our order will proscribe the tying of all including those as to which competitors may not exist (except to the extent that trol considerations justify the tie-in, *infra*). If no competitors materalize, Chock ate the order by remaining the sole source of supply of the items in question to its Any other approach would permit ready evasion of an order against franchise simple expedient of slight changes in products served, or enhanced emphasis on which no willing competitors may have been shown to exist at the time of an tion.

D. Affirmative Defenses

It is apparent from the foregoing that the elements of an illegal tying agreement have been made out in this case. In anticipation of such a finding, Chock endeavored at the trial to present an affirmative defense, alleging that the necessity of maintaining the quality of certain distinctive Chock items sold in its restaurants necessitated requiring their purchase from Chock. This defense was not asserted with respect to all items required by the contracts to be purchased from Chock, but only certain ones, primarily (1) coffee, (2) baked goods, (3) salad sandwich spreads, (4) hamburger, and (5) certain miscellaneous products, and we shall discuss it below.

With respect to items for which Chock could make no claim of "distinctiveness" and consequent necessity for quality control, Chock argued, along the lines of its defense to the price-fixing charges above, that it has, for some time, not sought in fact to require purchase from it by franchisees of such products, despite the express language of its contracts.

The administrative law judge, rejecting the "legalistic" approach of complaint counsel and agreeing with Chock, issued no order against respondent, though he dismissed the complaint without prejudice to the Commission's right to bring a new complaint

* * * if respondent does not amend as soon as practicable, the Type No. 3 and 4 Agreements in accordance with the technical requirements of the law and the facts of record here developed * * * and if respondent, in fact, were to require its licensees to purchase food products other than the distinctive Chock Full O'Nuts coffee, bakery goods and salad sandwich spreads. (I.D. 20) [p. 595 herein]

While Chock's enforcement of its contractual purchase restrictions has been, particularly in recent years, at best sporadic, and principally confined to those products it manufactures and claims are "distinctive," evidence reveals that in at least certain cases in the past Chock did enforce or sought to enforce restrictions on franchisee purchases of wholly fungible food items and paper products, for which Chock could assert no quality control justification. Thus, Chock officially notified various of its franchisees of violations of purchase restrictions.

In a letter to one franchisee it noted:

We have now discovered that you are using french fried potatoes supplied by others than this Corporation.

As we have heretofore advised you by letter on January 5, 1968, this practice constitutes a breach of the franchise agreement. (CX 88)

A second was informed of violations as follows:

3. Failure to purchase from Chock all the products sold to your restaurant customers, in that you purchase frankfurters from another source.
4. Failure to use paper products containing our name and trademarks as recommended by Chock.

* * * * * * *

We hereby demand that you remedy all of the foregoing violations of the franchise agreement within five (5) days from the date of your receipt of this letter. (CX 96B)

Following issuance of the proposed complaint, on November 16, 1971, Chock wrote to its franchisees to inform them officially that it did not consider them obliged to purchase from it items not manufactured by Chock itself, citing the Federal Trade Commission's interest in the matter. (CX 84A–B) Of course, as noted in the succeeding discussion, even the continuing requirement that franchisees purchase from Chock all products manufactured by it (as opposed to those simply bought and resold by Chock) is overbroad to the extent that manufacture by Chock is not shown to be necessary for quality control.

Under these circumstances, we believe an order proscribing tying with respect to concededly nondistinctive Chock items is clearly appropriate. Tying agreements are illegal *per se,* and the continued existence of agreements plainly illegal on their face cannot be permitted.[14]

The fact that an agreement is leniently administered * * * does not necessarily lessen, and certainly does not eliminate, its restrictive effect on competition. The overhanging threat of enforcement is ever present * * *. *Advance Business Systems, supra,* at p. 64.

With respect to the issue of quality control and Chock's allegedly distinctive items, complaint counsel argue that the test by which a quality control justification should be measured is "speci-

[14] There was also a dispute at the trial over whether or not Chock had ever required its censees to purchase utensils and other restaurant *supplies* from it. We find it unnecessary to solve the conflicting evidence on this point. Our order prohibits the tie-in of supplies as well food products, a result which is justified by the finding of a tie-in with respect to food oducts alone. The abuse here is the requirement that licensees as a condition of their trade-rk license, buy from the franchisor all manner of other items for which there is no justifican. To prevent this in the future, an order must cover all items. It would be ludicrous to scribe only the tying of food items and thereby permit the franchisor to rearrange his busis so as to require his licensees to purchase from him other items as to which there is no ification for a tie-in. See *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F.2d 971–72 (3rd Cir. 1941); *American Tack Co.* v. *Federal Trade Commission,* 211 F.2d 239 l Cir. 1954).

fiability." If the ingredients of the tied product may be specified without undue difficulty, so that they may be manufactured by others, the tyor is obliged to so specify them and permit manufacture by others, *Siegel* v. *Chicken Delight, Inc.,* 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 306 (1949).

Chock argues, in effect, that "specifiability" must be defined to encompass the entire range of ingredients and manufacturing conditions that contribute to the finished food product. Chock argues further that even if the ingredients and methods of manufacture of its products may be specified, that is no guarantee that the specifications will be adhered to and quality food produced by other manufacturers who may be licensed to manufacture distinctive Chock products. Chock would have us find from the record that

> none of the distinctive food products manufactured by Chock for use in its restaurants may "practicably" be reduced to written specifications so as to permit them to be duplicated consistently and uniformly. (RPF 62)

The problem presented here is a difficult one, for which little explicit guidance is available in case law precedent. It is obvious that the franchisor must have the right to maintain the quality of food sold through his retail outlets, for the performance of each outlet affects vitally the image and profitability of all, including those which are wholly owned by the franchisor himself. At the same time, the energy and resources supplied by a group of franchisees constitute a substantial fund of distributional capital. The evil of the tie-in is that it arrogates this capital to the distribution of goods selected and priced solely by the franchisor, unconstrained by competitive pressures. As a result the franchisee may be precluded from purchasing and selling the least expensive item of a given quality, with consequent detriment to consumers. The serious threat to competition inevitably posed by a tie-in compels the most careful scrutiny of claims that a tyor's tied product cannot practicably be duplicated by anyone else.

Ultimately the question is one of fact: May the ingredients of the tied product be specified in such a way as to render duplication by competing manufacturers practicable? [15] The administra-

[15] An alternative formulation has been suggested by some: Is there a less restrictive means (than the tie) by which Chock might feasibly ensure maintenance of the requisite quality? It should be noted, of course, that specifications must be *reasonable* as well as practicable. That is, the franchisor clearly may not impose specifications that bear no relation to any legitimate purpose of quality control or image maintenance, simply in order to render it impractical for competing manufacturers to supply that particular item to the franchisee. See the discussion of hamburger, *infra.*

tive law judge did not focus closely on this critical question, perhaps because he found Chock absolved of liability on various other grounds, which we reject. In his only possible applicable reference to the quality control defense, the administrative law judge concluded that:

> This record shows that Chock manufactures these distinctive products as a direct result of the inability of other suppliers to do so with reliable consistency and uniformity. (I.D., pp. 19–20) [p. 594 herein]

There is no record citation for this conclusion in the initial decision, and there is no evidence of record that Chock has made any effort, for at least 20 years, to determine whether anyone else could manufacture the products in question with reliable consistency and uniformity. (*Cf.*, Tr. 946–49) Our own review of the record evidence is summarized below. We believe that Chock has sustained its burden of proof on the question of whether its restrictions are reasonably necessary for maintenance of quality with respect to its coffee and baked goods, though not with respect to the rest of its distinctive products.

Hamburger

Of Chock's hamburger, the administrative law judge concluded:

> Hamburger is not on the Administrative Law Judge's list of "distinctive" food products. While the record will support a finding that Chock hamburger is different, the difference is more apparent than real. In the judgment of the Administrative Law Judge, this record will not support a factual foundation to establish legal significance to Chock hamburgers in contrast to ordinary hamburgers even if the Chock hamburgers are more "spicy" [apparently containing more salt and pepper]. (Tr. 955–56) (I.D., p. 18, n. 20) [p. 593 herein]

Chock's bakery and commissary manager testified that other manufacturers did make hamburgers by the same method as Chock, and that the principal reason for Chock's decision to manufacture patties itself was that it felt it could maintain better control over quality, percentage of fat, and the proper percentage of "salt and pepper." (Tr. 955–56) There was some evidence adduced that Chock's hamburger was "spicier" and of a different texture from other hamburgers (Tr. 834), but the fact that other manufacturers do not presently make hamburgers totally identical to Chock's was not shown to be due to any difficulty in reproducing Chock's hamburger, assuming specifications are provided.

It is clear from our review of the sparse record with respect to its hamburger that Chock has come nowhere near demonstrating that it must manufacture it in order to maintain the requisite quality. A more difficult question, however, is suggested by the administrative law judge's conclusion that the hamburgers are not legally "distinctive."

While a food franchisor has every right to take steps to ensure that his franchisees purvey food of a particular quality, the standards imposed on food items must be reasonably related to a legitimate business purpose—maintenance of high quality and distinctive taste being the critical matters here. Specifications which bear no relation to legitimate business purposes may not be used to foreclose competitors from competing with the franchisor.[16]

The dilemma is illustrated by Chock's hamburger. Evidence was introduced at trial to show that certain franchisees had undertaken to purchase hamburger from outside suppliers, behavior which was greeted in certain cases by threats of termination from Chock. (CX 89, 92; Tr. 453–57) It was generally conceded that the "outside" hamburger was different, although franchisees maintained stoutly that in many cases it was better. (Tr. 242–43, 550, 653–55, 678) At one point, for instance, Chock hamburger was apparently manufactured with non-meat additive (Tr. 678), and franchisees believed its fat content was greater than that of commercial alternatives. (Tr. 653–55) On one occasion, Chock lowered the price of its hamburger in response to complaints from franchisees concerning the price disparity between the hamburger they were required to purchase from Chock and that available elsewhere. (Tr. 652–54) (That such a disparity could arise is, of course, a graphic illustration of the potential abuses of the tying arrangement.)

If Chock is permitted to specify the precise ingredients of its hamburgers to its franchisees, this may effectively foreclose the possibility of competition for their sale. That is so because it well may not be economically feasible for any competing manufacturer to make hamburgers to Chock's specifications for a market the size of Chock's franchisees, whereas Chock itself would have a greater incentive to do so since it would manufacture for company-owned stores as well as itself. (*Cf.*, Tr. 833) Indeed, imposition of unreasonable specifications is a device that may be used by

[16] See *International Salt Co.* v. *United States*, 332 U.S. 392, 398 (1947).

any franchisor to foreclose competition in the sale of items to its franchisees.

Based on the facts of this case, however, it appears to us that Chock's insistence on sales by its franchisees of a hamburger with an admittedly different taste is a requirement reasonably related to the maintenance of the quality and image of the Chock operation. Nothing was indicated, as noted above, of course, to suggest that others could not duplicate the taste if provided with the specifications for Chock's hamburger, and thus it is clear that the company may not lawfully forbid its franchisees to purchase hamburger from suppliers who are willing to prepare it to reasonable specifications set by Chock, and that Chock may not withhold such specifications if it wishes to insist that its franchisees' hamburgers conform to them.

Salad Sandwich Spreads

Chock's salad sandwich spreads are made from a variety of ingredients. The illustration used by Chock's witness was shrimp salad made from celery, shrimp, a salad dressing, horse radish, spices and catsup. (Tr. 956) Special equipment is used to sterilize the celery and other ingredients and a bacterial count is taken at certain stages of the operation. While the equipment used in this process is not "shelf item standard equipment," it was acknowledged by Chock's representative that it would be available to other manufacturers. (Tr. 903) A Chock witness also acknowledged that

> From speaking to members of the Board of Health in New York City, I would say similar methods of sterilization is carried out by the other plants. None use the method we use. (Tr. 977)

The salad sandwich spreads are transported in refrigerated trucks to the licensees, to maintain freshness and purity. There was no testimony to indicate that others could not maintain this same freshness and purity, (*Cf.*, Tr. 978) although a question was raised as to whether it would be economically feasible for would-be competitors to employ the refrigerated trucks utilized by Chock to maintain the product in transit to franchisees. (Tr. 898–99)

In light of its witnesses' testimony on this matter, we find Chock's contention that only it can maintain the requisite quality of its salad sandwich spreads unsupported. No serious claim is made that other manufacturers could not duplicate the flavor or texture of the spreads, or maintain the necessary quality control.

We find it hard to believe, and surely Chock did not demonstrate, that there are not to be found in its market area numerous manufacturers capable of producing uncontaminated salad sandwich spreads, and possessing a reputation for so doing. Indeed, Chock's own witnesses virtually admitted as much.[17]

Coffee

Chock argues that "the creation of a coffee blend and preservation of its uniformity over a substantial period of time is an art * * *." (RPF 63) It is certainly not an exact science. The record indicates that reproduction of the premium Chock coffee served in Chock restaurants may not be achieved by means of specification of ingredients, but only through a process of trial and error involving blending of coffee beans and cup-tasting by an expert blender.

According to Chock's expert witness, the types of coffee beans used in the Chock blend are subject to constant change, at least once, and on occasion several times, per week. (Tr. 870–71) A green coffee bean answering to a particular description may differ from one season or even one shipment to another. (Tr. 856–60) The coffee purchaser can thus not order beans by specifying the type of bean, but must instead purchase, brew, and cup-taste a particular bean to determine its flavor and suitability for the Chock blend. (Tr. 860–63) Further cup-tasting may be necessary after a particular shipment of beans has arrived to determine whether the bean received corresponds to the one tasted at the time of purchase. (Tr. 864)

An expert witness called in rebuttal by complaint counsel testified that in his view it would be possible for him to produce Chock coffee by undertaking the same process of trial and error, blending and cup-tasting to produce a brew corresponding in taste to that produced by Chock's own blender. (Tr. 1001–02) This may well be so, but clearly the likelihood of deviation in flavor arising from differences in the subjective judgments of two coffee tasters is much greater than the likelihood of such deviation in the case of a product whose ingredients can be readily specified and which

[17] It may be that no manufacturer is to be found who is willing to undertake distribution of the product in question to Chock franchisees, given the volume involved, and the necessity to customize the material. If this is indeed the case, Chock franchisees will be obliged to continue to purchase from Chock in order to be able to sell salad sandwich spreads of the requisite character and quality. In the event, however, that a reputable manufacturer wishes to undertake distribution of salad sandwich spreads to Chock franchisees, it is clear that Chock is obliged to permit him to do so. It should be noted that Chock has seen fit to have the filling for its distinctive nutted cheese sandwich made by an outside supplier. (Tr. 952–53)

is thus less a result of the gustatory judgment of particular individuals. An alternative—to subject coffee produced by competing manufacturers to the constant scrutiny of Chock's own blender would seem clearly impracticable.

Under these circumstances, we believe that Chock has sustained its affirmative defense with respect to its coffee. Given the central role played by coffee in the Chock franchises, and the consequent necessity that its taste and quality be precisely maintained, and given that the flavor and quality of a particular blend depends so heavily on the subjective judgment of the coffee blender, we conclude from the record that maintenance of the quality of coffee served in Chock restaurants would not be practicable were others permitted to undertake manufacture of it.[18]

Baked Goods

Chock baked goods include whole wheat doughnuts, pies, cakes and pastries, and rolls and breads.

A variety of witnesses testified to the uniqueness and high quality of Chock baked goods, although it was not clear from the record that such distinctive products could not be duplicated by others.

Chock's pies are different in that they are fruitier, runnier and less starchy than those produced by commercial bakeries, are made by a two-step process not apparently employed generally by commercial bakers (Tr. 965–66, 947), and are free of certain chemical additives commonly used in commercial baked goods. (Tr. 947) The runniness of certain of Chock's fruit pies has apparently been a source of some consternation to Chock franchisees; (Tr. 679–80, 825, 603, 626) the record reveals several instances in which franchisees sought alternative sources of lemon pie in response to perceived "deficiencies" in this Chock product (or in an effort to obtain less expensive pie). (Tr. 604, 826, 680) Chock, to the contrary, regards runniness as, if not a virtue in itself, then an inevitable concomitant of the distinctiveness of these baked products.

Chock's cakes and pastries are touted as being "made with the same ingredients your grandmother used," containing "no glycerides, no preservatives, never an artificial color or flavor" and

[18] It must be noted that this finding depends heavily on the circumstances of this case. It is possible to envision other food franchise arrangements in which coffee would constitute a quite insignificant menu offering, and the quality of such coffee would figure in no way in promotion of the franchise name or image. Under these circumstances, it might be considerably more difficult to argue that service of a particular blend of coffee (that made by the franchisor) was in any way related to a legitimate business purpose.

using "fresh milk, top quality eggs, Grade AA butter, pure flavors." (RX 21–24, 25, 27, p. 235, 32A–B, 36–41, 63–64, 66–67; Tr. 831)

Chock's rolls and breads allegedly derive their uniqueness from their "eggier" and more "delicate" qualities, although Chock apparently was seeing fit at the time of trial to permit others to manufacture its rye bread and frankfurter rolls. (CX 84A–B; Tr. 949–50)

Respondent's witnesses seemed to reserve highest praise for Chock's whole wheat doughnut, samples of which were served at the trial, but not, contrary to the promise of respondent's counsel, on appeal. (Tr. 899) The batter for this doughnut is supplied to Chock by an outside supplier, but thereafter Chock utilizes a process of frozen storage which is apparently uncommon to the manufacture of other doughnuts in the area. (Tr. 910–11)

There was some dispute as to whether or not other bakers could in fact duplicate Chock's baked goods if provided with the ingredients and other relevant details of manufacture. An independent food technologist called by Chock testified that mere specification of ingredients might be insufficient to guarantee equality of products, that differences in equipment might well result in a somewhat different product. (Tr. 894–95) This witness cited his experience with Pepperidge Farms, which had endeavored to duplicate particular products from almost identical plants in different states, and found itself unable to do so. (Tr. 893–95) On cross-examination the witness adhered to the view that duplication via specification would not be feasible to the extent that at least certain consumers would be able to detect differences in non-Chock products. (Tr. 902–03)

While we find it difficult to believe that duplication of baked goods via specification is quite so formidable a task as Chock's witnesses would have us believe, on the record before us Chock has made out a *prima facie* case that duplication of its baked goods by others would not be practicable. No evidence was adduced by complaint counsel to rebut the testimony of Chock's experts on this score.

Our finding with respect to baked goods relates, of course, only to those actually manufactured by Chock. To the extent that Chock may be willing to entrust the manufacture of certain items (such as rye bread) to other manufacturers, there is clearly no warrant for insistence that such items be purchased through Chock.

Miscellaneous Chock-made Items

Little evidence was introduced by Chock with respect to a quality-control justification for certain miscellaneous items manufactured by it, including its "Diet-Freeze" chocolate drink, orange drink, coffee whitener, and certain other Chock beverages and food items. (RPF 78) The "Diet-Freeze" is a trademarked item which is advertised as being distinctive with respect to fat content, calories, and freedom from artificial sweeteners. (RX 44–45, 71; CX 146A–B) Clearly Chock may insist that a competing manufacturer wishing to sell this product to its franchisees duplicate it in all respects. In the case of other items, such as orange drink and coffee whitener, it is hard to see what justification can possibly exist for requiring that these items be purchased by Chock licensees from Chock, or in what way such substances are at all distinctive.[19]

Trade Secrets

Chock alleges further, by way of affirmative defense, that the specifications for those products it manufactures constitute trade secrets, and that it is unfair to require that they be divulged to competing manufacturers.[20] We reject this argument for several reasons.

Assuming, *arguendo,* that the ingredients of Chock's foods may be considered trade secrets within the broadest meaning of that broad term,[21] the proposed order in this case would in no way require that they be abandoned. If Chock desires that its licensees continue to sell products identical in composition to those manufactured by it, it need only license other willing and able manufacturers to produce according to its formulae, retaining appro-

[19] Chock argues, and the administrative law judge concluded, that the volume of each item considered separately is "relatively *de minimis*" and therefore Chock should be permitted to continue requiring its franchisees to buy them from Chock. We disagree. The total volume of items subject to the illegal tying agreements is clearly not insubstantial. (See p. 16 *supra* [p. 640 herein]). In dealing with franchise tie-ins involving sales of numerous items, courts have in the past looked to the total volume of commerce involved. See *Susser* v. *Carvel,* 332 F.2d 505, 514 (2nd Cir. 1964). There is clear justification for this approach, in that a given wholesaler may well supply many individual items to Chock franchisees, if unconstrained by the tie, just as Chock now supplies numerous items together. Complaint counsel's burden of demonstrating substantiality is thus satisfied by a showing that the *aggregate* volume of commerce subject to tying agreements is not insubstantial.

[20] This argument was raised in the *Chicken Delight* case, *infra,* and implicitly rejected by the trial judge who declined to solicit a finding regarding trade secret status when he instructed the jury. See BNA *Antitrust and Trade Regulation Report,* No. 458, pp. A1–2 (April 21, 1970).

[21] Chock's showing on this point was far from convincing. While evidence was adduced to the effect that the formulae for hamburgers and salad sandwich spread were maintained in confidence, there was no showing that these formulae were in any way commercially valuable, or that they were not ascertainable by one who might be interested in them. (See n. 22, *infra.*)

priate legal remedies in the event of disclosure of alleged secrets by such manufacturers. We might note that Chock has apparently found this approach to be quite adequate in the case of one of its allegedly most distinctive items, the whole wheat doughnut. The batter for this item is prepared by Doughnut Corporation of America pursuant to a contract presumably satisfactory to Chock. (Tr. 952) We see no reason why such an approach would not be wholly adequate with respect to other Chock "trade secrets."

Concededly, licensing of a trade secret involves a certain loss of control, since the legal remedies for negligent or willful disclosure by the trade secret licensee may not constitute adequate compensation to the licensor. At the same time, however, there is a strongly countervailing consideration in the case of a tie-in—the restraint of trade which would result were a manufacturer to be allowed both to withhold its product specifications from competitors and at the same time to require its licensees to purchase products conforming to those specifications. It is plainly absurd to contend that simply because the Chock hamburger has some amount of spices in it that no one else is able to guess, or because the shrimp salad contains an amount of horseradish that is not precisely determinable by others, that Chock may therefore establish itself as the sole supplier of these products to a group of independent businessmen—its franchisees. This consideration compels, if not categorical rejection of the trade secret defense, at the very least careful scrutiny of the character of the alleged secrets involved, and a showing of probable substantial harm from a request that they be licensed.[22] Surely no showing has been made by Chock in this case that it will suffer any harm whatsoever if it elects to license other manufacturers to produce according to formulae it provides them for its hamburgers and

[22] Precise definition of a trade secret is not possible as numerous authorities have noted. The *Restatement of Torts* suggests several factors to be considered in determining whether or not the status is deserved; among them being:

(4) the value of the information to [the employer] and to his competitors;

(5) the amount of effort or money expended by him in developing the information;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others. [§ 751, comment (b)]

The evidence respecting hamburger at least suggests that no manufacturer would have any commercial interest in duplicating the Chock recipe, except insofar as it might be legally necessary to do so in order to supply Chock franchisees. Similarly, no evidence was presented to indicate that possession of the Chock formulae for salad sandwich spreads would enable any manufacturer to sell more salad sandwich spread than otherwise. It is pointless to argue whether or not Chock has thereby failed to demonstrate that its formulae deserve categorization as "trade secrets." What is crucial is that no demonstration has been made to suggest injury from licensing of these formulae in any way justifying the restraint of trade it is suggested be sanctioned in order to avoid that injury.

salad sandwich spreads. And, of course, Chock may also elect to permit its independent franchisees simply to buy hamburgers and salad sandwich spreads of similar quality from other manufacturers, without disclosing the exact ingredients of its own products, if it prefers.

Consumer Expectations

Finally, by way of affirmative defense, Chock asserts that manufacture by it of various products is necessary to vindicate its customers' legitimate expectations concerning the character of its food. Chock asserts that a consumer survey, conducted for purposes of the instant litigation,

> * * * established without contradition that the majority of those who patronize Chock restaurants, whether company-owned or licensed, do so *because* they believe that the foods served there are uniform in quality and taste, and *because* the coffee is Chock's own, and the baked goods and special salad sandwich spreads are prepared fresh daily in Chock's own commissary. (RX 55; RPF 20) (RB 53)

Presumably the argument is that if other manufacturers are permitted to manufacture Chock salad sandwich spreads, consumer expectations concerning the *origin* of these products will be defeated.[23]

We do not share respondent's or the administrative law judge's confidence concerning the capacity of the survey in question to determine the proposition for which it is cited. For instance, the question from which respondent derives its assertion concerning consumer expectations as to the *origin* of the salad sandwich spread was:

> When people order a salad sandwich at a Chock restaurant, they expect that the salad mix used for the sandwich has been freshly prepared by Chock Full O'Nuts and is of consistent high quality. (RX 54)

The consumer is then asked to check "Agree" or "Disagree" and to indicate whether the statement is "Important" or "Unimportant" in his decision to eat at a Chock Full O'Nuts restaurant.

The question as it is phrased makes it impossible to determine to what extent the question of product *origin* as opposed to product *quality* figures in the consumer's choice. What response should be made to the question, and was made in practice, by people who believed that "freshly made" and "of consistent high quality" are

[23] To the extent that this argument is identical to that regarding quality control, *i.e.*, that consumer expectations regarding *quality* will be disappointed, we have already concluded, *supra.*, that this has not been demonstrated. No questions concerning hamburger were asked, and our determination with respect to baked goods and coffee, *supra.*, renders the "expectations" argument as to them superfluous.

important, but who may not have cared whether the product was produced in Chock's Secaucus commissary or in one of numerous other sanitary, city-inspected facilities from which millions of brave New Yorkers somehow dare to purchase salad sandwich spreads?

In addition, the survey in question is a dubious tool for determining why precisely consumers patronize Chock. The survey makes a variety of leading statements of the sort quoted above, and asks whether or not each statement is important or unimportant in the customer's choice of Chock. It makes no effort to determine whether or not scores of other factors are important in the decision to patronize, or what impact would result from a change in one factor (such as manufacture of salad sandwich spread elsewhere than in the Chock commissary).

Nothing in the order in this case precludes Chock from insisting that its licensees maintain a given level of quality in the products they sell. That being so, we find no basis upon which to conclude that material expectations of Chock consumers will in any way be disappointed by the order here. Moreover, it is not clear to us that fulfillment of consumer expectations is justification for a restraint of trade. The solution in a case in which consumers do indeed expect the manufacturer to engage in practices violative of the law may be disclosure notifying them that the practice has been changed. It is hardly necessary, however, in this case.[24]

IV. ORDER

The order in this case differs in several minor respects from the Notice Order issued with the complaint, in conformity with the findings and conclusions which we have reached.

The prohibition on price-fixing (Par. I–1) is essentially the same as that contained in the Notice Order (Par. III).

Paragraph I–2 of the order corresponds to Paragraphs I and IV of the Notice Order. Chock is forbidden to require purchase by

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[24] It is also unclear how seriously Chock itself takes its customers' expectations concerning the origin of its products. For instance, the questionnaire at issue included the statement:

"When people order baked goods at a Chock restaurant, they expect that they have been made fresh daily by Chock Full O'Nuts." (RX 54)

An overwhelming percentage of Chock patrons queried considered this factor important in their decision to patronize Chock. In fact, some of Chock's baked goods are not made by Chock (rye bread and hot dog rolls at the time of trial). At least with respect to rye bread it appears that Chock has found it economically preferable not to manufacture that itself. We do not believe that Chock means to argue that it is obliged as a matter of fairness to consumers to manufacture all its baked goods in perpetuity, so long as it does not affirmatively advertise that it does so, and so long as it insists on maintenance by its licensees of advertised quality.

licensees of any "food products (with the exception of premium grade coffee and baked goods manufactured by Chock itself), restaurant supplies, services or any other products from respondent or from any other source," however Chock may establish "reasonable standards of manufacture, reasonable specifications, reasonable recipes or formulae for products sold or used in its licensed restaurants, if such standards, specifications, recipes or formulae are made available without charge to manufacturers desiring to produce products for Chock licensees pursuant to them. Furnishing of standards, specifications, recipies, and formulae may be made subject to assurances of confidential treatment by those to whom they are provided." The Commission will not require that specifications established by Chock be approved by it in advance, as provided in the Notice Order; however it will, as in all matters, review the manner in which Chock is complying with its order.

Paragraph I–3 of the order (Par. II of Notice Order) requires Chock to license others, without charge, to imprint its trademark on paper products, plastic serving utensils, and other restaurant supplies for exclusive sale to Chock licensees, *in the event Chock should choose to insist upon use by licensees of imprinted restaurant supplies*. There was some evidence presented at trial to suggest that Chock had delayed in granting permission for other paper products manufacturers to imprint the Chock logo, while some licensees may have been under the impression that presence of the mark was required. (Tr. 341–45) We do not question the right of Chock to require that items used in its restaurants bear the Chock mark, nor do we challenge its right to the exclusive use of its trademark. We merely insist that Chock not do both at the same time.

Paragraphs II, III, IV, and V of the order are similar to Paragraphs V, VI, VII, and VIII of the Notice Order. Letter "A" which Chock is required to send to its licensees has been changed in conformity with our opinion and order.

For the foregoing reasons, the appeal of complaint counsel is granted, to the extent provided hereinabove. The initial decision of the administrative law judge will be vacated and set aside, and an appropriate order will be entered.

Final Order

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having granted, in part, the appeal:

It is ordered, That the initial decision be vacated and the appeal of complaint counsel be granted to the extent provided hereinafter.

Accordingly, the following cease and desist order is hereby entered:

ORDER

I.

It is ordered, That respondent Chock Full O'Nuts Corporation, Inc. (hereinafter referred to as "Chock" or "respondent"), a corporation, its successors, assigns, officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the franchising or licensing of persons to operate a restaurant business, the operation of a food manufacturing business, and the operation of restaurant supplies business, such franchising, licensing, and operations constituting commerce, as commerce is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Entering into, carrying out, continuing or cooperating in any course of action or any understanding, agreement, combination or conspiracy to:

(a) Establish, fix or maintain the resale prices of any products; or

(b) Require any licensee to adhere to any resale prices, fixed or maintained by respondent; or

(c) Require any licensee to adhere to resale prices set forth in any sample or exhibit menu, menu insert, menu sticker, price list, advertising announcement, store owner's operation manual, newsletter or bulletin; or

(d) Terminate or threaten to terminate the license of any licensee who refuses to sell products at prices fixed or maintained by Chock; or

(e) Establish, fix or maintain the resale prices charged by any licensee for any product in connection with any fair trade program in states where respondent sells that product.

2. Requiring in any manner or by any means, directly or indirectly, its licensees to purchase food products (with the

exception of premium grade coffee and baked goods manufactured by Chock itself), restaurant supplies, and any other products or services from respondent or from any other source;

Provided, That nothing in this order shall prohibit respondent from establishing reasonable standards of manufacture, reasonable specifications, reasonable recipes or formulae for products sold or used in its licensed restaurants, if such standards, specifications, recipes or formulae are made available without charge to manufacturers desiring to produce products for Chock licensees pursuant to them. Furnishing of standards, specifications, recipes, and formulae may be made subject to assurances of confidential treatment by those to whom they are provided.

3. Refusing to grant to manufacturers of paper products, plastic serving utensils, or other restaurant supplies meeting respondent's established standards and specifications, permission to imprint the "Chock Full O'Nuts" trademark and/or trade name upon such items for exclusive sale to respondent or respondent's licensees, in the event that respondent chooses to require its licensees to use products, utensils, or supplies with the "Chock Full O'Nuts" trademark upon them. No charge of any kind shall be made by respondent to any such manufacturer in connection with the granting of permission to imprint the trademark and/or trade name.

II.

It is further ordered, That respondent forthwith forward or deliver by ordinary mail a copy of this order and of attached letter "A" to each present and every future licensee of respondent.

III.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, take all necessary action to effect the cancellation or deletion of each provision of every contract or agreement between respondent and any of its licensees which is contrary to, or inconsistent with, any provision of this order.

IV.

It is further ordered, That respondent shall, within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the terms of this order.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent's constitution, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Letter "A"

(On official Chock Full O'Nuts stationery)

Gentlemen:

The Federal Trade Commission has entered an Order against Chock Full O'Nuts Corporation which, among other things, prohibits Chock from requiring you to purchase from it food products (with the exception of premium grade coffee and baked goods manufactured by Chock itself), restaurant supplies, and any other products or services. In addition, it requires Chock to permit other manufacturers to imprint the Chock trademark on any items used or sold by licensees which Chock may require to bear such a trademark. The Order further prohibits Chock from fixing the prices at which products are sold in your stores. A copy of the Order is enclosed.

Chock retains the right to establish reasonable standards of manufacture, reasonable specifications, and reasonable recipes or formulae for products sold in its restaurants. Chock will supply these, without cost, to other manufacturers who may desire to sell the products to which they apply to Chock licensees.

Pursuant to the terms of the Order, you are also free to set the prices for all products sold in your store; and you are not required to adhere to any prices set forth in sample or exhibit menus, menu inserts, menu stickers, recommended price lists, advertising announcements, store owner's operation manual, newsletters or bulletins.

Sincerely,
William Black,
Chairman of the Board
Chock Full O'Nuts Corporation, Inc.

IN THE MATTER OF

AMSTAR CORPORATION, ET AL.

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

Docket 8887. Complaint, May 8, 1972—Decisions, Oct. 2, 1973.

Consent order requiring a New York City manufacturer of sugar, among other things, to cease making false nutritional claims and from using false endorsements regarding its products. Further, respondent is prohibited from advertising Domino sugar for a one-year period unless it runs corrective advertising.

Consent order requiring two advertising agencies located in Philadelphia, Penn. and Los Angeles, Calif., which handle the advertising for Amstar Corporation, among other things to cease misrepresenting the nutritional value of sugar and to cease using false endorsements in advertising refined sugar.

Appearances

For the Commission: *Judith A. Mitnick* and *Michael A. Perlman.*

For the respondents: *Frederick M. Porter, Assistant General Counsel,* for Amstar Corporation, New York, N.Y.; *Sullivan & Cromwell,* New York, N.Y. for Lewis & Gilman, Inc.; *Covington & Burling,* Wash., D.C. and *Gang, Tyre & Brown,* Hollywood, Calif. for Dailey and Associates.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Amstar Corporation, a corporation, Lewis & Gilman, Inc., a corporation, and Dailey and Associates, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Amstar Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1251 Avenue of the Americas, New York, N.Y.

PAR. 2. Respondent Lewis & Gilman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1700 Market Street, Philadelphia, Penn.

PAR. 3. Respondent Dailey and Associates, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and place of business located at 3807 Wilshire Boulevard, Los Angeles, Calif.

PAR. 4. Respondent Amstar Corporation is now, and for some time last past has been, engaged in the manufacture, sale and distribution of refined sugars which come within the classification of a "food," as said term is defined in the Federal Trade Commission Act. Its refined sugars are usually, but not always, sold for household use under the "Domino" and "Spreckels" brands.

PAR. 5. Respondents Lewis & Gilman, Inc., and Dailey and Associates, are now, and for some time last past have been, advertising agencies of Amstar Corporation and now and for some time last past, have prepared and placed for publication and have caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of Amstar Corporation's refined sugars, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 6. Respondent Amstar Corporation causes the said products, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Amstar Corporation maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 7. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said refined sugars by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in magazines and newspapers, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said refined sugars in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are a number of television and radio commercials, labels, and point-of-purchase advertisements featuring endorsements by athletic organizations. These commercials and promotional materials contain the message that the consumption of said refined sugars will yield "Strength, Energy and Stamina," or "SES." Several such commercials are set forth in printed form in subparagraphs A – E below as approximate descriptions of the contents of the films and tape recordings of some of the aforementioned commercials.

A. One such television commercial shows a youngster at the breakfast table with a bowl of cereal. He says, "Pass the sugar, Mom." The announcer then states that Domino Sugar is the official sugar of the National Football League Training Tables, and a scene of one player passing a sugar bowl to another is shown. The scenes shift between the family breakfast table and the football training table, while the announcer says, "It gives you and your family the same strength, energy and stamina that powers the pros. Get strength * * * energy * * * and stamina. Get Domino Sugar. It's on NFL training tables. It's on the tables of healthy, active people everywhere."

B. Another such television commercial depicts family members in action situations—cheerleading, playing handball, bowling and riding a bike—on one half of a split screen. On the other half of the screen are the words "She needs SES" alternating with "He needs SES." The split screen continues, now with a football player in action on one side and the words "He has SES" on the other. The announcer says "SES powers the Pros." Still on a split screen, a bag of Domino Sugar, with the words "Strength Energy Stamina" printed prominently on it, appears. While the scene of the bag of Domino sugar remains constant, the other half of the screen shows the words "This is SES" and "STRENGTH ENERGY STAMINA." The announcer says "This is SES Domino Sugar. Strength * * * Energy * * * Stamina. It's the official sugar of the National Football League Training Table." Then with a bag of Domino Sugar still focused on one side of the screen, the family action scenes are repeated. Along with this, the announcer says "Serve your family Domino Sugar, the natural sweetener. Domino Sugar * * * SES for healthy, active people." The messages "STRENGTH ENERGY STAMINA for healthy, active people," and "SES for healthy, active people" are shown on the split screen with a bag of Domino Sugar.

C. Another television commercial features an enthusiastic young lady in a loose-fitting baseball uniform, holding a bag of Domino Sugar. She says "Hi, everybody! You want your kids to have strength, energy, and stamina, don't you? You want your weary old bones to have strength, energy and stamina, don't you? Well, besides plenty of sleep and exercise and all that stuff, you should have sugar. Sugar! MMmmm! Bet you didn't know that. *And not just any old sugar you never heard of!*" The camera focuses on the bag of Domino Sugar showing the words "Strength Energy Stamina" as the young lady continues "You ought to have Domino Sugar. What would you say to a sugar that's so terrific * * * it's been chosen by whole baseball teams for strength, energy and stamina? You wouldn't believe it. Well, you're wrong. Domino is so terrific it's the official sugar of major league baseball." The camera focuses on the words "Official Sugar of Major League Baseball." The girl continues "Even if you don't know anything about baseball, you know that's got to be something! There's something in natural Domino Sugar that turns into strength, energy and stamina—the minute you eat it." (emphasis added)

D. A television commercial for Spreckels Sugar centers around a young boy in baseball gear and his mother. The boy comes to the mother in the kitchen and says "Mom—you know Spreckels Sugar is the official sugar of major league baseball * * * maybe I'll eat Spreckels and be a professional ballplayer." Mom says "It's nice sugar, but you'll be a doctor." As the camera focuses on a bag of Spreckels Sugar flanked by a baseball and a glove, the announcer states "Spreckels Sugar gives strength, energy and stamina to pitchers * * * shortstops * * * and [as a surgeon's head mirror encircles the top of the Spreckels Sugar bag] surgeons."

E. Three such radio commercials are set out as follows:

Strength—Stamina—and Energy—that's what you give your family when you serve them foods made with Spreckels Sugar. Matter of fact—Spreckels is such a good energizer, it's the official sugar of major league baseball! So the next time you need sugar, buy the one that scores big for sweetness. And Neatness—Spreckels Sugar in the easy-open/easy-pour zip top bags. Now with a great baseball warm-up jacket offer on their sunny yellow backs!

No one knows better than Mother, what's good for her family. That's Mother's job. And that's why most mothers all over the country serve Domino Sugar to their families. They know that Domino Sugar has what it takes to keep a healthy, active family on the go. Domino Sugar has S-E-S. S-E-S stands for strength, energy, stamina. And those are three big words to a Mother with a family. Remember S-E-S—strength, energy and stamina next time you're at the store. And pick up Domino Sugar. It'll give you and your healthy, active family the S-E-S you need—by the bagful. That's why lots of Mothers call Domino Sugar *the premium sugar*. And that's why it's a must on your shopping list. So write it down, right now. Domino Sugar. *The sugar with S-E-S*—strength, energy and stamina. It's the sugar to serve to your family at every meal. Get strength, energy and stamina—get Domino Sugar—it's a tradition with healthy, active families. (emphasis added)

Mrs. Homemaker—somebody really cares about you! The Domino Sugar people know the mileage you cover—cleaning, cooking, shopping, washing. And how you're on your toes all the livelong day. So everyone at Domino Sugar thinks you ought to know about S-E-S. S-E-S is strength, energy and stamina, and you get all three by the bagful in Domino Sugar. That's why it's served on the training tables of the National Football League. And if it can power the football pros, just think what it can do for you and your active family. All that strength, energy and stamina in Domino Sugar helps keep you and everybody else at home going full steam ahead. And that's why it makes good sense to make it a must on your shopping list. So serve Domino Sugar to your family and give them S-E-S—strength, energy and stamina by the bagful.

F. Two such print media advertisements are the following:

PAR. 9. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication that:

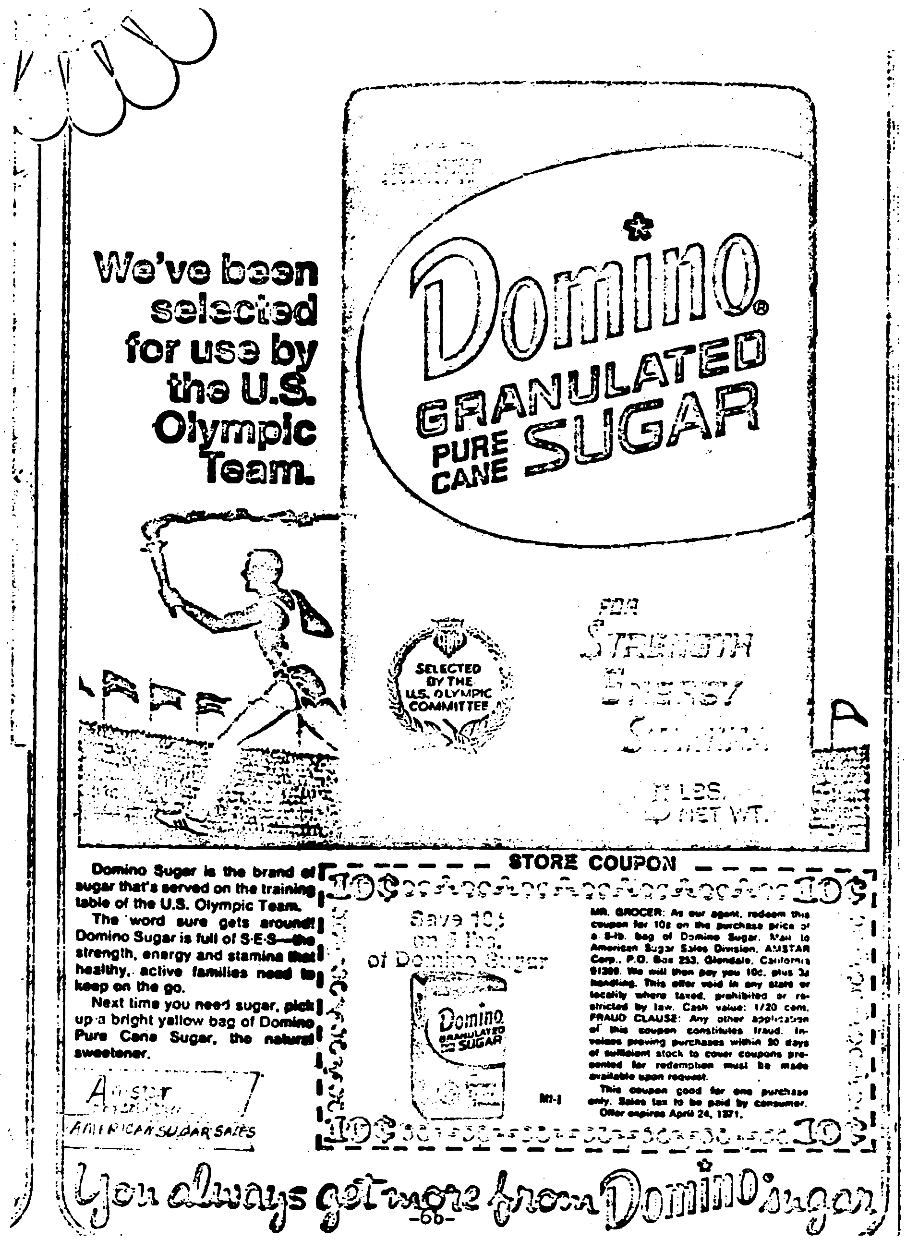
A. All individuals will derive strength, energy and stamina from the consumption of Domino and Spreckels refined sugars.

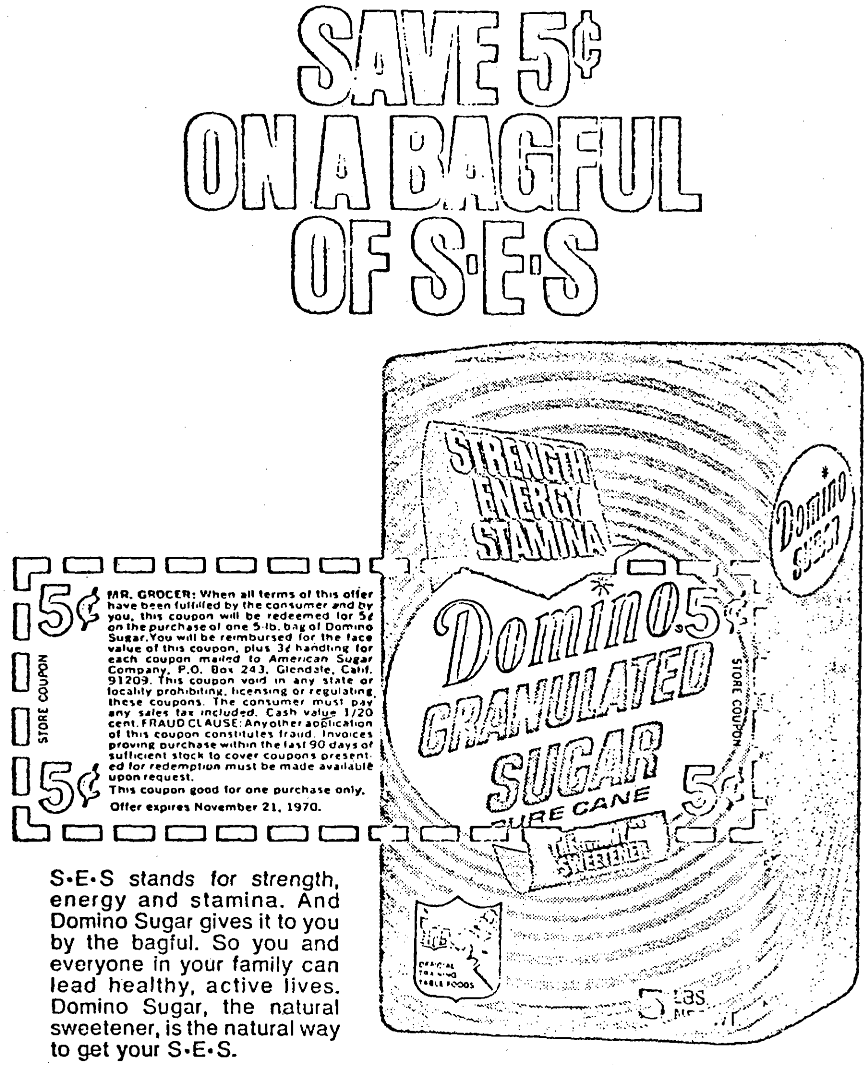
B. Domino Sugar and Spreckels Sugar have been selected as the "official sugar" of the National Football League and of Major League Baseball because of their superior quality and nutritional value.

C. Domino Sugar has been selected for use by the U.S. Olympic Team and by the U.S. Olympic Committee because of its superior quality and nutritional value.

D. The table use of Domino Sugar and Spreckels Sugar by athletes enables the athletes to perform better in their respective sports.

E. Eating refined sugar is as necessary a factor in staying healthy as sleeping and exercising.


We've been selected for use by the U.S. Olympic Team.
Domino
GRANULATED
PURE CANE SUGAR
SELECTED BY THE U.S. OLYMPIC COMMITTEE
LBS. NET WT.
Domino Sugar is the brand of sugar that's served on the training table of the U.S. Olympic Team.
The word sure gets around! Domino Sugar is full of S·E·S—the strength, energy and stamina that healthy, active families need to keep on the go.
Next time you need sugar, pick up a bright yellow bag of Domino Pure Cane Sugar, the natural sweetener.
Amstar
AMERICAN SUGAR SALES
STORE COUPON
10¢
of Domino Sugar
Domino GRANULATED SUGAR
MR. GROCER: As our agent, redeem this coupon for 10¢ on the purchase price of a 5-lb. bag of Domino Sugar. Mail to American Sugar Sales Division, AMSTAR Corp., P.O. Box 253, Glendale, California 91209. We will then pay you 10c, plus 3¢ handling. This offer void in any state or locality where taxed, prohibited or restricted by law. Cash value: 1/20 cent. FRAUD CLAUSE: Any other application of this coupon constitutes fraud. Invoices proving purchases within 90 days of sufficient stock to cover coupons presented for redemption must be made available upon request.
This coupon good for one purchase only. Sales tax to be paid by consumer. Offer expires April 24, 1971.
You always get more from Domino sugar
-66-



Adv. No. 51-A-70—300 lines—b/w—Newspapers

F. Domino Sugar and Spreckels Sugar are substantially different from all other refined sugars in composition and food value.

G. Mothers can rely on Domino Sugar and Spreckels Sugar to keep their families healthy and active.

PAR. 10. In truth and in fact:

A. Not all individuals will derive strength, energy and stamina by consuming Domino refined sugar, Spreckels refined sugar, or any other refined sugar. The strength, energy and stamina that an individual possesses depend on many factors, including but not limited to general body build, exercise, rest, and diet.

B. Domino Sugar and Spreckels Sugar were not selected as the "official sugar" of the National Football League and of Major League Baseball because of their superior quality and nutritional value. Said selection was based primarily on monetary consideration furnished by respondent Amstar Corporation.

C. Domino Sugar was not selected for use by the U.S. Olympic Team and by the U.S. Olympic Committee because of its superior quality and nutritional value. Its selection by the U.S. Olympic Committee was based primarily on monetary consideration furnished by respondent Amstar Corporation.

D. The table use of Domino Sugar and Spreckels Sugar by athletes does not enable them to perform better in their respective sports. Refined sugar is used at the table primarily for the purpose of sweetening beverages and other foods. Such table use does not contribute substantially to the athletic training program or to athletic performance.

E. Eating refined sugar is not a necessary factor in staying healthy. Other carbohydrates are nutritionally suitable alternatives to refined sugar in a balanced diet, whereas there are no suitable alternatives to sleep and exercise, if one is to remain healthy.

F. Domino Sugar and Spreckels Sugar are not substantially different from all other refined sugars in composition and food value. Refined sugars generally, including Domino Sugar and Spreckels Sugar, consist almost entirely of sucrose, a simple carbohydrate.

G. Mothers cannot rely on Domino Sugar and Spreckels Sugar to keep their families healthy and active.

Therefore, the advertisements referred to in Paragraph Eight were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraph Eight and Nine were, and are, false, misleading and deceptive.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Amstar Corporation has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondents.

PAR. 12. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents Lewis & Gilman, Inc., and Dailey and Associates, have been, and now are, in substantial competition in commerce with other advertising agencies.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent Amstar Corporation's refined sugars by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on May 8, 1972, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondents is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having thereupon placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter, now, in further conformity with the procedure prescribed in its rules, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Amstar Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its general office and place of business located at 1251 Avenue of the Americas, New York, New York.

2. Respondent Lewis & Gilman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 1700 Market Street, Philadelphia, Pennsylvania.

3. Respondent Dailey and Associates is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3807 Wilshire Boulevard, Los Angeles, California.

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

ORDER AS TO RESPONDENT AMSTAR CORPORATION

I. *It is ordered,* That respondent Amstar Corporation, a corporation, and its officers, agents, successors and assigns, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of refined sugar forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

a. The consumption of any such product is indispensable for proper or good health.

b. The consumption of any such product, in and of itself, will increase one's athletic ability, or that any such product is a special or unique source of strength, energy or stamina.

c. The consumption of any such product is indispensable to enable one to lead an active life.

d. The consumption, of any such product, in and of itself, will satisfy the concern of parents for the health of their families.

2. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents the value of any such product in an athlete's diet.

3. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act which contains any of the representations prohibited in subparagraph 1 above, and the misrepresentation prohibited in subparagraph 2, above.

II. *It is further ordered,* That respondent Amstar Corporation, a corporation, and its officers, agents, successors and assigns, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

a. Any such product has been chosen for use by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, where said choice is based primarily on monetary consideration flowing to such association, league or organization.

b. Any such product is used by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, unless said contribution is substantial when the product is used in the quantity and manner in which it is used or intended to be used by those at whom the advertisement is directed and unless the nature of said contribution is clearly and conspicuously and truthfully disclosed.

c. Any such product is in any way more nutritious than any other product to which it is identical or virtually identical in composition.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act which contains any of the representations prohibited in subparagraph 1 above.

III. *It is ordered,* That respondent Amstar Corporation, a corporation, and its officers, agents, successors and assigns, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of refined sugar forthwith cease and desist from making, directly or by implication, any statement or representation that:

1. The consumption of any such product is indispensable for proper or good health.

2. The consumption of any such product, in and of itself, will increase one's athletic ability, or specifically that any such product is a special or unique source of strength, energy, or stamina.

3. The consumption of any such product is indispensable to enable one to lead an active life.

4. The consumption of any such product, in and of itself, will satisfy the concern of parents for the health of their families.

IV. *It is ordered,* That respondent Amstar Corporation, a corporation, and its officers, agents, successors and assigns, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, forthwith cease and desist from making, directly or by implication, any statement or representation that:

1. Any such product has been chosen for use by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, where said choice is based primarily on monetary consideration flowing to such association, league or organization.

2. Any such product is used by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, unless said contribution is substantial when the product is used in the quantity and manner in which it is used or intended to be used by those at whom the advertisement is directed and unless the nature of said contribution is clearly, conspicuously and truthfully disclosed.

3. Any such product is in any way more nutritious than any other product to which it is identical or virtually identical in composition.

A statement as to the qualities or attributes of a product can amount to an implied uniqueness claim if it is made in a context which conveys an impression of uniqueness for the product. However, statements as to the qualities or attributes of any product covered by this order will not constitute a violation thereof for the sole reason that such statements could also be made with respect to other products.

It is provided, however, That nothing contained in this order shall be deemed to prohibit advertisements or labeling complying with any guidelines or regulations with respect to product endorsements that hereafter from time to time may be promulgated by the Commission or enacted by Congress.

It is further provided, That Amstar Corporation shall not be held accountable under this order for advertising and labeling of products which it packaged, manufactured or otherwise processed but which bear labels other than those of Amstar or any of its subsidiaries or operating divisions, unless Amstar conceived or aided in the conception of said advertising or labeling and that Amstar Corporation shall not be held liable under this order for advertising by or on behalf of any trade association where such advertising does not refer directly or by implication to the trademark or trade name of any particular manufacturer.

V. *It is further ordered,* That respondent Amstar Corporation forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement by means of the United

States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for Domino refined sugar for a period of one year from the date this order is served upon it, unless not less than twenty-five percent (25%) of the media expenditures (excluding production costs and costs for advertisements directed exclusively to members of the food industry and industrial sugar users) for each medium in each market, or, in the alternative, unless at least one (1) out of every four (4) advertisements (excluding advertisements directed exclusively to members of the food industry and industrial sugar users) of equal time or space for each medium in each market, be devoted to advertising containing a clear and conspicuous disclosure as follows:

> Do you recall some of our past messages saying that Domino Sugar gives you strength, energy, and stamina? Actually, Domino is not a special or unique source of strength, energy and stamina. No sugar is, because what you need is a balanced diet and plently of rest and exercise.

In the case of radio and television advertising, such advertising is to be disseminated in the same time periods and during the same seasonal periods as other advertising of Domino sugar; in the case of print advertising, such advertising is to be disseminated in the same print media as other advertising of Domino sugar. Such advertising shall be prepared in a manner consistent with normal technical and artistic standards of production, and shall not contain material which is in any way inconsistent with the required disclosure.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That if respondent hereafter proposes to make any change in its corporate structure which may affect compliance obligations arising out of the order, including such changes as dissolution, assignment, or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries, respondent shall notify the Commission of such change at least thirty (30) days in advance, except that if respondent has less than thirty (30) days prior knowledge of a proposed change, respondent shall notify the Commission as promptly as possible and in no event more than thirty (30) days after respondent has such knowledge.

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

ORDER AS TO RESPONDENTS LEWIS & GILMAN, INC. AND DAILEY AND ASSOCIATES

I. *It is ordered,* That respondents Lewis & Gilman, Inc., and Dailey and Associates, corporations, and their officers, agents, successors and assigns, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of refined sugar forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

a. The consumption of any such product is indispensable for proper or good health.

b. The consumption of any such product, in and of itself, will increase one's athletic ability, or that any such product is a special or unique source of strength, energy or stamina.

c. The consumption of any such product is indispensable to enable one to lead an active life.

d. The consumption of any such product, in and of itself, will satisfy the concern of parents for the health of their families.

e. Any such product is in any way more nutritious than any other product to which it is identical or virtually identical in composition.

2. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents the value of any such product in an athlete's diet.

3. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act which contains any of

the representations prohibited in subparagraph 1, above, and the misrepresentation prohibited in subparagraph 2, above.

II. *It is further ordered,* That respondents Lewis & Gilman, Inc., and Dailey and Associates, corporations, and their officers, successors and assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

a. Any such product has been chosen for use by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, where said choice is based primarily on monetary consideration flowing to such association, league or organization.

b. Any such product is used by an athletic association, league, or any other athletic organization, due to the contribution it makes to athletic performance or physical fitness, unless said contribution is substantial when the product is used in the quantity and manner in which it is used or intended to be used by those at whom the advertisement is directed and unless the nature of said contribution is clearly and conspicuously and truthfully disclosed.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act which contains any of the representations prohibited in subparagraph 1 above.

A statement as to the qualities or attributes of a product can amount to an implied uniqueness claim if it is made in a context which conveys an impression of uniqueness for the product. However, statements as to the qualities or attributes of any product covered by this order will not constitute a violation thereof for the sole reason that such statements could also be made with respect to other products.

It is provided, however, That nothing contained in this order shall be deemed to prohibit advertisements or labeling complying with any guidelines or regulations with respect to product endorsements that hereafter from time to time may be promulgated by the Commission or enacted by Congress.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That if any respondent hereafter proposes to make any change in its corporate structure which may affect compliance obligations arising out of the order, including such changes as dissolution, assignment, or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries, such respondent shall notify the Commission of such change at least thirty (30) days in advance, except that if such respondent has less than thirty (30) days prior knowledge of a proposed change, respondent shall notify the Commission as promptly as possible and in no event more than thirty (30) days after respondent has such knowledge.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon it, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ROBERT SHELDON, ET AL. TRADING AS REJUVENATION CENTER LTD.

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

Docket C-2462. Complaint, Oct. 4, 1973—Decision, Oct. 4, 1973.

Consent order requiring a San Antonio, Tex. firm operated principally to promote a cosmetic process called a rejuvenation treatment, among other things to cease misrepresenting the nature, safety and results of its cosmetic rejuvenation process which involves chemical skin peeling. Further, the firm is required to obtain from each prospective customer a physician's certificate specifying the client's ability to undergo the process; to provide a 3-day cooling-off period during which clients may cancel their contracts, and to devote no less than 15 percent of their advertising to disclosures as to te procedures used and dangers inherent in the process. The Commission was successful in obtaining from the United States District Court for the Western District of Texas, a temporary injunction enjoining respondent from engaging in the challenged practices pending disposition of the Commission proceeding.

Appearances

For the Commission: *Donald Higginbatham* and *James B. Brookshire*.

For the respondents: *Leroy Morgan Jahn,* San Antonio, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Robert Sheldon, Beverlee Sheldon, also known as Beverlee Choate, and Terry Lee Armas, III, individuals, trading and doing business as Rejuvenation Center, Ltd., hereinafter referred to as respondents, have violated Sections 5 and 12 of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Robert Sheldon, Beverlee Sheldon, also known as Beverlee Choate, and Terry Lee Armas, III, are individuals trading and doing business as Rejuvenation Center, Ltd., with their offices and principal place of business located at 8151 Broadway, Suite 110, San Antonio, Tex.

PAR. 2. In the operation of Rejuvenation Center, Ltd., respondents promote on their own behalf a cosmetic process called a rejuvenation treatment which involves the application of certain chemical solutions to the face, or various other portions of the bodies of their clients for the purported purpose of taking away or diminishing wrinkles, blemishes, freckles, lines, spots or other manifestations of aging by peeling the upper layers of skin from the treated areas. After the solutions are applied to the client's skin, bandages are then applied to the treated areas for several days, after which time, the bandages are removed, and the upper layers of skin, destroyed by the process, are peeled away.

PAR. 3. In the course and conduct of their business as aforesaid, respondents promote their cosmetic process by advertising over television and in newspapers of general circulation which are distributed by mail in states other than the state in which they are printed. In addition, respondents maintain at least one agent in the State of Okla. for the purpose of soliciting prospective clients in Oklahoma and transporting them to respondents' place of business in San Antonio, Tex., for application of the cosmetic process. As a result of such newspaper advertisements and as a result of respondents' maintenance of an agent located in Okla., respondents have maintained a substantial course of trade in commerce, as "commerce" is used in Sections 5 and 12 of the Federal Trade Commission Act, and as a result of such newspaper advertising and the utilization of such out-of-state agent have disseminated and caused to be disseminated false advertisements by United States mail, and in commerce within the meaning of Section 12(a)(1) of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their cosmetic process, respondents directly and through their agents have made and are now making numerous statements and representations in advertisements inserted in newspapers of general circulation, in other promotional materials and during oral sales presentations. Typical and illustrative of such written or oral statements and representations contained in said advertisements, but not all inclusive thereof, are the following:

> The Rejuvenation process requires no cutting, scraping, abrasives or machines. It consists of a solution, which when applied to the skin regenerates the epidermis, restoring the elasticity, creating a fine textured skin, eliminating wrinkles, freckles and brown spots.
>
> New biochemical face lift lets you look 10 to 20 years younger in 7 days.
>
> Middle-aged people may actually look from 10 to 20 years younger. * * *
>
> Because these solutions work only in the uppermost layer * * * * the process is harmless and non-medical.
>
> * * * facial rejuvenation is now widely accepted by the medical profession.

PAR. 5. Through the use of the above advertisements, and others of similar import and meaning, but not expressly set out herein, and by oral statements and representations made by respondents and their agents, respondents have represented and are now representing directly or by implication that:

1. Respondents' cosmetic process is nonsurgical in nature.

2. Respondents' cosmetic process is generally painless and involves no abrasives or creams.

3. The potential discomfort possibly resulting from respondents' process is no more severe than that normally associated with a sunburn.

4. Respondents' cosmetic skin-peeling process will permanently remove signs of aging.

5. Respondents are trained professionals, and that Beverlee Sheldon, also known as Beverlee Choate, is a registered nurse and Robert Sheldon is a pharmacist and chemist.

6. Respondents' prospective clients need not seek medical advice, or have allergy or skin sensitivity tests conducted prior to receiving the skin peeling process.

7. Respondents' cosmetic process will cause their clients to appear to from 10 to 20 years younger than their actual chronological age.

8. The application of respondents' cosmetic process is a safe procedure free from possible serious side effects or complications.

9. Respondents' method of cosmetic process is widely accepted by the medical profession as performed by respondents.

10. Respondents are duly licensed to practice medicine or to prescribe or dispense drugs or cosmetics which by law may be prescribed or dispensed only by a doctor or pharmacist.

PAR. 6. In truth and in fact:

1. Respondents' cosmetic process is a procedure involving chemical surgery in the removal of the upper layers of skin.

2. Respondents' cosmetic process involves abrasive chemicals and creams which burn the upper layers of skin to create peeling and is in fact painful in many cases.

3. The potential discomfort possibly resulting from respondents' cosmetic process is in some cases much more severe than that normally associated with a sunburn. The potential discomfort of cosmetic face peels as conducted by respondents can and may result in severe pain and long-lasting or permanent discoloration of the skin.

4. Only minor manifestation of aging, such as very fine wrinkles in carefully selected patients, can be removed by face peeling under optimum medical conditions. Even when conducted by professional cosmetic surgeons under controlled clinical conditions and producing good results, the more youthful appearance will rarely last over 18 months, at the end of which time the patient will again appear his or her actual chronological age.

5. Respondents are not trained professionals. Beverlee Sheldon, also known as Beverlee Choate, is not a registered nurse, nor is Robert Sheldon either a chemist or licensed pharmacist.

6. Prospective clients should consult with their physicians regarding the advisability of receiving a cosmetic face peel, since those with sensitive skin or a history of allergies are often refused the process by cosmetic surgeons due to the complication rate involved.

7. Those receiving cosmetic face peels cannot reasonably expect that their appearance will be altered by more than a year or two

from their actual chronological age, even with the best results obtained by a cosmetic surgeon.

8. Respondents' process is not a safe procedure in nature, but a process involving a controlled burning of the skin known as chemo-surgery, which is inherently dangerous unless performed by professional cosmetic surgeons under closely-controlled clinical conditions. When not properly administered, the process may result in severe pain, burning of the skin, infection, disease or scarring.

9. Facial rejuvenation involving cosmetic skin peeling is not widely accepted by the medical profession, but, in fact, many plastic surgeons will not conduct face peels on patients at all because of the possible adverse side effects, and normally many more patients who request face peels are refused the process than are given the treatment, due to allergies, skin sensitivity and other factors.

10. Respondents are not licensed to practice medicine or to prescribe or dispense drugs or cosmetics which by law may be prescribed or dispensed only by a doctor or pharmacist.

PAR. 7. In the course and conduct of their business, respondents, directly or through their agents have represented in advertisements the asserted advantages of their cosmetic process as hereinabove described. Respondents or their agents have failed to disclose important and material facts to prospective clients concerning the application of their cosmetic process involving skin peeling. In no case have respondents' advertising or oral representations disclosed:

1. The need for prospective clients to consult with a physician concerning skin sensitivity or possible allergic reactions prior to receiving the application of respondents' cosmetic process.

2. That clients may experience severe discomfort or possible intense pain as a result of respondents' application of the chemicals used in their cosmetic process.

3. That clients will be subject to the risk of irritation, infections and other skin disease, as a result of the treatment.

4. That permanent scarring to the face, or various other parts of the body may result from the application of the chemical solutions used in respondents' cosmetic process.

The consequences described in above paragraph have, in fact, occurred, and to a reasonable medical certainty can be expected to occur, and respondents knew, and had reason to know, that they could be expected to occur, when clients did not seek medical consultation prior to the application of respondents' cosmetic process.

Therefore, the advertisements referred to in Paragraph Seven are false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 8. For the purpose of inducing the purchase of their cosmetic face peeling process respondents directly and through their agents entice members of the public with advertisements of "Look 20 years younger in 7 days" and like advertisements designed to attract members of the purchasing public concerned with aging skin, and with offers of free consultation involving no obligation. In most cases, respondents directly or through their agents do not disclose details of their system unless and until a prospective client visits their place of business or agent. When members of the purchasing public visit the center, they have been subjected to emotional sales tactics for the purpose of persuading them to sign a contract for the application of the cosmetic skin peeling process and to make a substantial downpayment, without being afforded a reasonable opportunity to consider and comprehend the scope and extent of the contractual obligation involved, the seriousness of the procedure involved, or the possibilities of discomfort, pain, disease or disfigurement related thereto. Respondents employ the following tactics:

1. Representing that the consumer demand for the cosmetic skin peeling process is very substantial and that it has been widely accepted by the medical professions and has become popular with members of the performing arts.

2. Catering primarily to the highly emotional desire of the aging, especially middle-aged and elderly women to regain a youthful appearance.

3. Inducing prospects to sign contracts and/or make downpayments, and to sign medical releases before they have consulted a medical doctor and freely and openly discussed with such doctor the medical risks involved in the face peeling process.

Therefore, the advertisements referred to in Paragraph Eight were and are false and misleading, and the acts and practices set forth in such paragraph were and are unfair and deceptive.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents and their agents have been and are in substantial competition in commerce in the sale of their cosmetic process of skin peeling.

PAR. 10. The use by respondents, directly and through their agents, of the unfair and deceptive representations and practices has had and now has the capacity and tendency to mislead consumers and to unfairly influence customers to hurriedly and precipitately sign contracts for the application of respondents' cosmetic face peeling process and to make a partial or full payment therefor, without affording them a reasonable opportunity to consider and comprehend the scope and extent of the contractual obligation involved, the seriousness of the treatment involved, or the possibilities of discomfort, pain, disease or disfigurement related thereto.

PAR. 11. The respondents' acts and practices alleged herein are to the prejudice and injury of the purchasing public and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails and in commerce in violation of Section 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Robert Sheldon, Beverlee Sheldon, also known as Beverlee Choate and Terry Lee Armas, III, are individuals trading and doing business as Rejuvenation Center, Ltd., with their office and principal place of business located at 8151 Broadway, Suite 110, San Antonio, Tex.

Respondents Robert Sheldon and Beverlee Sheldon, also known as Beverlee Choate, formulate, direct and control the policies, acts and practices of their business, Rejuvenation Center, Ltd. Terry Armas, III, assists in said business and, in many cases, applies respondents' chemical skin peel process to respondents' customers.

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

ORDER

It is ordered, That respondents Robert Sheldon, Beverlee Sheldon, also known as Beverlee Choate, and Terry Lee Armas, III, trading and doing business as Rejuvenation Center, Ltd., individually, their successors or assigns and respondents' agents, representatives, employees either directly or through any corporate or other device, or through any franchisees or licensees, in connections with the offering for sale, sale, or distribution of any cosmetic chemical application resembling a chemo-surgical process of face lifting or face peeling or any other like process in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that:

1. Any cosmetic process involving skin peeling or any other like process does not involve chemical surgery.

2. Any cosmetic process involving skin peeling is painless and involves no caustics or caustic chemicals.

3. The potential discomfort possibly resulting from the application of said cosmetic process is no more severe than that normally associated with a sunburn.

4. Any cosmetic skin-peeling process will permanently remove signs of aging.

5. Respondents are professionals in the field of medicine, or that any of them is a registered nurse, chemist or pharmacist.

6. Prospective clients should not seek medical advice

or have skin sensitivity or allergy tests conducted prior to receiving the skin-peeling process.

7. Said cosmetic process will cause their clients to appear any specific number of years younger than their actual chronological age.

8. Said cosmetic process is a procedure free from possible serious side effects or complications.

9. Said cosmetic process is widely accepted by the medical profession as performed by respondents.

10. Respondents are duly licensed to practice medicine or to prescribe or dispense drugs or cosmetics which by law may be prescribed or dispensed only by a doctor or pharmacist.

B. Advertising, offering for sale, selling or in any manner applying or dispensing any chemical skin-peeling process or treatment, or any other like process or treatment, unless respondents make clear and conspicuous disclosures in all advertising and in all oral sales presentations, that:

1. Any such chemical process or treatment involves a surgical procedure by which the upper layers of skin are burned chemically and are later peeled away.

2. Because of the chemical process resembling a chemo-surgical procedure, there is a probability of discomfort, pain, and a risk of infections, and permanent scarring.

3. Should the above-described side effects result, respondents are not professionals equipped nor trained to provide the necessary medical aid and attention to their clients.

4. Many cosmetic and plastic surgeons refuse to perform skin peeling procedures on the majority of those requesting the treatment due to the possibility of complications arising, and further that professional medical experts will perform such procedures on selected patients under clinical conditions only after a consultation and review of their medical history.

5. Respondents are not licensed to practice medicine or to prescribe or dispense drugs or cosmetics which by law may be prescribed or dispensed only by a doctor or pharmacist.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of respondents' cosmetic process, and shall devote no less than 15 percent of each advertisement or presentation to such disclosures. *Provided however,* That in advertisements which consist of less than ten column inches in newspapers or periodicals, and in radio or television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements:

Warning: This application involves a process resembling chemo-surgery whereby chemicals are applied to various parts of the body and skin is peeled away. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.

No less than 15 percent of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

It is further ordered, That respondents provide prospective clients with a separate disclosure sheet containing the information required in the immediately preceding paragraph of this order and that respondents require that such prospective clients, subsequent to receipt of such disclosure sheet, consult with a duly licensed physician who is not associated, directly or indirectly, financially or otherwise, with the respondents regarding the nature of the surgery to be done, the probabilities of discomfort and pain, and risks of infection, and scarring.

It is further ordered, That no contract for application of respondents' cosmetic process shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays after the day of the purchaser's above-described consultation with a duly licensed physician who is not associated, directly or indirectly, financially or otherwise, with the respondents, or after the day on which said contract for application of the system was executed, whichever day is later, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument executed by the purchaser in connection with the sale of their process, that the purchaser may rescind or cancel any obligation incurred, by mailing or delivering a notice of cancellation to the office responsible for the sale prior to midnight of the third day,

excluding Sundays and legal holidays, after the day of the purchaser's above-described consultation with a duly licensed physician or after the day on which said contract for application of the system was executed, whichever day is later.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the day of the purchaser's above-described consultation with a duly licensed physician, or after the day on which said contract for application of the system was executed, whichever day is later.

4. Respondents shall obtain from each purchaser of their chemical skin peeling process or any other process in which caustic chemicals are applied to the skin, a certificate signed by the physician who was consulted as required by this order, such certificate specifying that the said physician has conducted skin sensitivity and allergic reaction tests appropriate to determine said purchaser's ability to undergo respondents' process, and specifying the date and approximate time of such consultation; further, respondents shall obtain from each purchaser as aforesaid, a signed and dated certificate stating that said purchaser has been informed by respondents of the nature of the chemical skin peeling process to be performed, and that he or she has been advised of the probabilities of discomfort and pain, and the risks of infection, and scarring; and respondents shall retain all such certificates for three years.

It is further ordered, That respondents serve a copy of this order upon each employee or agent participating in application of any process by respondents and obtain written acknowledgements for so long as such persons continue to participate in the application of said process.

It is further ordered, That respondents maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

BERGEN BRUNSWIG CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2463. Complaint, Oct. 4, 1973—Decision, Oct. 4, 1973.

Consent order requiring a Los Angeles, California, wholesale distributor of druggists' sundries, among other things to cease knowingly inducing or receiving discriminatory payments. Respondent is further required to provide each person or organization invited to participate in its trade shows, a copy of this order for a period of five (5) years.

Appearances

For the Commission: *John E. Passarelli, Ronald J. Dolan* and *Daniel R. Kane.*

For the respondent: *Douglas Chadwick,* Los Angeles, Calif. and *Murray J. Laulicht, Lowenstein, Sandler, Brochin, Kohl & Fisher,* Newark, N.J.

COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, having reason to believe that Bergen Brunswig Corporation, a corporation, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in respect thereto as follows: