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 respondent notify the Commission at least 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 obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) 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 this order.

IN THE MATTER OF

THE A & R AGENCY, ET AL.

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

Docket C-2681. Complaint, July 14, 1975-Decision, July 14, 1975

Consent order requiring a New York City advertising promoter, among other things to cease using misrepresentations to sell advertising in ethnic publications, and from placing and seeking payment for unauthorized advertisements.

Appearances

For the Commission: *Moira P. McDermott.*

For the respondents: *Richard C. Shadyac*, Annandale, Va. and *Stanley R. Stern*, 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 The A & R Agency, a partnership doing business in its own name and as Daily Challenge, Spanish Newspaper Agency, Jewish Newspaper Agency, Scandanavian Newspaper Agency, Italian Newspaper Agency, Chinese Newspaper Agency, Catholic Newspaper Agency, German Newspaper Agency, Recorder Newspaper Agency, Caribbean Echo, Bronx Home Newspaper Agency, Polish Publication Agency, Hungarian Newspaper Agency, Greek Newspaper Agency, and Anthony Abraham individually and as a partner in said partnership and Anthony Clausi individually and as an

employee of said partnership, 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 thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The A & R Agency is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 350 Fifth Ave., New York, N.Y.

Respondent Anthony Abraham is an individual and is the only active partner in the partnership respondent. Respondent Anthony Clausi is an individual and is employed as manager of the partnership respondent. Said individual respondents formulate, direct and control the acts and practices of the partnership respondent, including the acts and practices hereinafter set forth. The address of respondent Anthony Abraham is 727 S. Alhambra Cir., Coral Gables, Fla., and the address of respondent Anthony Clausi is that of the partnership respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the solicitation of advertisements to be published in a number of newspapers, magazines, and other publications and in the collection of accounts arising out of their said business.

PAR. 3. In the course and conduct of their business, respondents engage in extensive commercial activities among the various States of the United States. By long distance telephone and other means, respondents contact prospective purchasers of advertising space in states other than the State of New York and seek to sell advertising space to such persons. Respondents transmit through the United States mails to such persons invoices, statements, letters and other business communications and receive from them bank checks, letters and other instruments of a commercial nature. Respondents 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.

PAR. 4. In the course and conduct of their business respondents and their agents or representatives contact prospective purchasers of advertising space by telephone and other means and seek to induce them to purchase advertising space in many newspapers and periodicals among which are the Daily Challenge, El Tiempo and Menora.

In connection with such solicitations, respondents and respondents' agents and representatives, have made numerous statements regarding the character and volume of circulation of the individual publications.

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

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That the Daily Challenge has a circulation of 10,000 subscribers in Wilmington, Del., or 350,000 circulation in New England, New York and Washington, D.C., or reaches hundreds of Black homes by mail or is the largest newspaper in the East serving the Black community; that El Tiempo has a circulation of 200,000 or 500,000; that Menora has a guaranteed paid circulation of 72,000, or is read by 50,000 Jewish families in the New York area, or has a general circulation of more than 100,000 or 250,000 or 100,000 readers in Long Island.

PAR. 5. In truth and in fact, the various statements and representations made by respondents and respondents' agents and representatives regarding the character and volume of said publications were and are false and exaggerated. The total circulation of the Daily Challenge is about 34,000; of El Tiempo 33,000 and of Menora 30,000.

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

PAR. 6. In the course and conduct of their business, respondents and their agents or representatives seek to induce prospects to purchase advertising space in various publications by representing that the readership of a publication is of a special type or class. For example: that the Daily Challenge's readers are Black professionals, and that Menora is the Jewish businessman's paper, is widely circulated among prominent Jewish doctors, lawyers, and professionals, and goes to Jewish investment houses.

PAR. 7. In truth and in fact, the various statements and representations made by respondents and respondents' agents and representatives regarding the type or class of subscribers or readers of the said publications were and are false and exaggerated. The Daily Challenge carries no news of special interest to Black professionals and the Menora is published in the Hungarian language and there is a limited number of American Jewish people who can read Hungarian.

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

PAR. 8. In the course and conduct of their business, respondents have also engaged in the practice of placing advertisements of various persons and firms in various publications without having received authorization from such persons or firms. Respondents have then sought to exact payment from said persons and firms for such unauthorized advertisements.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive practices as set forth in Paragraphs Four and Six has had, and now has, the capacity and tendency to mislead prospective advertisers into the purchase of advertising space by reason of said practices. The unfair and deceptive practice engaged in by respondents

of publishing wholly unauthorized advertisements as set forth in Paragraph Eight has subjected firms and individuals to harassment and unlawful demand for payment of nonexistent debts.

PAR. 10. In the course and conduct of their business, respondents have engaged in the following additional unfair, false, misleading and deceptive practices:

1. In a substantial number of instances, respondents have represented that advertisements will appear in special sections of a publication when in fact the publication is not divided into sections and does not segregate advertisements according to type but commingles advertisements.

2. In a substantial number of instances, respondents have represented that advertisements will appear in special editions of a publication when in fact there was no special edition of the publication.

3. In a substantial number of instances, respondents have placed advertisements on dates which are contrary to those selected by the advertisers and have not advised the advertisers of the change or the reason therefor.

4. In a substantial number of instances, respondents' agents engaged in the solicitation of advertisements have represented themselves as employees of the publication for which the advertisement is being solicited.

PAR. 11. In the conduct of their business, and at all times mentioned herein respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of advertising space in newspapers, magazines and other publications.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity or tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of advertising space by reason of said erroneous and mistaken belief.

PAR. 13. 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.

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 that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 The A & R Agency is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, N.Y.

Respondent Anthony Abraham is an individual and is the only active partner in the partnership respondent. His address is 727 S. Alhambra Cir., Coral Gables, Fla. Respondent Anthony Clausi is an individual and is employed as manager of the partnership respondent. His address is 40 Royal Park Terrace, Hillsdale, N.J. They formulate, direct and control the policies, acts and practices of said partnership, and their principal office and place of business is located at 350 Fifth Ave., New York, N.Y.

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 The A & R Agency, a partnership, doing business in its own name and as Daily Challenge, Spanish Newspaper Agency, Jewish Newspaper Agency, Scandanavian Newspaper Agency, Italian Newspaper Agency, Chinese Newspaper Agen-

cy, Catholic Newspaper Agency, German Newspaper Agency, Recorder Newspaper Agency, Caribbean Echo, Bronx Home Newspaper Agency, Polish Publication Agency, Hungarian Newspaper Agency and Greek Newspaper Agency and Anthony Abraham individually and as a partner in said partnership and Anthony Clausi individually and as an employee of said partnership, and their successors and assigns, respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the offering for sale or sale of advertising space in newspapers, magazines or any other publication, and in connection with the collection of or attempt to collect past due or allegedly past due accounts arising out of the publication of any advertisement, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the circulation, whether paid or unpaid, of any newspaper, magazine or other publication is more than the circulation figures provided in writing by the publisher of said publication as stated in its certification or statements to governmental authorities or as verified by an accounting audit by independent certified public accountants and/or as they appear in the independent Audit Bureau of Circulation Reports.

2. Representing, directly or by implication, that the readership of any newspaper, magazine or other publication is more than twice the circulation figure provided for in Paragraph 1 of this order.

3. Representing, directly or by implication, that a publication for which an advertisement is being solicited is read by a certain type or class of subscriber or reader or covers a specified geographical area when such is not the fact; or misrepresenting in any manner the nature or type of reader or geographic area covered by such publication.

4. Placing, printing or publishing, or causing to be placed, printed, or published, any advertisement on behalf of any person, firm or corporation in any publication unless a prior authorization, order or agreement to purchase said advertisement has been received by respondents.

5. Sending or causing to be sent bills, collection letters or notices to any person, firm or corporation with regard to any advertisement which has been or is to be printed, inserted or published on behalf of said person, firm or corporation, or in any other manner seeking to exact payment for any advertisement, without a prior authorization, order or agreement to purchase such advertising, either orally or in writing.

6. Representing that advertisements placed by respondents for its customers will appear in special editions or in special sections of a

publication when in fact there is no such special edition of or special section in the publication for which the advertisement is solicited.

7. Placing orders for advertisements to appear on dates which differ from the dates selected by respondents' customers without advising such customers of the changes and the reasons therefor and without obtaining authorization for such changes.

It is further ordered, That:

A. Respondents' advertising solicitors or agents in making contact with any person, firm or corporation for the purpose of selling advertising clearly disclose that they are employed by The A & R Agency, or Daily Challenge, or Spanish Newspaper Agency, or Jewish Newspaper Agency, or Scandanavian Newspaper Agency, or Italian Newspaper Agency, or Chinese Newspaper Agency, or Catholic Newspaper Agency, or German Newspaper Agency, or Recorder Newspaper Agency, or Caribbean Echo, or Bronx Home Newspaper Agency, or Polish Publication Agency, or Hungarian Newspaper Agency, or Greek Newspaper Agency, to solicit advertisements for the named publication and disclose the correct and complete name of the publication for which advertising is being solicited and state the number of times a week the publication appears and the language in which the publication is printed.

B. The complete name of the publication and the dates the advertisements appeared be clearly stated on all respondents' invoices to their customers.

C. Respondents furnish tear sheets to their customers on request, for every issue in which the customers' advertisements appear and that such tear sheets show the name of the publication and the dates of publication.

D. Respondents retain all complaints from any source relating to the acts or practices prohibited by this order, for a period of two years after their receipt, and that these records be made available for examination and copying by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business.

E. Respondents notify the Commission at least thirty (30) days prior to any proposed change in the partnership respondent such as dissolution or the addition of partners or any other change in the partnership which may affect compliance obligations arising out of this order.

F. Respondents give written instructions which cover all the provisions of this order to all present and future employees, agents and representatives engaged in the offering for sale, or sale of advertising space in newspapers, magazines or any other media and engaged in the

collection of or attempt to collect past due or allegedly past due accounts arising out of the publication of any advertisement and that respondents secure a signed statement acknowledging receipt of said written instructions.

G. 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 respondent's current business address and a statement as to the nature of the business or employment in which the individual is engaged as well as a description of his duties and responsibilities.

H. The partnership respondent distribute a copy of this order to each of its operating divisions or departments.

I. No provision of 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 the municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of or the statutes administered by the Federal Trade Commission.

J. *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

CTC COLLECTIONS, INC., ET AL.

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

Docket C-2682. Complaint, July 14, 1975-Decision, July 14, 1975

Consent order requiring a West Orange, N.J., debt collection agency, among other things to cease using unfair and deceptive form letters in collecting consumer debts.

Appearances

For the Commission: *Elliot Feinberg.*

For the respondents: *Charles M. Schmidt*, Long Branch, N.J.

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 CTC Collections, Inc., a corporation, and Loretta Fusaro and Kathleen O'Connor, individually and as officers of said corporation, hereinafter sometimes 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 CTC Collections, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 91 Main St., West Orange, N.J.

Respondents Loretta Fusaro and Kathleen O'Connor are officers of the 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 practice of collecting or attempting to collect any and all kinds of alleged delinquent accounts.

PAR. 3. In the course and conduct of their business as aforesaid, respondents solicit and receive accounts for collection from businesses and professional people located in the State of New Jersey and in various other States of the United States, which accounts the respondents seek thereafter to collect from debtors in the State of New Jersey. In the further course and conduct of their business, respondents transmit collection messages from their place of business within the State of New Jersey to debtors and third parties located in the various other States of the United States. The respondents 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.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are, in competition in commerce with other corporations, firms and individuals in the attempted collection and collection of consumer debts on behalf of creditors.

PAR. 5. In the course and conduct of their business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondents have transmitted and caused to to be transmit-

ted, and are now transmitting and causing to be transmitted form letters, demands for payment and other printed material.

Typical and illustrative of the statements and representations made in said forms and printed materials, but not all inclusive thereof, are the following:

1. The account shown above has been put into our hands for immediate collection and with complete authority to enforce payment and to record this item on your credit history file and to report to such credit agencies as we deem appropriate.

2. Unless payment is received by immediate return mail, we will proceed with other legal means to collect this debt.

3. We know this account can now be collected and since you have not been in touch with us, we are going to proceed with every legal means available to us. This will be costly and time-consuming for you, and can only be avoided by your *immediate* remittance.

4. This is a legal five-day notice before the above creditor brings court suit for the purpose of attaching your pay, property and bank accounts to satisfy this debt.

Unless satisfactory arrangements are made with us for the payment of this debt before that time, you will be served with legal summons by a constable for appearance in court.

5. Therefore: If payment is not received on or before the ——— day of ——————— A.D., 19——, proceedings may be taken against you by default.

PAR. 6. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Respondents have unlimited authority to collect accounts placed with respondents for collection and are authorized to disclose information regarding these accounts to credit reporting agencies.

2. The failure to pay the amount claimed as owing within the time period(s) specified will result in legal action against the debtor.

3. The failure to agree to pay the amount claimed as owing will result in attachment proceedings against the property and wages of the debtor.

PAR. 7. In truth and in fact:

1. Respondents' authority to collect debts is limited and respondents do not have the authority to report on their accounts to credit reporting agencies.

2. The failure of a debtor to pay the amount claimed as owing within the time period(s) specified does not result in most instances in the institution of legal action to effect payment.

3. The failure of a debtor to pay the amount claimed as owing within the time period(s) specified does not result in most instances in the institution of attachment proceedings to effect payment.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were and are false, misleading, deceptive and unfair.

PAR. 8. In the course and conduct of their business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondents have transmitted and caused to be transmitted, and are now transmitting and causing to be transmitted form letters, demands for payment and other printed material.

Typical and illustrative of respondents forms, but not all inclusive thereof, are the following:

FINAL NOTICE

Before Suit

State of New Jersey,
County of Essex } ss.:

Creditor _____

Debtor _____

To The Above Named Debtor

Take Notice: You are hereby notified that this is your final opportunity to pay your legal debt of $_____ due the above named Creditor.

Therefore: If payment is not received on or before the _____ day of _____ A.D., 19____, proceedings may be taken against you by default.

JUDGMENT WILL BE ASKED TO INCLUDE

I. FULL PRINCIPAL DUE
II. MAXIMUM LEGAL RATE OF INTEREST
III. ALL COURT COSTS
IV. ALL COSTS OF COLLECTION
V. REASONABLE ATTORNEYS FEES

Executed this _____ day of _____, A.D., 19____, in the State and County aforesaid.

Signed _____

MAKE PAYMENT TO CTC COLLECTIONS
91 Main Street, West Orange, N. J. 07052

Final Notice Before Suit

Creditor _____

Debtor _____

State of _____

County of _____

CTC COLLECTIONS, INC.
P.O. Box 31 Town Center Branch
91 Main Street
West Orange, New Jersey 07052
tel.: (201) 736-3904

BONDED

TO:

REGARDING YOUR ACCOUNT WITH:

BALANCE DUE:

Regarding your account with: Balance Due:

Your promise to have a payment in this office on the above account on _____ has not been kept.

We accepted this promise as being in good faith. We can have no patience with false or misleading promises. Unless payment is received by immediate return mail, we will proceed with other legal means to collect this debt.

We have been cooperative with you and we will not stand for being treated in this evasive manner. We have many means at our disposal to collect this money, all of them distasteful and expensive to you. Do yourself a favor and send the payment today. Save yourself a lot of unwanted difficulties.

Dan Lawson

SEND ALL PAYMENTS DIRECT TO THIS OFFICE ONLY

Return top portion with remittance.

PAR. 9. By and through the use of said forms and the statements and representations set forth therein and others of similar import and meaning but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Said "Final Notice" document in form and content is an official document duly issued or approved by a court of law.

2. Judgment may be entered against the debtor without further notice to the debtor.

3. The creditor has the post judgment rights stated in said forms.

PAR. 10. In truth and in fact:

1. Said "Final Notice" form is not an official document duly issued or approved by a court of law, but on the contrary is wholly private in origin.

2. Judgment may not be entered against the consumer without further notice to the consumer but on the contrary the debtor is entitled to notice and an opportunity to appear and defend himself in a court of law prior to the entry of a judgment.

3. The creditor's rights enumerated are incomplete, inaccurate and vague and are stated to intimidate the debtor rather than to inform him of the creditor's legal rights.

Therefore, the statements and representations as set forth in Paragraphs Eight and Nine hereof were and are false, misleading, deceptive and unfair.

PAR. 11. The use by respondents of the aforementioned false, misleading, deceptive and unfair statements, representations and forms has had, and now has, the tendency and capacity to deceive and mislead persons into the erroneous and mistaken belief that said statements and representations were and are true, and induce the recipients thereof to supply information which they otherwise would not have supplied and into the payment of accounts to respondents, by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, are unethical, 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. 13. 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 that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 CTC Collections, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 91 Main St., West Orange, N.J.

Respondents Loretta Fusaro and Kathleen O'Connor are officers of the aforementioned corporate respondent. They formulate, direct and control the acts and practices of said corporation and their 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 respondent CTC Collections, Inc., a corporation, its successors and assigns, and its officers Loretta Fusaro and Kathleen O'Connor, 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 collection of consumer debts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or by implication, that respondents possess unlimited authority to collect accounts on behalf of their creditor-clients; or misrepresenting, in any manner, respondents' authority to collect debts on behalf of a creditor.

2. Representing in any manner, directly or by implication, that respondents possess the authority or intend to disclose information regarding debtors to a credit reporting agency.

3. Representing in any manner, directly or by implication, that legal action, including attachment or garnishment proceedings, has been initiated or is being initiated unless respondents have in fact instituted the legal action represented; or that such legal action will be initiated unless respondents are able to establish that at the time the representation was made respondents intended in good faith to institute the legal action represented.

4. Using any form to collect debts or debtor information which simulates a judicial document or is represented by any means to be a document authorized, issued, or approved by a court of law or any other official or legally constituted judicial authority; or misrepresenting, in any manner, the official nature of any document utilized in the collection of debts.

5. Representing in any manner, directly or by implication, that judgment may be entered against a debtor without the debtor having notice of the legal action and an opportunity to appear and defend himself in a court of law.

6. Informing a debtor of a creditor's right after judgment without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself in a court of law.

7. Representing in any manner, directly or by implication, the post judgment rights of a creditor unless said rights are in fact as specifically represented in the jurisdiction in which collection is sought; or misrepresenting in any manner, directly or by implication, the post judgment rights of a creditor.

It is further ordered, That respondents shall maintain for a period of two years with respect to each delinquent debtor, records which shall consist of copies of all collection letters, dunning notices, requests for information and similar correspondence delivered to such debtor or third parties or an indication of what form items were sent; a record or tabulation of all telephone calls made to or about the debtor showing the identity of the caller, the date and time of the call, the identity of

the recipient of the call, the telephone number called, the purpose and result of the call; and copies of all documents pertaining to collection efforts such as referrals to lawyers or other agencies and legal documents utilized in collection efforts.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions, collection managers and to all personnel or other parties including attorneys and collection agencies responsible for or engaged in collection of consumer debts.

It is further ordered, That respondents notify the Commission at least 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 or corporations, 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 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 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 no provision of 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. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

BENEFICIAL CORPORATION, ET AL.

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

Docket 8922. Complaint, Apr. 10, 1973 - Decision, July 15, 1975

Order requiring a Wilmington, Del., seller of personal income tax preparation services and its wholly-owned subsidiary located in Morristown, N.J., among other things to cease misrepresenting the terms and conditions of its guarantees, using the term "instant tax refund," and misusing confidential information obtained from taxpayer customers.

Appearances

For the Commission: *David C. Fix* and *Robert D. Friedman.*

For the respondents: *Edgar T. Higgins*, Morristown, N.J., *Hogan & Hartson*, Wash., D.C.

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 Beneficial Corporation and Beneficial Management Corporation, corporations, 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 Beneficial 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 1300 Market St. in the city of Wilmington, State of Delaware.

Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 200 South St., in the city of Morristown, State of New Jersey. It is a wholly-owned subsidiary of, and is managed, directed and controlled by, respondent Beneficial Corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of personal income tax preparation services and the extension of consumer credit to the general public.

Respondents sell their aforesaid products and services directly and

through various corporate subsidiaries and affiliates, hereinafter referred to for convenience as respondents' representatives.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, monies, contracts, business forms and other commercial paper and printed materials in connection with said income tax preparation and personal loan and consumer financing services to be sent by United States mail from respondents' place of business in the State of New Jersey to their local offices and subsidiaries and purchasers of respondents products and services located in various other States of the United States, and maintain and at all times mentioned herein have maintained a substantial course of trade in said services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents and their representatives have disseminated, and caused the dissemination of, certain advertisements concerning the said income tax preparation services by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said income tax preparation services and the extension of consumer credit.

PAR. 5. For the purpose of disseminating such advertisements, respondents and their representatives have employed television and radio commercial broadcasts, newspaper and periodical insertions, direct mail literature and point of sale promotional materials.

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

1. Radio and Television:

a) This year have your tax returns prepared a better way * * * by computer * * * at Beneficial Finance. With Beneficial's Income Tax Service for as little as $5 * * * you get maximum deductions * * * 100% accuracy * * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan-you get your refund * * * in cash-instantly. So have your taxes done at Beneficial Finance. and get your Instant "Tax Refund."

b) Where are the smart people having their tax returns prepared this year? At Beneficial Finance. That's right, Beneficial Finance — with its new, fully computerized Income Tax Service. You get all the deductions you're entitled to — and since your return is figured by computer, it's guaranteed accurate. Now * * * here's the big news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund"—at Beneficial Finance.

c) If you haven't done your income taxes yet * * * if you're worried about all those new forms and regulations * * * if like so many of us you just can't get down to all that figure work on your tax return—let Beneficial Finance take the load off your mind! For as little as $5, Beneficial's Income Tax Service will do your return by computer. It couldn't be simpler: Beneficial's computer figures out your maximum deductions and prepares your return with 100% accuracy. And, if you have a refund coming, you can get

it right away with Beneficial's Instant "Tax Refund" the instant you qualify for a loan, you get your refund—in cash—instantly! Just look in the white pages of your phone book for the Beneficial office near you. And, call up or come in * * * today

2. Newspaper and direct mail.

a) New Income Tax Service offers INSTANT "TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any penalty or interest if it makes an error!)

* If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund-in cash-instantly. Only at Beneficial.

* * * * *

This year, let Beneficial prepare your tax returns! $5 and up.

* * * * *

And if you want cash to pay your taxes, or for any good reason, remember: your're good for more at Beneficial. Offices everywhere * * * open all year. Phone or come in * * * now! Avoid the rush.

b) It's a fact: 7 out of every 10 taxpayers who have their returns prepared by Beneficial's Income Tax Service get refunds.

c) BENEFICIAL INCOME TAX SERVICE * * * for as little as $5

* * * fully computerized to give you maximum deductions and guaranteed 100% accuracy. * * * especially designed for the typical American family.

* * * * *

Then, there are the pitfalls, hazards, and worries about overpayment; underpayment; delays in getting refunds; being questioned or audited, making mistakes; the Internal Revenue Service computer; adding, substracting, multiplying, and dividing, misunderstanding complicated instructions, and coming to grips with the problem itself. That's why smart people-smart taxpayers-will rely on tax experts to prepare their income tax returns this year. And foremost among tax experts are the men at Beneficial.

* * * * *

Beneficial is completely familiar with—and understands—the new tax forms and tax requirements. Beneficial's Managers-experts in money matters — are accustomed to extremely accurate figure work and are therefore, exceptionally competent with tax returns.

* * * * *

Beneficial stands behind and guarantees the accuracy of every tax return it prepares. If Beneficial makes any errors that cost you penalty or interest of any kind, we will pay the penalty or interest.

PAR. 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents and their representatives have represented, and are now representing, directly or by implication, that:

1. Respondents will provide taxpayers who have their returns prepared by respondents and to whom a refund is owed by the Internal

Revenue Service with an "instant refund" at the time their returns are prepared.

2. Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment, if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

3. Respondents' and their representatives' tax preparing personnel are specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

4. The percentage of respondents' tax preparation customers who receive refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds.

PAR. 7. In truth and in fact:

1. Respondents' "instant tax refund" is not a refund but a personal loan and the recipient of the loan is required to pay finance charges and other costs for such loan.

2. Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

3. Respondents' and their representatives' tax preparing personnel are not specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and they do not have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

4. The percentage of respondents' tax preparation customers who receive refunds is not demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

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

PAR. 8. In the further course and conduct of their business respondents and their representatives enter into a relationship with their tax preparation customers which is impliedly represented as, and is inherently, confidential and private in nature. As a result of the aforesaid relationship, respondents and their representatives are provided and receive certain information from their tax preparation customers. Respondents and their representatives retain a copy of each income tax return prepared by them and a copy of a financial profile which is filled out for each customer on the basis of information

provided by the customer ostensibly for respondents' use in the preparation of the customer's tax return.

Both the aforesaid copy of the tax return and the financial profile contain private and confidential data of both a personal and financial nature for each of respondents' tax preparation customers.

During the initial interview with the customer and at various times subsequent thereto, respondents and their representatives review the information on the retained copy of the customer's tax return and financial profile, and make a determination as to whether to solicit the customer for some type of consumer financing offered by respondents. On the basis of such determination, respondents and their representatives solicit the tax preparation customer, either orally and in person or by mail or telephone, for the purpose of inducing the customer to accept an extension of consumer credit in the nature of a personal loan or otherwise.

Respondents use, and have used, the aforesaid information gathered as a result of the preparation by respondents and their representatives of their customers' income tax returns in the manner hereinabove described without the prior knowledge and consent of said customers, and respondents have failed to disclose such use and intended use to their customers.

PAR. 9. The aforesaid acts and practices of respondents, and the special relationship created by respondents with their customers as described in Paragraph Eight hereof, has had, and now has, the capacity and tendency to mislead respondents' customers into the erroneous and mistaken belief that the information they provided respondents will only be used for the purpose of preparation of their income tax returns and will remain confidential.

Therefore, the respondents' failure to disclose the use of the aforesaid information for purposes other than the preparation of their customers' tax returns is false, misleading and deceptive.

Furthermore, respondents' use of the aforesaid information for purposes other than the preparation of their customers' tax returns without the prior knowledge and consent of their customers is contrary to, and in substantial disregard of, the special relationship between respondents and their customers as described in Paragraph Eight, hereof, and is, and was, unfair.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents and their representatives have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of income tax preparation services of the same general kind and nature.

PAR. 11. The use by respondents and their representatives of the

aforesaid false, misleading and deceptive statements and representations, and unfair acts and practices, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' and their representatives' income tax preparation services by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents and their representatives as herein alleged, were and are all to the prejudice and injury of the public and of respondents' and their representatives' 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.

INITIAL DECISION BY MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

OCTOBER 21, 1974

PRELIMINARY STATEMENT

On Apr. 10, 1973, the Federal Trade Commission issued a complaint charging Beneficial Corporation and Beneficial Management Corporation with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) by engaging in certain acts and practices in connection with their income tax preparation business. Paragraphs Four through Seven of the complaint allege that certain advertising claims made by respondents in connection with their income tax preparation business are false, misleading and deceptive. Paragraphs Eight and Nine of the complaint allege that respondents have used income tax information obtained from their tax preparation customers to solicit the latter for consumer loans and that these practices are deceptive and unfair to the consumer. By answer duly filed, respondents denied that any of their challenged acts or practices violated Section 5 of the Federal Trade Commission Act.

Prehearing procedures commenced in May 1973. In January 1974, the case was reassigned to the present administrative law judge. Respondents' two motions to withdraw the matter from adjudication, duly certified to the Commission by the administrative law judges, were denied by the Commission in August 1973 and April 1974. In November 1973, counsel for the parties entered into a Stipulation For Partial Adjudicated Settlement, which was filed on Dec. 3, 1973. As a result, all of the advertising issues in the complaint, except Paragraph Six (1) and

Paragraph Seven (1) dealing with respondents' "Instant Tax Refund" advertising claims, were settled. Evidentiary hearings with respect to the remaining issues were held in April, May and June 1974, in Washington, D.C. Following reception of further evidence upon a motion by respondents, the evidentiary record was closed on July 23, 1974, and the parties filed their respective proposed findings and orders, and briefs on Aug. 23, 1974.

Any motions not heretofore or herein ruled on specifically or indirectly by necessary effect of the conclusions of this initial decision are hereby denied.

The proposed findings, conclusions and briefs of the parties have been given careful consideration, and to the extent not adopted in this initial decision in the form proposed or in substance, they are rejected as not supported by the evidence or as immaterial.

Having considered the entire record in this proceeding and the demeanor of the witnesses, together with the proposed findings, conclusions and orders and briefs submitted by the parties, the administrative law judge makes the following findings of fact.[1]

FINDINGS OF FACT

I. Respondents and Their Business

1. Respondent Beneficial 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 1300 Market St., in the city of Wilmington, State of Delaware (Ans., par. 1).

2. Respondent Beneficial Corporation wholly owns subsidiaries engaged in the consumer loan business; many of those subsidiaries also operate a tax preparation business. In addition, Beneficial Corporation wholly owns Western Auto Supply Company (a nationwide merchandising company), Spiegel, Inc. (a mail order merchandising company), and various other companies engaged principally in the sales finance and creditor insurance business (CX 18 at p. 3). In 1972, Beneficial Corporation had a net income of approximately $82 million (CX 18 at p. 6).

3. Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws

[1] References to the record are made in parenthesis, using the following abbreviations:
CX - Commission Exhibit
RX - Respondents' Exhibit
Tr. - Transcript of the testimony
CPF - Complaint Counsel's Proposed Findings
RPF - Respondents' Proposed Findings
CB - Complaint Counsel's Brief
RB - Respondents' Brief.

of the State of Delaware, with its principal office and place of business located at 200 South Street, in the city of Morristown, State of New Jersey. It is a wholly-owned subsidiary of respondent Beneficial Corporation and provides various accounting, auditing, management services, including the formulation of advertising and sales policies, for the subsidiaries of Beneficial Corporation who operate the local loan and tax preparation offices (Ans. pars. 1, 2; Higgins, Tr. 204).

4. Respondent Beneficial Corporation through its subsidiaries has for many years been engaged in the consumer loan business and more recently in the tax preparation business. Its subsidiaries, including respondent Beneficial Management Corporation, have formulated and caused the dissemination of advertisements concerning income tax preparation services throughout the United States. Respondents have maintained a substantial course of trade in the offering of consumer loans and income tax preparation services in commerce, as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, respondents have been, and now are, in substantial competition with individuals, firms and corporations engaged in the offering of consumer loans and income tax preparation services of the same general kind and nature as offered by respondents (Ans., pars. 1-5; CX 18, 33, 137; Snyder, Tr. 8).

II. Liability of Respondents

5. Beneficial Corporation is a conglomerate primarily composed of the Beneficial Finance System (a general term used to refer to the Beneficial Corporation subsidiaries which engage in the loan and finance business), Spiegel, Inc., and Western Auto Supply Company (CX at p. 3; Higgins, Tr. 178; finding 2).

6. On Dec. 31, 1972, there were approximately 1800 subsidiaries in the Beneficial Finance System, 1505 of these in the United States. Each of these U.S. local loan offices are owned and operated by a separate subsidiary of Beneficial Corporation [hereinafter local loan subsidiaries]. Approximately 1300 of these offices offer tax preparation services. With the exception of a few shares of a few subsidiaries, Beneficial wholly owns all of the stock of the local loan subsidiaries in the United States (CX 18 at pp. 8-9; Higgins, Tr. 179, 152). Beneficial Management Corporation, also a wholly-owned subsidiary of Beneficial Corporation, furnishes services at cost to the local loan subsidiaries (Ans., par. 2; Higgins, Tr. 204-05).

7. Beneficial Management Corporation of America is a wholly owned subsidiary of Beneficial Corporation. It employs regional and field supervisors throughout the country and is responsible for implementing the procedures which are established by Beneficial Management Corporation (Higgins, Tr. 205-06).

8. Beneficial Management Corporation formulated and approved all the advertising challenged in the complaint and in conjunction with the local loan subsidiaries caused its dissemination to members of the general public (Ans., par. 2; Snyder, Tr. 6-22; findings 36-38, *infra*).

9. Beneficial Management Corporation prepared and disseminated to the local loan subsidiaries various memoranda, directives, and other documents containing instructions on the use of tax information at issue in this case (CX 19-34, 35, 38, 41; Ans. to Requests for Admissions 1, 3, 4; Snyder, Tr. 24-25, 27).

10. Beneficial Corporation's local loan subsidiaries disseminated various point of sale and direct mail advertising pieces which were prepared by Beneficial Management Corporation. The local loan subsidiaries pay for the cost of this advertising (finding 38, *infra;* CX 99-111, 124, 125, 162, 163, 164, 165; Snyder, Tr. 19).

11. Telephone directory advertising is often placed at the request of the local loan subsidiary and is generally paid for by that subsidiary (Snyder, Tr. 18; findings 36-41, *infra*).

12. The acts and practices relating to use of tax information which are alleged to be unfair and deceptive in Paragraphs Eight and Nine of the complaint were actually committed by employees of the local loan subsidiaries (CX 25-27, 29, 34, 35, 38(a)) (findings 59-64, *infra*).

13. Respondent Beneficial Corporation's wholly-owned local loan subsidiaries committed the unfair and deceptive acts and practices alleged in the complaint (findings 9-12, *supra*).

14. Respondent Beneficial Corporation is the sole stockholder of the local loan subsidiaries and either its board of directors or executive committee select who are to be on the board of directors of the local loan subsidiaries (Higgins, Tr. 196-97).

15. The officers of each of the 1143 local loan subsidiaries are identical, except for the president who is, in each region, the regional vice president of Beneficial Management Corporation. This pattern existed throughout the period 1969 through 1974 (CX 145(a); Donohue, Tr. 225-27).

16. All of the officers and directors of the non-New York local loan subsidiaries are employees of either Beneficial Management Corporation or Beneficial Management Corporation of America, both wholly-owned subsidiaries of Beneficial Corporation (Higgins, Tr. 198-201; Findings 3, 6, 7, *supra*).

17. Beneficial Management Corporation of America employs between 75 and 100 persons. Its principal offices are located in the same building as are those of respondent Beneficial Corporation, in Wilmington, Del. It employs various field supervisors and auditors, and regional personnel and promotional supervisors throughout the coun-

try. Its only function is to provide supervision over, and service to, the local loan subsidiaries. It receives all of the funds necessary for its operations from Beneficial Corporation, and generally does not make a profit (Higgins, Tr. 205-20; Donohue, Tr. 245).

18. Mr. Carroll Donohue, who serves as director and vice president and secretary of all the local loan subsidiaries, is not paid a salary by the local loan subsidiaries for performing these services, but is paid by Beneficial Corporation, though he is neither an officer nor director thereof (Donohue, Tr. 220-21, 245).

19. All of the local loan subsidiaries rely solely on Beneficial Corporation for the money that they use in the operations. Funds are advanced to the local loan subsidiaries initially as capital contributions, or as loans. When a local loan subsidiary needs additional loans, it contacts the treasurer's department of Beneficial Corporation to arrange for the needed financing. The decision whether to advance funds in the form of additional capital contribution or loans is made by the treasurer and comptroller of Beneficial Corporation (Higgins, Tr. 192-93; CX 18 at p. 9; CX 150(Z) (34-50)).

20. The accounting for the local loan subsidiaries in the Beneficial Finance System is handled largely by computer. Beneficial Data Processing Company, a wholly-owned subsidiary of Beneficial Corporation, provides the computer service to handle the basic data relating to the loan and finance business. It operates a terminal and computer system in Morristown, N.J., which has a terminal in every local loan office. It obtains all the funds needed for its operation from Beneficial Corporation (Higgins, Tr. 207-08).

21. Beneficial Corporation in effect provides all the financing needed by the local loan subsidiaries for their operations and maintains a close watch over the financial operations of those subsidiaries (findings 19-20, *supra*).

22. Beneficial Corporation operates various plans for the benefit of the employees of the local loan subsidiaries (Higgins, Tr. 208-11; CX 150(n), (Z)(57), (Z) (67), (Z)(2), (Z)(24), 150(m), 150(c); (Z)(13)).

23. Respondent Beneficial Corporation owns and effectively controls the local loan subsidiary corporations (Findings 10-21).

24. Respondents obviously endeavor to have the local loan subsidiaries identified in the public mind as part of the "Beneficial Finance System." All of the local loan subsidiaries are called "Beneficial Finance Company of ————————" (the name of the town in which they are located) (CX 18 at p. 3; finding 5, *supra;* Higgins, Tr. 178-79). The name "Beneficial Finance" is displayed on the outside of most of the local loan offices. All of the advertising for respondents' tax service uses the terms "Beneficial" or "Beneficial Finance" (findings 33-47, *infra*), and

stresses the fact that a large nationwide organization is the entity offering the income tax preparation service. The tax service is referred to as the "Beneficial Income Tax Service." For example, CX 165(b) states: "Beneficial Income Tax Service — A Service of Beneficial Finance System — over 1700 loan and finance offices coast to coast."

25. There is evidence in the record that consumers are of the belief that they are dealing with a large nationwide company when they patronize a Beneficial local loan subsidiary and that such belief is one of the reasons they choose to have their taxes prepared at Beneficial (Deveny, Tr. 375; McIntire, Tr. 426).

26. The combined effect of respondents' advertising and the names of the local loan subsidiaries is to create the reasonable impression that the local subsidiaries are local representatives of some nationwide controlling "Beneficial" entity. That entity is in fact Beneficial Corporation (findings 24-25).

27. Beneficial Management Corporation functions as a service organization for the local loan subsidiaries of the Beneficial Finance System. Beneficial Management Corporation does not directly engage in loan or income tax preparation business. Among the services it provides are supervision, audit, accounting, advertising, and legal services. It provides these services to the local loan subsidiaries at cost and does not make a profit. All of the funds for its operation come from Beneficial Corporation, through capitalization and advances of money as needed. Beneficial Management Corporation has never utilized outside sources of capital (Snyder, Tr. 6; Higgins, Tr. 204-05).

28. Some of respondents' "Instant Tax Refund" advertisements have been copyrighted. These copyrights are held by Beneficial Corporation (CX 113-20).

29. On Apr. 26, 1972, there were 17 members of the board of directors of Beneficial Corporation. Of these 17 members, six worked for Beneficial Corporation or its subsidiaries: Messrs. Benadom, Bowes, Burd, Fultz, Higgins and Tucker. The remaining directors were outside directors (Higgins, Tr. 189-90).

30. Beneficial Corporation exercises control over Beneficial Management Corporation primarily through three men who hold key positions in both companies: Edgar T. Higgins, Cecil M. Benadom and Robert A. Tucker (CX 150).

31. The significance of the overlap demonstrated in finding 30, *supra*, lies in the fact that during most of the time period relevant to this case, these individuals constituted a majority of the executive and finance committees of Beneficial Corporation and were the entire executive committee of Beneficial Management Corporation. Much of the formal decision-making responsibility of both corporations is

exercised by these committees as opposed to the entire boards. Therefore, the three top executive officers of Beneficial Corporation are in a position to control effectively the activities of Beneficial Management Corporation (CX 150(f), (s), (Z)(16), (51), (63), (68), (18-34), (68-87); Higgins, Tr. 190-92; CX 178; finding 14, *supra*).

32. The executive committee of the board of directors of Beneficial Management Corporation approved the decision to enter into the tax preparation business and were aware of the advertisement used with regard to Beneficial Income Tax Service (Snyder, Tr. 7, 10).

III. The Unfair and Deceptive Acts and Practices

A. Stipulation for Partial Adjudicated Settlement

33. On Nov. 30, 1973, complaint counsel and counsel for respondents entered into a Stipulation for Partial Adjudicated Settlement which was filed on Dec. 3, 1973. The effect of this stipulation was to settle all of the advertising issues in the complaint except Paragraph Six (1) and Paragraph Seven (1) which deal with respondents' "Instant Tax Refund" advertising claims. Counsel stipulated that the cease and desist order provisions set forth in Paragraph Two of the Stipulation for Partial Adjudicated Settlement were appropriate relief in the public interest as to the acts and practices which were the subject of the stipulation (see order, *infra*). Counsel also stipulated, *inter alia*, to the following facts concerning these advertising representations:

(A) Subsidiaries of respondent Beneficial Corporation disseminated the following advertisements:

RADIO AND TELEVISION

(1) This year have your tax returns prepared a better way * * * by computer * * * at Beneficial Finance. With Beneficial's Income Tax Service for as little as $5 * * * you get maximum deductions * * * 100% accuracy * * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan—you get your refund * * * in cash—instantly. So have your taxes done at Beneficial Finance. and get your Instant "Tax Refund."

(2) Where are the smart people having their tax returns prepared this year? At Beneficial Finance. That's right, Beneficial Finance-with its new, fully computerized Income Tax Service. You get all the deductions you're entitled to- and since your return is figured by computer, it's guaranteed accurate. Now * * * here's the big news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund"—at Beneficial Finance.

(3) If you haven't done your income taxes yet * * * if you're worried about all those new forms and regulations * * * if like so many of us you just can't get down to all that figure work on your tax return—let Beneficial Finance take the load off your mind! For as little as $5, Beneficial's Income Tax Service will do your return by computer. It couldn't be simpler: Beneficial's computer figures out your maximum deductions and prepares your return with 100% accuracy. And, if you have a refund coming, you can get

it right away with Beneficial's Instant "Tax Refund" the instant you qualify for a loan, and get your refund—in cash—instantly! Just look in the white pages of your phone book for the Beneficial office near you. And, call up or come in * * * today.

NEWSPAPER AND DIRECT MAIL

(1) New Income Tax Service Offers "INSTANT TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any penalty or interest if it makes an error!)

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund—in cash—instantly. Only at Beneficial.

* * * * *

This year, let Beneficial prepare your tax returns! $5 and up.

* * * * *

And if you want cash to pay your taxes, or for any good reason, remember: you're good for more at Beneficial. Offices everywhere * * * open all year. Phone or come in * * * now! Avoid the rush.

(2) Its a fact: 7 out of every 10 taxpayers who have their returns prepared by Beneficial's Income Tax Service get refunds.

(3) BENEFICIAL INCOME TAX SERVICE * * * for as little as $5

(B) By and through the use of the above-quoted statement and representations, and others of similar import and meaning, respondents and their representatives have represented, and are now representing, directly or by implication, that:

(1) Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment, if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

(C) In truth and in fact:

(1) Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

(2) Respondents' and their representatives' tax preparing personnel are not specially trained and unusually competent in the preparation of tax returns and the giving of tax advice, and they do not have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns.

(3) The percentage of respondents' tax preparation customers who receive refunds is not demonstrably greater than the percentage of the taxpaying public at large who receive refunds.

Therefore, the statements and representations set forth above in finding 34 (A) and (B), were and are, false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act (Stipulation For Partial Adjudicated Settlement).

B. The "Instant Tax Refund" Advertising

34. From 1969 through 1973, Beneficial Management Corporation either formulated or approved all of the advertising material utilized by respondents' income tax preparation business. The advertisements were disseminated by subsidiaries of Beneficial Corporation. All of respondents' advertising introduced into evidence in this case was in fact disseminated (Ans., pars. 2, 4; Snyder, Tr. 8-12; CX 124). There are in evidence advertising schedules showing respondents' radio and television commercials that were run for the income tax seasons 1970 to 1973, and the areas where said commercials were run (CX 84-88; Ross, Tr. 79-80).

35. Films with audio, for two of the 1973 television commercials, were shown during the hearings and were introduced into evidence (RX 20A, B). Scripts of these two commercials, accurately reflecting the audio portion of each, were also received into evidence (RX 20D; CX 84J). Tape recordings and their transcripts of two of the 1973 radio commercials were played during the hearings and were introduced into evidence (RX 20C, E, F).

36. Telephone directory advertising of respondents' income tax preparation service was initiated in the second half of 1970, and began appearing in directories published in late 1970 or during 1971. A schedule showing the copy of the telephone directory advertising utilized, and where and when placed, prepared by respondents' advertising agency, was received into evidence (RX 89A-T; Ross, Tr. 79-80).

37. The format for newspaper advertisements used during the 1971 tax season in approximately six states was received into evidence (CX 56; Snyder, Tr. 20-21).

38. Beneficial Management Corporation prepares and causes to be printed various point of sale and direct mail advertising pieces, which are then shipped to the local loan offices for dissemination (Snyder, Tr.

19). Examples of these were introduced into evidence (CX 52-55, 57, 59, 76, 95, 100(B-C), 102(B-C), 103(B-H), 104(B-C), 105(A-B), 106(A-B), 107(A-B), 108(A-B), 90-93, 97, 98, 110(A-G).

39. In 1973, approximately one-half to three-quarters of the Beneficial loan offices placed two foot by two and one-half foot advertising poster in their windows and a similar size poster in their lobbies (CX 164A-B), copies of both of which were introduced into evidence (Snyder, Tr. 22-23).

40. All of the advertisements utilized by respondents from 1969 through 1973 prominently featured the "Instant Tax Refund" theme. In almost all of the advertisements, this is the dominant message conveyed, the most effective representation made (See advertisements set forth in findings 41-44, 55-59, *infra*).

41. Prior to February 1970 and prior to 1972, in the case of telephone directory advertisements, respondents' "Instant Tax Refund" advertising provided no explanation of what the "Instant Tax Refund" actually was. (CX 89(e)) is representative of such telephone directory advertisements placed from 1970 until the summer of 1972 (CX 89A-C):

BENEFICIAL FINANCE SYSTEM

Fully computerized Beneficial Income Tax Service gives you maximum deductions, complete accuracy. Exclusive: Instant "Tax Refund" loans. Phone or come in "WHERE TO CALL"

The "Instant Tax Refund" portion of the radio commercial set forth below was run throughout most of the country in 1969 and early 1970 (CX 85B):

* * * Do you have a refund coming to you or your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now — even before you mail your return — with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial, you're good for more * * * (CX 85F)

42. In the summer of 1972, certain minor changes were made in the copy used in respondents' telephone directory advertisements. The relevant change was the insertion of the word "Plan" between "Instant Tax Refund" and "loans." CX 89P below, is representative of the telephone directory advertisements used in most states from July 1972 until the present (CX 89B):

BENEFICIAL FINANCE COMPANIES

BENEFICIAL INCOME TAX SERVICE Fully computerized to give you maximum deductions, complete accuracy. Special: As about "Instant Tax Refund" Plan loans, offices in this area * * * find the office near you in the Yellow Pages under "Loans." Call or come in today.

43. The radio and television advertisements using the "Instant Tax Refund" theme underwent certain modifications from 1969 until the

present. In approximately February 1970, the "Instant Tax Refund" representation was slightly changed to include the mention of the word "loan." The portions of the radio and television commercials set forth below are from the transcripts of commercials using the "Instant Tax Refund" theme from February 1970 until the end of the 1970 tax season. CX 85(c) was run throughout the country (CX 85(a)). CX 84(b)-(c) was the only television commercial used during this time period. CX 84(a):

Radio

* * * Now * * * here's the *big* news: At Beneficial, and only at Beneficial, you can get an Instant "Tax Refund." The instant you sign your return and qualify for an on-the-spot loan, Beneficial advances you the full amount of your refund. So, there's no waiting all those weeks and weeks for your check from the Government. It's the Instant "Tax Refund" — at Beneficial Finance * * * (CX 85(c).)

Television

* * * With their new, fully-computerized, Beneficial Income Tax Service. You get * * * maximum deductions * * * 100% accuracy. Plus, an Instant "Tax Refund." Get your refund, instantly with an on-the-spot loan. So this year have your tax returns done at Beneficial Finance. There's an office near you * * * (CX 84(b)-(c).)

44. In late 1970, before the 1971 tax season, the "Instant Tax Refund" representation, in radio and television advertising, was again slightly modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "Advances you the full amount of your refund" were changed to "You get your refund — in cash — instantly." The television commercial transcript set forth below (CX 84(d)) was run throughout the country during the 1971 tax season, until March 1971 (CX 84(e)). The radio commercial transcript set forth below (CX 86(c)) is representative of the "Instant Tax Refund" theme in radio commercials run during this time period.

Radio

* * * Right now, at Beneficial Finance * * * You're good for an Instant "Tax Refund." At Beneficial, you're good for more. Why wait weeks for your refund check from the Government? Get an Instant "Tax Refund" at Beneficial Finance. The instant you qualify for an on-the-spot loan, you get your refund — in cash — instantly. No matter where you may be borrowing, or had a loan before, call Beneficial * * * Get your Instant "Tax Refund." See Beneficial * * * Get your Instant "Tax Refund." Come to where you're good for more. Just look in the White Pages of your phone book for the Beneficial office near you * * * (CX 86(c).)

Television

* * * Plus you can get an Instant "Tax Refund." The instant you qualify for a loan — you get your refund * * * in cash — instantly. So, have your taxes done at Beneficial Finance, and get your Instant "Tax Refund" * * * (CX 84(d).)

45. The final modification in the radio and television versions of the "Instant Tax Refund" advertising was made in March 1971. The word "Plan" was added after the phrase "Instant Tax Refund", and the phrase "lend you the equivalent of your refund in cash" was added.

Although the commercials run subsequent to March 1971 vary, the "Instant Tax Refund" representation remains essentially the same in each (Higgins, Tr. 507-08). The portions of the radio and television transcripts set forth below are representative of the "Instant Tax Refund" theme in commercials run subsequent to March 1971.

Radio

* * * And listen to Beneficial's "Instant Tax Refund" Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the "Instant Tax Refund" Plan * * * at Beneficial Finance * * * (CX 87(b).)

Television

* * * And the Beneficial "Instant Tax Refund" Plan. If you have a refund coming, Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan * * * (CX 84(f).)

46. Respondents' printed advertisements featuring the "Instant Tax Refund" theme also underwent minor modifications from 1969 until 1973. Beginning in 1970, the print advertising was modified by placing an asterisk after the "Instant Tax Refund" reference and a corresponding asterisk below where respondents purportedly explained the "Instant Tax Refund." CX 56, 57(a) and 60(b) are representative of the "Instant Tax Refund" reference with asterisk modification in print advertisements used from 1970 until March 1971:

New Income Tax Service Offers

INSTANT "TAX REFUND"*

Beneficial Finance offers a complete tax preparation service, fully computerized to give you maximum deductions. Accuracy is 100% guaranteed. (Beneficial pays any interest or penalty if it makes an error!)

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund — in cash — instantly. Only at Beneficial * * * (CX 56).

Instant "Tax Refund"*

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund — in cash — instantly. (CX 57(a).)

Introducing * * *

Instant "Tax Refund"*

*If you have a refund coming, you don't have to wait weeks for a Government check. The instant you sign your return and qualify for a loan, Beneficial advances you the full amount of your refund. We call it the Instant "Tax Refund." (CX 60(b).)

47. The final modification of the printed advertising occurred in mid-March 1971. The words "loan" or "plan" were added to the "Instant Tax Refund" reference, and the phrase "lend you the equivalent of

your refund" was introduced (Higgins, Tr. 507-08). CX 93(a), set forth below, is representative of the use of the "Instant Tax Refund" slogan in printed advertising from mid-March 1971 to the present:

"Instant Tax Refund" Plan

If you have an income tax refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly. (CX 93(a).)

48. Respondents' "Instant Tax Refund" is an ordinary loan, not distinguishable in any way from any other loan specially or generally advertised or processed in the office of any consumer finance subsidiary of Beneficial Corporation, in terms of months to repay, amounts of loan available, rates of charge, or otherwise (CX 123; Snyder, Tr. 29).

49. Respondents' early advertisements, which contained no explanation whatever as to the nature of the "Instant Tax Refund" offer, had, on their face, the capacity and tendency to mislead the consumer into believing that if he let Beneficial prepare his income tax return and if the return should indicate a refund is due him, then Beneficial would, as a special service, give him a cash advance in the amount of his refund. There was nothing in the advertisements to alert the customer that what was being offered was a normal consumer loan with finance charges (finding 14, *supra*). Respondents' executives admitted that the advertising was unclear; survey reports from their advertising agency showed customers were confused (CX 159(4-5); Ross, Tr. 84-85; CX 155(a); Ross, Tr. 87), and all changes made in the "Instant Tax Refund" advertising was made in an attempt to clarify what the "Instant Tax Refund" was (Snyder, Tr. 53-55, 71; Higgins, Tr. 506-07).

50. Respondents' subsequent attempts at explanatory language in their radio, television, and print advertising do not succeed in exposing the true nature of the "Instant Tax Refund" offer (See, *e.g.*, advertisements set out in findings 42, 45, 47, *supra*). Read in the context of the whole the "explanatory" language does not adequately explain that what is being offered is a regular consumer loan with finance charges. When considered in its entirety, the message is confusing and misleading. The fact is that the modified advertisements contain two different and conflicting claims. The best that can be said is that the advertisements are susceptible of two meanings: one, that Beneficial offers "Instant Tax Refund," the other, that Beneficial offers a consumer loan to its customer — with conditions that are not revealed — if they qualify for such a loan. The former is clearly deceptive; therefore the advertisement as a whole is misleading. Moreover, the manner in which the attempted explanation is presented adds to the confusion and deception inherent in such advertising. In print, the "explanation" is generally far less prominently featured than

is the "Instant Tax Refund" reference. (See, *e.g.*, exhibits listed at finding 47, *supra*). In the radio and television advertising, the dominant theme is the "Instant Tax Refund," not the "explanatory" language (CX 84-88).

51. There is, furthermore, substantial evidence in the record in the form of credible consumer testimony to the effect that members of the public were in fact confused, misled and deceived by respondents' "Instant Tax Refund" advertising, even in its most modified form (CX 158(c); Martin, Tr. 661-63, 691; RX 20(d); Flot, Tr. 713-17, 727, 729-30, 735-38, 745-46, 764-70; CX 87(c); Moyers, Tr. 771-76, 778-79, 780; CX 80(A-B); Snyder, Tr. 808-09; CX 84(k)).

52. The administrative law judge finds therefore that even as finally modified, respondents' "Instant Tax Refund" advertising has the tendency and capacity to deceive the public (findings 50-51, *supra*).

IV. Misuse of Tax Information

C. Respondents' Conduct Prior to Passage of Section 316 of the Revenue Act of 1971

53. Prior to actually doing so, respondents discussed internally for a number of years the possibility of conducting an income tax preparation business in their local loan offices. Discussions on the subject also took place between respondent Beneficial Management Corporation and its advertising agency Al Paul Lefton Co., Inc., with the idea that a tax preparation business in the local loan offices could generate additional loan business, through the sale of loans to tax customers (Snyder, Tr. 6-8; Ross, Tr. 83-84).

54. Respondents entered the tax preparation business in 1969, the purpose being to use the tax preparation business as a "feeder" to the loan business. Tax advertising was to enhance and develop the loan business, and great emphasis was placed on converting each tax customer into a loan customer (Higgins, Tr. 503, 508-09; Ross, Tr. 114; CX 20, 22, 24-27, 34, 38(a)). The loan and tax preparation businesses were and are completely interrelated (Higgins, Tr. 513-15).

55. Respondents' tax preparation business was in fact highly effective in producing new loan business for the local offices (CX 154(19), (22-30); CX 156(a); CX 157(i); CX 127(c); CX 142(a)-(b); CX 143(b); Higgins, Tr. 508-09).

56. Respondents made extensive use of temporary employees to work in their local offices during the tax preparation season. These employees were used primarily to fill out tax interview sheets for tax preparation customers; they were not required to be experienced in tax matters, nor was much training required to learn to fill out interview sheets (CX 31, 32; Snyder, Tr. 34-35). Both temporary tax employees (if

experienced) and other office personnel would solicit consumers for loans (Snyder, Tr. 34; Taylor, Tr. 161; CX 27, 32, 34).

57. Prior to December 1971, Beneficial Management Corporation prepared and disseminated certain instructions to the local loan subsidiaries of Beneficial Corporation that were engaged in income tax preparation on procedures to be followed in operating the tax business (CX 19-34, 35, 38, 41; Answer to Requests for Admissions, No. 1, 3, 4; Snyder, Tr. 24-25, 27).

58. Prior to December 1971, the general procedure followed by the local offices in their tax preparation business was as follows:

Employees in the local offices filled out tax interview sheets (CX 10, 11) and data sheets (CX 9) when necessary, for each tax customer. This entailed the customer's disclosure of a wide variety of personal and financial information (CX 10, 11, 34(b)). When completed, the sheets contained all the information necessary to complete a customer's federal tax return (CX 24, 38(a); Snyder, Tr. 31-32). The interview sheets and data sheets were sent to Programmed Proprietary Systems, Inc., a computer service which returned to the local office the completed tax return (CX 30; Snyder, Tr. 32). The customer returned to the office to pick up his completed tax return (CX 30). Copies of the interview sheets, data sheets, and completed Form 1040's were kept in the permanent files of the local office (CX 23, 29, 30).

59. The information furnished for tax preparation purposes gave respondent a valuable sales tool, as respondents realized. As CX 34(b) states:

> When you've completed the Tax Interview Form you'll have in front of you nearly all the information you need for making a loan. Take advantage of it. What more do you need?

The local office did make every attempt to take advantage of the opportunities that such information provided to sell the customer a loan (CX 20, 22, 24, 27, 34(d), 38(a), 41).

60. Respondents did not confine themselves to soliciting tax preparation customers for "Instant Tax Refund" loans, but attempted to sell loans for a variety of purposes (CX 25-26; Snyder, Tr. 28-29). They used the information appearing on tax interview sheets to determine the particular type of loan to offer the customers (CX 25-27, 34, 35, 38(a)). For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared - all with a Bill Consolidation Loan (CX 26).

CX 25 states:

> When you get through taking the tax interview form you can determine — within reasonable limits — about how much the taxpayer will have to pay in taxes. Here's your

chance, of course, to sell a loan to pay the Government the taxes the customer owes (Plus Bill Consolidation (CX 25)).

61. Failure to make a sale in the course of the first interview would not end the office's attempts to use the customer's tax information to sell him a loan (findings 62-64).

62. Employees in the local offices used the information available on the tax interview forms to run credit checks on customers to whom they did not sell loans on the first interview. These customers were then approached again, with a "firm offer of a loan amount" made to them when they returned to the local office to pick up their completed tax returns (CX 27, 34(d)).

63. Employees in the local offices used the information available on the tax interview forms to determine credit worthiness of tax customers in order to decide whether to offer them a Beneficial Credit Card. The Beneficial Credit Card is an identification card issued to customers so that they can identify themselves and be able to borrow money at local offices away from their home (CX 27, 35; Snyder, Tr. 37).

64. Employees in the local offices used the information on tax interview forms to solicit tax customers for loans or "Credit Cards" by telephone or otherwise long after these customers had concluded their tax business with the local office (CX 29, 35).

D. Respondents' Conduct Subsequent to Passage of Section 316 of the Revenue Act of 1971

65. Section 316 of the Revenue Act of 1971 was passed Dec. 10, 1971, and became effective Jan. 1, 1972. Beginning in December 1971, respondents disseminated instructions to employees in the field on new procedures to be followed in soliciting tax customers for loans (CX 126(a)-(f), 127, 129, 131, 132, 134, 138, 139, 142, 143). These included the use of a "BOR-56 Authorization" form by the local offices (CX 126(f)). This was supposedly a consent form, allowing the respondents to solicit the tax preparation customer for other business of the respondents. The offices were instructed to have each tax customer sign the BOR-56 before any tax work was done (CX 126(b)). Completed tax forms were placed in a special "Customer Tax Folder" (CX 126(d)). If the customer had signed a BOR-56, respondents felt free to solicit him for a loan. "Loan Information Sheets" were then filled out, containing such data as bills owed by the customer, bank loans outstanding, loan company loans outstanding, car loans. All such information was kept in a "Customer Loan Folder," the only source to which the local office could refer in processing a loan (CX 139(i), (k); CX 142(b), (c); CX 126(d)).

66. Respondents continued to emphasize the importance of selling loans to every tax customer, and to use the tax preparation relationship

as a lead-in to the sale of loans (CX 127(j), (k); 129(d), (f); 130(c); 138(b), (h), (i); 139(f), (k), (m), (u), (z); 140(h); 142, 143).

67. The BOR-56 form fails to disclose clearly to the tax preparation customer respondents' intended use of tax information to solicit him for loans. It is inadequate on its face as a consent form (CX 126(f)). Substantial evidence in the record supports the finding that consumers do not understand the nature of the BOR-56 (Deveny, Tr. 372; Dillard, Tr. 392-95; Harp, Tr. 409-11, 414-16; Bolt, Tr. 485-87; Flot, Tr. 717, 738-39).

E. Deception

68. Respondents failed to disclose to tax preparation customers the fact that information given for the purpose of tax preparation would not be kept confidential and used only for that purpose (finding 67).

69. There is substantial evidence in the record that respondents' tax preparation customers consider the information they provide for tax preparation to be private, personal, and confidential, and that they did or would feel taken advantage of by being solicited for loans based on that information without their consent (Dillard, Tr. 397-98; Snyder, Tr. 809-11, 835-36; Flot, Tr. 724-27; Moyers, Tr. 776-78, 793, 797-98, 804-06; McIntire, Tr. 428-29; Heath, Tr. 494-95).

70. Respondents' practices in using tax information to solicit for loans were deceptive (findings 68-69, *supra*).

F. Respondents' Acts and Practices Were Unfair

71. Existing, established public policy, manifested in federal and state statutes as well as in the ethical codes of professional associations, regards individual income tax information as confidential (26 U.S.C. §7216, Tr. 351; 26 U.S.C. §7213, Tr. 356; 26 U.S.C. §6103, Tr. 356; Code of Virginia §58-27.4, Tr. 356; California Business and Professions Code §17530.5, Tr. 356; CX 81, Tornwall, Tr. 250-55; CX 79, Hechinger, Tr. 130-35, 148; Canon 4, Code of Professional Responsibility of the American Bar Association, Ethical Consideration 4-5, Disciplinary Rule 4-101, Tr. 356).

72. Respondents' failure to respect the confidentiality of individual income tax information by allowing such information to be used to solicit tax customers for loans without their consent offends public policy and constitutes an unfair practice under *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972); (findings 65-71, *supra*).

DISCUSSION

Stipulation for Partial Adjudicated Settlement and Remaining Issues

As a result of the Stipulation for Partial Adjudicated Settlement, filed of record by the parties on Dec. 3, 1973, it was agreed that certain advertising issues set forth in Paragraphs Six (2) through (4) and Seven

(2) through (4) of the complaint be settled without further litigation and an agreed-to order contained in the Stipulation may be entered covering the foregoing issues. Thus, the remaining issues to be litigated were: (1) whether respondents' advertising containing the "Instant Tax Refund" slogan is false, misleading and deceptive in violation of Section 5 (Paragraphs Six (1) and Seven (1) of the complaint); (2) whether the unauthorized use of income tax information by respondents for consumer loan purposes is a deceptive act or practice in violation of Section 5 (Paragraphs Eight and Nine of the complaint); and (3) whether such unauthorized use of income tax information by respondents is also unfair to the consumer in violation of Section 5 (Paragraphs Eight and Nine of the complaint).

The "Instant Tax Refund" Advertising

With respect to the "Instant Tax Refund" advertising which started in 1969 and continues to date, it is convenient to consider separately (1) the pre-February 1970 "Instant Tax Refund" advertisements, which did not employ any explanatory language, and (2) the post-February 1970 "Instant Tax Refund" advertisements, which contain some explanatory language designed to qualify the "Instant Tax Refund" slogan.

A. Pre-February 1970 "Instant Tax Refund" Advertisements

We need not dwell long on the first group of advertisements for they patently and indisputably have the capacity and tendency to mislead the consumer into believing that if he lets Beneficial prepare his income tax return and if the return indicates any refund due him, then Beneficial will, as a special service, give him a cash advance, namely, an "Instant Tax Refund." CX 85F, a radio commercial which was run throughout most of the country in 1969 and early 1970, is a striking example of this group (Also finding 41).

It is well settled that the Commission has the authority to draw its own inferences from challenged advertisements. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). The Commission and the courts have long held that an advertisement is deceptive if it has the tendency or capacity to deceive the public. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676 (2d Cir. 1944). And, in making this determination, the Commission looks to the impression the advertisement makes on the gullible and credulous rather than on the trained and experienced. *Id.* Also see *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942); *Merck* [*Co., Inc.* v. *Federal Trade Commission*, 392 F.2d 921, 926 (6th Cir. 1968); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370

U.S. 917 (1962). Indeed, the central purpose of Section 5 is "* * * to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce." *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).[2]

B. Post-February 1970 "Instant Tax Refund" Advertisements

Beginning in February 1970, Beneficial made certain changes in the "Instant Tax Refund" advertisements designed to explain that what was being offered by these advertisements was in fact a consumer loan. The initial change was the addition of an asterisk to the "Instant Tax Refund" slogan in printed advertisements. The asterisk directed the reader to an explanatory sentence which stated in substance that "if you have a refund coming, you don't have to wait weeks for a government check. The instant you sign your return and qualify for an on-the-spot loan, you get your refund-in cash-instantly." Similar explanations were contained in all other advertising references to the "Instant Tax Refund" slogan. For example, see Paragraph 2(a) of the complaint.

In late 1970, the "Instant Tax Refund" advertisements were again modified. In television commercials, the phrase "qualify for a loan" was added, and in radio commercials, the words "advances you the full amount of your refund" was changed to "you get your refund-in cash-instantly" (finding 44). Beginning in March 1971, the "Instant Tax Refund" slogan itself was expanded to include the words "loan" or "plan" (RX 13; CXs 71, 72, 83), and the expanded slogans were further accompanied by various explanatory language which stated in substance: the instant you qualify for a loan, Beneficial will lend you the equivalent of your refund in cash, instantly (findings 45, 47).

Respondents contend that the "Instant Tax Refund" advertising thus modified and accompanied by further explanatory language adequately informs the consumer that what is being offered is a consumer loan. The administrative law judge is not able to accept this contention. When viewed and considered as a whole, the message is confusing and misleading. *Sebrone Co.* v. *Federal Trade Commission*, 135 F.2d 676, 679 (7th Cir. 1943); *Aronberg* v. *Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942). This confusion is due to the fact that these advertisements contain two different and essentially conflicting claims. They first imply that Beneficial's tax preparation customers will get an "Instant Tax Refund." They then go on to imply that the promised "tax refund" is a "loan" and you must qualify for it. Furthermore, these advertisements are capable of misleading the public into believing that

[2] The record is also clear that respondents were made keenly aware of the confusion resulting from the use of this group of advertisements and decided to employ some form of explanatory language in conjunction with the "Instant Tax Refund" slogan beginning in February 1970 (Snyder, Tr. 53-55, 57; Ross, Tr. 115-18; Higgins, Tr. 506-07; CX 159; also see finding 49).

"loan" in this context means "a cash advance" offered as a special service to Beneficial tax preparation customers, for a nominal fee not related to interest charges, and that "qualify" in this context simply means that the tax preparation customer must have a refund due from the government (See findings 50, 51). In other words, regardless of the literal truthfulness of the advertisement, the overall implication in the mind of the viewer-audience has the capacity and tendency to mislead. *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F.2d 52 (4th Cir. 1950); *Bockenstette* v. *Federal Trade Commission*, 134 F.2d 369 (10th Cir. 1943).

This is especially true because the "Instant Tax Refund" slogan is an explicit and dominant theme and no qualifying language which may follow it can entirely undo the initial impact of that theme. *Cf. The J. B. Williams Co., Inc.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

The most charitable conclusion which can be drawn from these advertisements is that they are confusing, that they are susceptible of two meanings. Namely, one that Beneficial offers an "Instant Tax Refund" and the other that Beneficial offers a consumer loan to its customers if they qualify for such a loan. The former is clearly deceptive. Section 5 condemns such advertisements. In Judge Augustus Hand's words, the Commission can "insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.' " *General Motors Corp.* v. *Federal Trade Commission*, 114 F.2d 33, 36 (2d Cir. 1940). Also see *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955); *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924).

Furthermore, there is substantial evidence in the record which tends to show that the modified "Instant Tax Refund" advertisements confused and misled the public and that a number of consumers recalled the dominant theme of these advertisements to be an offer of "Instant Tax Refund" (Martin, Tr. 663-65, 672, 691-93; Snyder, Tr. 826-27; Moyers, Tr. 785). This, in return, reinforces the administrative law judge's impression of Beneficial's current television and radio commercials that they prominently feature the "Instant Tax Refund Plan" and play down the explanation (RX 20B and D).[3]

Unauthorized Use of Income Tax Information for Loan Purposes

[3] It is true that some of respondents' consumer witnesses testified to a clear understanding of these advertisements to mean an offer of a consumer loan. However, they were for the most part persons who were

(*Continued*)

A. Deceptive Act

Complaint counsel contend that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans from its tax preparation customers is deceptive because the customers are not told in advance that Beneficial will make such use of the confidential tax information furnished to it. The theory appears to be that Beneficial's failure to disclose this material fact constitutes a deceptive act in violation of Section 5. In order to support this theory, complaint counsel further contend that Beneficial, by virtue of certain affirmative representations it makes, creates an expectation on the part of its tax preparation customers that the income tax information they furnish Beneficial will be kept confidential.

In the administrative law judge's view, however, confidentiality inheres in the very nature of personal income tax information regardless of whether Beneficial makes, or does not make, any affirmative representations regarding confidentiality (See further discussion, *infra*, pp. 31-32 [pp. 145, 146, herein]). Furthermore, the record shows the element of confidence is an important aspect of the relationship between a taxpayer and a tax preparer (findings 69, 71, Crossley Survey). Beneficial's failure to disclose the material fact that the tax information will be used for loan solicitation purposes in these circumstances clearly is a deceptive practice in violation of Section 5. *All-State Industries of N.C., Inc.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828.[4]

Furthermore, what is deceptive here is the use of the "Instant Tax Refund" advertising as a *device* to lure tax preparation customers to Beneficial's offices for the purpose of soliciting them for consumer loans. In a real sense, Beneficial's practice in this respect is akin to the so-called "bait and switch" device, which is a deceptive act in violation of Section 5. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (4th Cir. 1963). The rationale of these cases applies with equal force to this case. It is the administrative law judge's determination that Beneficial's use of the "Instant Tax Refund" slogan for the purpose of obtaining leads to loan prospects or luring tax service customers to

knowledgeable of the operations of the consumer loan industry, including Beneficial, by reason of prior dealings or otherwise (Tr. 371, 384, 423, 406-07, 495, 472, 480-81, 611-12). It is well settled that testimony by some consumers that they personally would not be misled or deceived does not preclude a finding by the Commission that the challenged advertisement is deceptive. *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F.2d 268 (10th Cir. 1965), *cert. denied*, 384 U.S. 434 (1966).

Furthermore, as pointed out hereinabove, the purpose of Section 5 is to protect the gullible and credulous as well as the trained and knowledgeable, *supra*, p. 26 [p. 141, herein].

[4] It is well recognized that in such confidential relationships, *caveat emptor* has no place and equity imposes on the parties the duty to act in accordance with the highest standards of morality. Cardozo, *The Nature of the Judicial Process*, 109-110 (1922); Pound, *The Spirit of the Common Law*, 24-25 (1921). Such duty includes that of full disclosure of material facts. 2 Pomeroy. *Equity Jurisprudence* §902. *Cf.* 1 Story, *Equity Jurisprudence*, §206.

Beneficial's loan offices for the purpose of making loans is equally a deceptive act in violation of Section 5.

B. Unfairness

Complaint counsel further argue (1) that the use by Beneficial of confidential tax information for the purpose of soliciting consumer loans is offensive to the public policy regarding personal privacy, and (2) that Beneficial's loan solicitation of its tax customers is immoral, unethical, oppressive and unscrupulous. For these reasons, it is argued, that Beneficial's practices are unfair to the consumer within the meaning of the Section 5 under *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) ("*Keppel*") and *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972) ("*S&H*"). It is the determination of the administrative law judge that the challenged practices are unfair under *Keppel* and *S&H* because (1) they offend the well-established public policy regarding the confidentiality of income tax information, and (2) they are unethical, exploitative and unscrupulous.

In their defense, respondents have advanced several arguments. *First*, it is argued that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some public policy codified into a statute or recognized by common law. In this connection, respondents contend that, until the enactment of Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), the principle of confidentiality of individual income tax information did not acquire such a status. *Second*, it is argued that, to the extent that the confidentiality principle was recognized, it did not apply to the so-called commercial tax preparers, such as Beneficial, in any event. Respondents contend that Beneficial's tax customers did not regard Beneficial's tax preparers as tax experts or professionals who would be strictly bound by the confidentiality principle. Indeed, respondents further suggest that, because the fees charged by Beneficial for its tax service are substantially smaller than those customarily charged by lawyers and accountants, Beneficial's tax customers did not expect, or should not have expected, Beneficial to be strictly bound by the confidentiality principle. In the administrative law judge's view, these arguments are without merit and should be rejected.

The fact is that Congress, by the enactment of the 1971 Revenue Act, codified the confidentiality principle, prescribing criminal sanctions. Equally importantly, long before the 1971 Revenue Act, Congress explicitly demonstrated its public policy concerns regarding the confidentiality of income tax information. For example, 26 U.S.C. §6103 provides in substance that income tax returns are open to inspection only upon order of the President and under rules and regulations

approved by the President. 26 U.S.C. §7213 prescribes criminal penalties for federal employees who disclose information contained in an income tax return.[5]

In the final analysis, the confidentiality principle inheres in the very nature of personal income tax information and governs the *relationship* between the taxpayer and another person who may be entrusted with the information by the taxpayer. The relationship thus is fiduciary in nature. Therefore, the administrative law judge is unable to accept the argument that the amount of fees paid determines whether or not the person entrusted with such tax information is to be bound by the principle of confidentiality. This is not to ignore the reality that money is a universal measure of commercial transactions. I simply conclude that the relationship existing between a taxpayer and a tax preparer entrusted with his tax information imposes upon the latter, as a matter of equitable principle, the duty of confidentiality regardless of the amount of fee paid or the professional status of the latter.[6]

More importantly, respondents' argument that a business practice, in order to be unfair to consumers within the meaning of Section 5, must be a violation of some public policy codified into a statute or recognized by common law is an attempt to restrict the Trade Commission's Section 5 power to enforcement of *existing* statutes. In essence, it is an attempt to turn the clock back half a century to the days of *Gratz*.[7] However, the attempts to restrict the Trade Commission's Section 5 power to existing or recognized methods of competition have been consistently rejected by the Court since *Keppel*.[8] Respondents would now, in this case involving unfairness to the consumer, rely on the same

[5] It has been stated that the purpose of the statute is to "prevent the disclosure of confidential information to those who have no legitimate interest in it." *Starr* v. *Rogalny*, 22 F.R.D. 256 (1958) (E.D. Ill.) That the policy behind §6103 is directly related to that behind the federal prohibition of use and disclosure by income tax preparers can be seen from Senator Mathias' comparison of the former provision and his proposed law. 117 Cong. Rec. S. 8318, Mar. 29, 1971. A great many states have provisions similar to 26 U.S.C.A. §7213 making State income tax return information confidential. See, *e.g.*, District of Columbia, Sec. 47-1564c, D.C. Code; Virginia, Code of Virginia §58-46; Maryland, An. Code Md. §300; Massachusetts, Sec. 58, Ch. 62, G.L.; Minnesota, Sec. 290.61; Ohio, Sec. 5747.18 R.C.; New York, Sec. 697, Tax Law, Ch. 60 C.L.; Michigan, Sec. 206.465, C.L.

[6] There is testimony in this record that the confidentiality of tax information is taken for granted even in cases where the tax preparers are laymen (Tr. 776).

[7] In that case, the Court, narrowly circumscribing the Trade Commission's discretion to define and declare an act an unfair method of competition, struck down the Commission's cease and desist order banning tying arrangements and said: "The words 'unfair method of competition' are not defined by the statute. * * * They are clearly inapplicable to practices never before regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." (253 U.S. at 423-427).

[8] *Keppel* recognized for the first time the Trade Commission's power to go beyond established common law principles to determine that lottery sales were an unfair method of competition in violation of Section 5. The court said: "We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed." (291 U.S. at 314). Also see *FTC* v. *Motion Picture Adv. Service Co., Inc.*, 344 U.S. 392 (1953); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *FTC* v. *Texaco Inc.*, 393 U.S. 223 (1968); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

argument rejected by the Court in the unfair-method-of-competition cases.

Contrary to respondents' argument, however, the Trade Commission's power to define and prohibit *new* unfair acts as they arise, and do so apart from existing statutes or established public policy, is not open to question. The clear holding of the *Keppel* and *S&H* cases is that the Commission has that power. In *Keppel*, the Court accepted a gambling analogy to uphold a Trade Commission ban against lottery sales of candies to children. There, the Court was essentially striking at the unfairness of a practice which exploited the vulnerabilities of children. In *S&H*, the Court, reaffirming the Trade Commission's power to prohibit trade practices which are unfair to consumers (405 U.S. at 239-244),[9] merely insisted that the Trade Commission articulate the basis upon which the practice was found to be unfair (405 U.S. at 248).

What then are the standards against which the challenged practice in this case may be judged? In *S&H*, the Court adumbrated a broad and expansive approach: "in measuring a practice against the elusive, but congressionally mandated standard of fairness, [the Commission], like a court of equity, [consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (405 U.S. at 244). Two things are clear. First, the Trade Commission may proceed on equitable principles, like a court of equity.[10] Second, the Commission may consider "public values."[11]

Applying the Court's broad guidelines to the instant case, the well-recognized principle of confidentiality of individual income tax information is clearly a valid standard in the circumstances of this case.

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[9] As early as in 1923, Justice Cardozo looked to the Trade Commission to build up "a body of precedent which will fix the proprieties of commercial usage." Cardozo, *The Growth of the Law*, 126 (1924). In Judge Learned Hand's words, the Trade Commission's powers "are not confined to such practices as would be unlawful before it acted" and its duty is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *Federal Trade Commission* v. *Standard Education Soc.*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

[10] It is elementary that equitable principle is essentially based on general grounds of morals and the community's sense of decency and fair play. See Maitland, *Equity*, 1-11 (1909); Main, *Ancient Law*, 27-28, 65-66, 401 (notes by Pollock) (Beacon Paperback Ed. 1963); Pound, *An Introduction of the Philosophy of Law*, 57-58 (1922). More than two millenia ago, Aristotle articulated the ethical basis of equity. *Nicomachean Ethics*, V, 11; *Rhetoric*, I, 13. It is of interest to note a parallel between Aristotle's concept of equity (*Rhetoric*, I, 13) and the organic concept of "unfair methods of competition" and "unfair practices" embodied in Section 5 of the Federal Trade Commission Act. See *Federal Trade Commission* v. *Motion Picture Adv. Service*, 344 U.S. 392, 394-395 (1953); *S&H*, *supra*, 405 U.S. at 244.

[11] In *S&H*, (405) U.S. at 244-245, n. 5), the Court accepted without comment the factors the Trade Commission considers in determining whether a practice is unfair, as stated in the Commission's 1964 *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*. These factors were:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

The standards set forth in (2) clearly show that the Trade Commission may prohibit as unfair to consumers, a practice that has not been proscribed by the common or statutory law or judicial decisions. See Note "Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Redefined," 26 Rutgers L. Rev. 427, 433 (1973).

The confidentiality principle has long been incorporated into the codes of ethics of the legal and accounting professions. Congress long ago established the public policy regarding confidentiality of income tax information (26 U.S.C. §§6103, 7213). In 1971, it was made a statutory command to tax preparers, backed by federal criminal sanction. Furthermore, the record is clear that customers of the so-called commercial tax preparers, such as Beneficial, did expect tax preparers to be bound by the principle before 1972 (finding 69). Respondents' argument that commercial tax preparers were not expected to adhere to this principle at all, or not as strictly as lawyers and accountants until the Revenue Act of 1971, would astound their tax customers as well as the general public. In these circumstances, the use by Beneficial of confidential individual income tax information, obtained ostensibly for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans to the same customer is offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer.[12]

It cannot be gainsaid that the so-called commercial income tax preparers, such as Beneficial, provide a service very much in demand by the consumer. They perform a legitimate and highly useful function. However, respondents do not contend that the trade realities peculiar to the commercial tax preparation business are so compelling as to require that the deep-rooted concept of confidentiality of individual income tax information yield to them or be modified in some way.[13] Nor is there any basis for such an argument in this record. The ultimate product of commercial civilization need not be abandonment of all traditional values.

That breach of confidence in fact occurred in this case was due to the peculiarities of Beneficial's own business operations, namely (1) combination of the tax preparation business and consumer loan business and (2) use of confidential tax information for the purposes of Beneficial's loan business. The record indicates that historically

[12] In this connection, it is significant to note the evolving concept of unconscionability codified in Section 2-303 of the *Uniform Commercial Code*, which Congress has adopted for the District of Columbia (D.C. Code Ann. Art. 28 (1967)). It is generally recognized that this section reflects in part the congressional concern for consumer interests and a public policy of vindicating that interest where justice requires. A comment to that section of the *Uniform Commercial Code* states that "the principle is one of the prevention of oppression and unfair surprise," *Uniform Commercial Code* §2-302, Comment 1. Commentators have suggested that, in developing the standards of unconscionability, the courts should not only look to established common law concepts of unfairness but "pass directly on the unconscionability of the contract." *Id.* Also see generally Note, "Unconscionable Contracts: The Uniform Commercial Code," 45 Iowa L. Rev. 843 (1960); Leff, "Unconscionability and the Code-The Emperor's New Clause," 115 U. Pa. L. Rev. 485 (1967); Note, "Section 5 of the Federal Trade Commission Act - Unfairness to Consumers," 1972 Wis. L. Rev. 1071, 1094-1095.

[13] Needless to say, business realities are highly relevant to Section 5 analysis. See dissenting opinion of Brandeis', J. in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, at 434-437 (1920); *Federal Trade Commission* v. *Keppel Bros.*, *supra*, 291 U.S. at 314. In the broadest sense, it has long been recognized that the law cannot long resist the needs of economic life that is strong and just. Cardozo, *The Growth of the Law*, 118 (1924). Also see Holmes, *The Common Law*, 5 (Belknap Ed., 1963); *Collected Legal Papers*, 187 (1920); Cardozo, *The Nature of Judicial Process*, 61-62 (1921).

Beneficial entered the tax preparation business mainly as a means of augmenting its consumer loan business (findings 53-54). In a manner of speaking, therefore, the danger of breach of confidence with respect to tax information was inherent both in the purpose and implementation of Beneficial's business plan from its inception. In this sense, it is arguable that the mere combination of tax preparation and consumer loan business under the same roof and common management of Beneficial may raise a Section 5 question for every such combination contains a seed of very real danger that the confidentiality may in fact be breached. This issue was eliminated by complaint counsel from this case (Mar. 13, 1974 admissions, Paragraph 20) and the administrative law judge has, of course, no occasion to make a determination of this issue one way or the other. However, it is beyond question that the *actual* use of tax information obtained in the tax preparation business for the purposes of soliciting or making consumer loans of any kind by Beneficial, including the so-called tax refund loan,[14] is a violation of the well-organized principle of confidentiality and is clearly unfair to consumers within the meaning of Section 5.

It should be stressed that the administrative law judge does not hold the challenged practice to be unfair simply because it is unethical. Whether a practice is morally or ethically objectionable in a general way is the beginning, not the end, of a Section 5 analysis. Here, the determination that the challenged practice is unfair with the meaning of Section 5 is not simply based on the fact that it is repugnant to some broad ethical desiderata, such as the need to protect personal privacy of individuals. Rather, it is based on a particularized standard, befitting the particular fact situations of this case, namely, the unauthorized use of confidential individual income tax information, ostensively obtained for the purpose of income tax preparation, for the purpose of soliciting or making consumer loans. What is being condemned is the essentially exploitative and unscrupulous misuse of confidential information in a breach of fiduciary relationship involved in this case. As Justice Cardozo observed long ago, Section 5 requires that "the careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79 (1933). Therefore, respondents' arguments that there is no established public policy with respect to the protection of personal privacy in general or that personal privacy is routinely disregarded in

[14] The record is replete with evidence tending to show that (1) the customers responding to Beneficial's "Instant Refund" advertisement were solicited for general consumer loans and, in some instances, for consolidation loans, both totally unrelated to the amounts of income tax refunds due them and (2) the financial information furnished by the customer in the course of the income tax preparation phase was used by Beneficial for the purpose of soliciting these unrelated loans (findings 60, 66).

the conduct of some businesses, such as the direct mailing industry and the sale of various mailing lists, do not save respondents' challenged act from Section 5's proscription.[15]

Trade Commission's Section 5 Jurisdiction and Section 316 of the 1971 Revenue Act

With respect to Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), respondents further argue that that Revenue Code provision is directed precisely at conduct of the type alleged in Paragraphs Eight and Nine of the complaint, and that this legislative enactment has the effect of precluding the Trade Commission from taking any action against respondents under Section 5 of the Federal Trade Commission Act. These arguments are without merit.

Firstly, the Revenue Act of 1971 does not expressly repeal any of the provisions of the F.T.C. Act. Nor does it give tax preparers an express exemption from Section 5 of the Federal Trade Commission Act. And "[i]mmunity from the antitrust laws is not lightly implied." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963). This well-established principle applies to the Federal Trade Commission Act, which was designed to supplement and bolster the Sherman and Clayton Acts by reaching not only existing violations of them, but trade practices which conflict with their basic policies as well as those which are unfair to competitors or consumers. *S&H*, *supra*, 405 U.S. at 245-246. *Cf. United States* v. *Western Pacific R. R. Co.*, 352 U.S. 59, 63-65 (1956).

Secondly, the Trade Commission's instant proceeding in no way invades the exclusive jurisdiction of the courts to enforce the criminal sanctions prescribed by the Revenue Code. Rather, this is simply another instance where Congress provided for concurrent jurisdictions with cumulative remedies. The Trade Commission's jurisdiction and power to enforce the Federal Trade Commission Act has been consistently sustained against challenges that statutes enforced by other agencies should be construed to preclude such jurisdiction. See *e.g.*, *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, *supra*, 143 F.2d at 679. See also *Irwin* v. *Federal Trade Commission*, 143 F.2d 316, 325 (8th Cir. 1944); *Waltham Watch Co.* v. *Federal Trade Commission*, 318 F.2d 28, 31-32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944; *Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir. 1963); *cert. denied*, 375 U.S. 824; *American Cyanamid Co.* v. *Federal*

[15] Complaint counsel forcefully argue that there is an established public policy of protecting personal privacy and the right of an individual to control the dissemination of information of personal nature. The administrative law judge agrees that a broad principle of protecting privacy has evolved gradually during the past 40 years. In general, however, the courts and Congress have engrafted numerous exceptions based on their notion of a balancing of conflicting interests in particular situations. The instant case is clearly governed by a deep-rooted and particularized public policy regarding the confidentiality of income tax information and there is no need to invoke the broader emerging concept of privacy.

Trade Commission, 363 F.2d 757 (6th Cir. 1966), 401 F.2d 574 (6th Cir. 1968),

It is also well settled that a party may be subject to simultaneous jurisdiction by more than one agency under different statutes. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *United States* v. *RCA*, 358 U.S. 334, 343-344 (1959); *United States* v. *Borden Co.*, 347 U.S. 514 (1954); *Safeway Stores, Inc.* v. *Freeman*, 369 F.2d 952, 957 (D.C. Cir. 1966). Similarly, courts have consistently held that concurrent Food and Drug Administration-Trade Commission proceedings involving the same issues are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive. *United States* v. *1 Dozen* * * * *Boncquet Tablets*, 146 F.2d 361 (4th Cir. 1944); *United States* v. *Five Cases* * * * *Capon Springs Water*, 156 F.2d 493 (2d Cir. 1946). Furthermore, in cases where the Trade Commission has concurrent jurisdiction under different statutes, the enforcement standards of the Federal Trade Commission Act may also be different. See *e.g.*, *Brandenfels* v. *Day*, *supra; American Cyanamid Co.* v. *Federal Trade Commission*, *supra;* and the FDA cases cited hereinabove. This is such a case.

In view of the foregoing discussion, respondents' argument that their use of the so-called BOR-56 consent form fully complies with the requirements of Section 316 of the 1971 Revenue Act, a question the administrative law judge has no occasion to decide, is entirely irrelevant to this Section 5 proceeding. For our purposes, it is enough that the present BOR-56 consent form, together with the manner in which it was used by respondents, is not sufficient to cure the unfairness at issue here (findings 65-67).

The Liability of Beneficial Corporation

We need dwell on respondents' argument that Beneficial Corporation, a holding company which owns and controls the Beneficial loan and tax service subsidiaries, is not liable for the practices challenged in this proceeding. The record is abundantly clear that Beneficial Corporation, in addition to its control by ownership, in fact exercises an absolute control over the affairs of its operating subsidiaries, which it collectively calls the Beneficial Finance System, not only through a pervasive web of interlocking directorates and managements but also through its absolute power of the purse (findings 21, 23, 30, 31). Indeed, the "Instant Tax Refund" slogan, which respondent so strenuously insist on retaining for continued use, has been copyrighted by Beneficial Corporation itself (finding 28). It is well settled that those who place in the hands of others the instrumentality by which unfair or deceptive acts are accomplished may be held responsible for these

practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

THE REMEDY

It is well settled that the Trade Commission has broad discretion in fashioning an appropriate remedy once a Section 5 violation is found in order to ensure discontinuance of the condemned act. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion in this respect is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *OKC Corp.* v. *Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972).

Complaint counsel have proposed an order which, except for a few modifications, is substantially similar to the notice order which was attached to the complaint.

Respondents urge two reasons why in their view the imposition of any order would not be in the public interest: (1) discontinuance and (2) the enactment of the 1971 amendment to the Internal Revenue Code. In the administrative law judge's view, they are invalid and should be rejected.

A. Discontinuance

Respondents' argument that the misleading advertisements ceased years ago and that, therefore, no order need be entered is contrary to the administrative law judge's conclusion, elaborated hereinafter, that only the excision of the "Instant Tax Refund" slogan will provide adequate protection. *Infra*, pp. 42-44 [pp. 153,154 herein]. In any event, it is well settled that discontinuance of abandonment of the offending practice does not render a cease and desist order improper. The statutory scheme of the Federal Trade Commission Act clearly contemplates the issuance of an appropriate order in order to protect the public from any resumption of the unfair practices without further resort to the statutory sanctions available for future enforcement. *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Montgomery Ward Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F 2d 921 (6th Cir. 1968).

B. The Revenue Act of 1971

Respondents next contend that, because the use of individual income

tax information by commercial tax preparers for any purpose other than the preparation of tax returns of their clients has been made a criminal offense by Section 316 of the Revenue Act of 1971 (26 U.S.C. §7216), there is no longer any need for the Trade Commission to issue a cease and desist order against unauthorized use by Beneficial of confidential income tax information for the purpose of soliciting or making consumer loans in the future. This argument is without merit for the same reasons discussed hereinabove in connection with the Commission's Section 5 power to proceed in this case. Essentially, the Commission's remedy is cumulative, and not mutually exclusive with the statutory remedy provided for by the Revenue Code. *Supra*, pp. 39-40[pp. 150-151]. Furthermore, the Trade Commission has a broad equitable power to prescribe a more stringent or different remedy than that provided for by the Revenue Act of 1971, or the regulations promulgated thereunder, in order to adequately protect the consumer. In the final analysis, therefore, respondents' argument in this respect is directed to the Commission's discretion. And, on the basis of this record, the administrative law judge concludes that the issuance of a cease and desist order is necessary and proper.

C. Provision Against the Use of "Instant Tax Refund" Slogan

Complaint counsel assert that nothing short of an outright prohibition against further use of the "Instant Tax Refund" slogan, or any variation thereof, would provide an adequate remedy in the circumstances of this case. They stress that mere insertion of an explicit qualifier or other explanatory language in advertisements containing the "Instant Tax Refund" slogan will not do. Respondents vigorously claim that the "Instant Tax Refund" slogan, which is a registered trademark and has been heavily promoted by them over the past few years, constitutes a valuable proprietary right, that the insertion of explicit and appropriate phrase stating that what is being offered is a loan in reasonable proximity of the slogan would adequately cure the alleged deception, and that under the circumstances, the extreme and harsh remedy of an outright ban against any use of the slogan would be unreasonable, arbitrary and capricious and a violation of due process. The administrative law judge is of the view that the same reasons which render unfair and deceptive the post-February 1970 "Instant Tax Refund" advertisements discussed hereinabove, compel the conclusion that further use of the deceptive slogan should be prohibited. See *supra*, pp. 26-28, [pp. 142-143, herein]. Furthermore, it is well settled that qualifying language that is contradictory to the deceptive trade name cannot be used. *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F.2d 776, 780 (D.C. Cir. 1937); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F.2d 429 (4th Cir. 1939);

Bakers Franchise Corp. v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Resort Car Rental System Inc.* v. *Federal Trade Commission*, F.2d (July 31, 1973). This is such a case. See *supra*, p. 28, [p. 143, herein].

For the same reason, respondents' argument that their proprietary right in the slogan should be respected by the Commission must be rejected. As Justice Cardozo so aptly put it in a leading case, to cling to a benefit which is the product of misrepresentation, however innocently made, would constitute "a kind of fraud." Respondents must extricate themselves from it by purging their advertisement of the offending slogan. Under the circumstances, only a complete excision of the "Instant Tax Refund" slogan or any variation thereof, can provide an adequate protection. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

Furthermore, the "Instant Tax Refund" slogan is calculated to exploit the common and natural desire of taxpayers to get back from the government as speedily as possible any money they may have paid above and beyond what they actually owe in taxes. In this sense, the slogan is more than simply deceptive and misleading. It is, in a real sense, exploitative. See *supra*, pp. 30, 37, [pp. 144, 149, herein]. In these circumstances, it would be unthinkable to permit respondents to continue to use the "Instant Tax Refund" slogan or any variation thereof in their future advertisements.

D. The Requirements for a Consent Form

Complaint counsel have proposed detailed requirements for a consent form which may be used by respondents in order to cure the deceptive and unfairness of their practices condemned herein. In the administrative law judge's view, these requirements are reasonably related to the violation found and appear to be designed to protect the consumers adequately in the circumstances of this case. These requirements will therefore be adopted by the administrative law judge.

E. The Provision Requiring Respondents to Send a Letter to their Tax Service Customers for the Most Recent Year

Complaint counsel have also proposed an order provision which would require respondents to send a letter explaining the terms of the cease and desist order entered in this case to the last known address of each of their tax preparation customers for the most recent tax years. Indeed, respondents have contended that the "Instant Tax Refund" slogan has been identified by the consumer with Beneficial and that it constitutes a valuable proprietary interest. It is arguable, therefore, that something more than mere prohibition of the offending advertisements is required in order to counter the residual effects of these

advertisements. It is beyond question that the Trade Commission has the power to require corrective advertisement as a part of an affirmative remedy where appropriate, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *American Cyanamid* v. *Federal Trade Commission*, 401 F.2d 574 (1968), *cert. denied*, 394 U.S. 920 (1969). Nevertheless, the administrative law judge is of the view that the record evidence does not justify a provision for corrective advertisement in this case. First, Beneficial's use of the offending advertisements has been of a relatively recent origin. It started some 4 years ago (findings 41). Second, the advertising campaign using the offending slogan has been largely seasonal, limited to the income tax season. Finally, the administrative law judge is concerned with the possibly counterproductive effects corrective advertisements may have upon those consumers who have never been exposed to Beneficial's "Instant Tax Refund" advertising campaigns. In this sense, any requirement for corrective advertisements may very well operate to dilute the central provision of the remedy in this case, namely, the excision of the "Instant Refund" slogan or any variation thereof from the future advertisements of Beneficial. For these reasons, the administrative law judge does not include a corrective advertisement provision in the order.

The administrative law judge rejects complaint counsel's argument that respondents be required to send a letter explaining the terms of the order to respondents' past tax customers. The necessity for and utility of such a notification letter is highly dubious. In the administrative law judge's view, the most effective protection that can be devised for respondents' tax preparation customers in this case is a total ban against the use of the "Instant Tax Refund" slogan by respondents in the future. This is adequate in the circumstances of this case.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has, and has had jurisdiction over respondents, and the acts and practices charged in the complaint and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents Beneficial Corporation and Beneficial Management Corporation are jointly responsible for the unlawful acts and practices committed in this case and both are subject to the order issued herein.

3. Respondents have engaged in false, misleading and deceptive advertising.

4. Respondents' use of information gathered as a result of their preparation of customers' tax returns for purposes other than the

preparation of those tax returns is false, misleading, deceptive and unfair.

5. The use by respondents of the aforesaid false, misleading and deceptive advertising and deceptive and unfair acts and practices has had, and now has, the capacity and tendency to mislead members of the public into the purchase of respondents' income tax preparation services, and were and are 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.

6. The order set forth below is the necessary and appropriate relief in this case.

As a consequence of the foregoing and of the findings of fact set out above, the following order is entered:

ORDER

It is ordered, That respondents Beneficial Corporation and Beneficial Management Corporation, corporations and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund," or any other word or words of similar import or meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment assessed against the taxpayer which results from the said errors.

5. Representing, directly or by implication, that the percentage of

respondents' customers who receive tax refunds is demonstrably greater than the percentage of the tax paying public at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are specially trained or unusually competent in the preparation of tax returns and the giving of tax advice; or that they have the ability and capacity to prepare and give advice concerning complex and detailed income tax returns; or misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using any information concerning any customer of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name;
2. The name of the customer;
3. The specific purpose for which the consent is being signed;
4. The exact information which will be used;
5. The particular use which will be made of such information;
6. The parties or entities to whom the information will be made available;
7. The date on which such consent is signed;
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and;
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, §316(a) Dec. 10, 1971; 26 U.S.C. §7216 or regulations issued pursuant to it.

It is ordered, That respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of 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 respondent corporations which may affect compliance obligations arising out of this order.

OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner:*

In this case respondents Beneficial Corporation and Beneficial Management Corporation, which we shall refer to jointly as Beneficial unless otherwise noted, appeal from the administrative law judge's initial decision and order.

Beneficial operates a nationwide system of consumer loan offices and, starting in late 1969, the loan offices began offering a personal income tax preparation service. The complaint in this matter, which was issued on Apr. 10, 1973, charged Beneficial with a variety of offenses under Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), stemming from the advertising and operation of the income tax service. During adjudication, counsel for the parties signed a stipulation for partial adjudicated settlement, by which Beneficial admitted violations, and consented to appropriate order provisions, concerning advertising misrepresentations of Beneficial's reimbursement policy, its competence to prepare tax returns, and the number of customers for whom it has secured government refunds. The law judge accepted this stipulation and we see no reason to overrule him. However, the order provisions which the law judge entered respecting these issues do not correspond in some particulars to the stipulated order provisions, and, on the joint motion of Beneficial and complaint counsel, we shall substitute the latter.

After the partial admission, the remaining issues to be adjudicated were the lawfulness of Beneficial's advertisements featuring its "Instant Tax Refund" slogan, the lawfulness of Beneficial's soliciting loans with information given by its tax service customers, and the liability of respondent Beneficial Corporation. The law judge found against respondents on each of these issues in an initial decision filed Oct. 21, 1974. Respondents have appealed on each issue.

We affirm the administrative law judge. Except to the extent that they are inconsistent with this opinion, the findings and conclusions of the law judge are adopted as those of the Commission.

I. LIABILITY OF BENEFICIAL CORPORATION

Every local loan office of what is known as the Beneficial Finance System is a separate corporation wholly owned, with the exception of a

few shares of a few companies, by Beneficial Corporation. At the end of 1972, 1,505 of these local loan corporations operated domestically. (CX 18 at 8)[1] Beneficial Corporation also wholly owns respondent Beneficial Management Corporation, which provides management services, at cost, to the local loan subsidiaries. Other wholly-owned Beneficial Corporation subsidiaries include Beneficial Management Corporation of America, which implements the local loan policies set by Beneficial Management Corporation, and Beneficial Data Processing Corporation, which provides accounting services for the local loan subsidiaries. (I.D. Pars. 7, 20). It is undisputed that the conduct challenged in this matter was performed, directly at least, by subsidiaries, and that Beneficial Corporation must be subject to vicarious liability or none at all.

In determining a parent corporation's liability, we examine the "pattern and framework of the whole enterprise." *Art National Mfgs. Dist. Co.* v. *Federal Trade Commission*, 298 F.2d 476, 477 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962). And if the facts demonstrate even latent control, the applicable standard is met:

> [W]here a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

P.F. Collier & Son Corp. v. *Federal Trade Commission*, 427 F.2d 261, 270 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970).

Despite this clear statement, respondents contend that we should be governed instead by the common law rule, restated in *National Lead Co.* v. *Federal Trade Commission*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd. on other grounds*, 352 U.S. 419 (1957), that to pierce the corporate veil we must find evidence of such complete control of the subsidiary by the parent that the subsidiary is a mere tool and its corporate identity a mere fiction. We reject the contention that any such stringent standard applies.

> Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute.

P.F. Collier, supra, 427 F.2d at 267. *See also, e.g., Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 590 (9th Cir. 1957).

Accordingly, we have examined the overall pattern of Beneficial

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[1] The following abbreviations are used in this opinion:
I.D. - Initial Decision of administrative law judge (cited by paragraph where adopted without change)
Tr. - Transcript of testimony
CX - Commission exhibit
RX - Respondents exhibit

Corporation's relation with its subsidiaries, and we find for several reasons that an order should issue against the parent.

First, respondent Beneficial Corporation shares a common management with respondent Beneficial Management Corporation. The president of the former serves as president and chairman of the board of the latter, and sits on the executive committee of each. The first vice president of Beneficial Corporation also sits on both executive committees. Beneficial Corporation's chairman of the board is additionally general counsel of Beneficial Management Corporation and, likewise, a joint executive committee member. These three men were a majority of Beneficial Corporation's executive committee and were the entire executive committee of Beneficial Management Corporation during much of the relevant period. The executive committee of Beneficial Management Corporation approved the start of the income tax preparation business (I.D. Pars. 30, 31, 32).

Through its domination of the service subsidiaries, Beneficial Corporation also controls each of its local loan subsidiaries. While no officer or director of the parent serves directly as an officer or director of any local loan subsidiary, Beneficial Corporation chooses local officers and directors from the ranks of the management subsidiaries.

Since at least 1969, Beneficial Corporation has installed each regional vice-president of Beneficial Management Corporation as a director of all local loan subsidiaries in his region; typically, the same man also serves as president of all the local loan subsidiaries in the region. The remainder of each local board is filled by a small group of employees of Beneficial Management Corporation of America. Thus, the president of Beneficial Management Corporation of America and two other employees of that corporation serve on the boards of all 1,143 local loan subsidiaries outside New York, and are a majority of those boards; the same three men are also, respectively, secretary, vice-president, and treasurer of these 1,143 subsidiaries. (CX 145a; Tr. 198-201, 221, 226).

The administrative law judge correctly called these patterns of control "a pervasive web of interlocking directorates and managements." (I.D. at 40 [p. 151, herein]). Here, as in *P.F. Collier*, *supra*, 427 F.2d at 268, the men who directed the policy and operations of the parent also directed the policy and operations of the wholly-owned subsidiaries.

Second, Beneficial Corporation also exercises complete financial control over the affairs of its subsidiaries. The local loan offices receive all cash for making consumer loans from the parent company, either by capitalization or by loan. Beneficial Data Processing Corporation performs all of the accounting for the local loan subsidiaries. The service subsidiaries provide their services to the local loan companies at

cost, and themselves borrow needed funds from Beneficial Corporation. (I.D., Pars. 19, 20). Without the continuing support and intervention of the parent, neither the local loan subsidiaries nor the service subsidiaries would be independently viable.

Third, Beneficial Corporation also allows or encourages local loan subsidiaries to hold themselves out as part of a single nationwide Beneficial entity. Each of them is similarly named — Beneficial Finance Company of Pittsburgh, or of Knoxville, or of Charlotte. Moreover, they are jointly identified through advertising as the Beneficial Finance System, with offices nationwide and around the world. Consumers believed themselves to be dealing with a nationwide Beneficial organization. (Tr. 375, 426). As in *P.F. Collier*, *supra*, 427 F.2d at 269, Beneficial Corporation allowed its subsidiaries to trade on its own name and good will. Moreover, by clothing its subsidiaries with apparent authority to act for it, Beneficial Corporation is liable when they use that authority to deceive the public. *Cf. Goodman* v. *Federal Trade Commission*, *supra*, 244 F.2d at 591-93.

Fourth, Beneficial Corporation has set up a retirement plan for all employees of the local loan companies and the service subsidiaries and has contributed several million dollars to the plan. Beneficial Corporation has also set up various other employee plans, such as a stock plan and a Thrift Club plan (Tr. 208-10; I.D. Par. 22).

Finally, the very advertising slogan which is a subject of this case is copyrighted by Beneficial Corporation. That the parent owns the slogan while the subsidiaries use it is further evidence, if any is needed, of the closely intertwined nature of Beneficial Corporation and its flock of subsidiaries. But the copyright ownership by itself is also sufficient to fix liability on Beneficial Corporation. As respondents vigorously point out when arguing to keep the slogan, a copyrighted phrase is a property right. And the law is clear that one who places into another's hands the instrumentality by which unfair or deceptive acts or practices are accomplished may be held responsible for those practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952).

As we have noted, a sufficient standard is whether the parent, having latent power to halt illegal practices of its subsidiary, instead tacitly approved them. That standard is clearly met. In fact, Beneficial Corporation's control was more than latent, for the parent was intimately entwined with the management, the finances, the employees, and the marketing practices of its subsidiaries. The paper division of Beneficial's business into 1,800 separate companies does not mask overall existence of a single enterprise. *See Zale Corporation, et al.* v.

Federal Trade Commission, 473 F.2d 1317 (5th Cir. 1973). Whether looking at the pattern or framework of the whole enterprise or at the individual factors mentioned, we find Beneficial Corporation liable. Indeed, even though the common law standard argued by respondents is inapplicable, in this case that more stringent standard is met as well, for the subsidiaries were simply convenient fictions for Beneficial Corporation's use.

II. INSTANT TAX REFUND ADVERTISING

As the administrative law judge found, substantially all of Beneficial's tax preparation advertising has featured the "Instant Tax Refund" theme. The first advertisements, in late 1969 and early 1970, gave little or no explanation of what Beneficial was actually offering. For example, one radio commercial states:

* * * Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now - even before you mail your return - with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance. Instant Tax Refund. At Beneficial you're good for more. * * * (CX 85(f).)

By February 1970, after initial public response demonstrated widespread misunderstanding of the Instant Tax Refund (Tr. 65-66), Beneficial began to alter its advertising. Broadcast advertisements since then have variously referred to the " 'Instant Tax Refund' Plan" or " 'Instant Tax Refund' loans," and have included such explanatory language as "lend you the equivalent of your refund in cash" or "qualify for a loan." A typical television advertisement is:

* * * And the Beneficial "Instant Tax Refund" Plan. If you have a refund coming, Beneficial will lend you the equivalent of your refund in cash the instant you qualify for a loan. * * * (CX 84(f).)

Print advertisements also changed somewhat from their original form. After 1970 Beneficial placed an asterisk after the Instant Tax Refund reference with a corresponding asterisk below accompanied by explanatory language, or otherwise used the words "loan" or "Plan" with explanatory language. For example, CX 63 states:

New Income Tax Service offers "Instant Tax Refund" Plan*

* * * * *

*When you get your taxes prepared at Beneficial you can take advantage of our "Instant Tax Refund" Plan. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund — in cash — instantly * * * even before you mail your return. * * *

In truth, it is admitted, what Beneficial is offering is its everyday loan service. The Instant Tax Refund is not a refund at all but a personal consumer loan, with regular finance charges, costs, and repayment period. (complaint, Par. 7(1); Ans., Par. 7; I.D. Par. 48). Such

a loan is always available to anyone meeting Beneficial's credit standards, whether or not the customer is owed a tax refund by the government, but Beneficial will not make any loan to a person failing to meet its credit standards, even if the customer is due a government refund. The size of the loan Beneficial wishes to sell is not related to any tax refund, but to the customer's credit limit (CX 143e, 143i; Tr. 169).

A.

Beneficial takes a narrow view of the dispute on appeal. According to Beneficial, the only issue which its Instant Tax Refund advertising presents is whether Beneficial offers real tax refunds. The broader issue, whether consumers are deceived over what Beneficial actually does offer, is presumably irrelevant. Beneficial suggests that deciding this case on other than the narrow issue of actual refunds will import a new theory neither charged nor litigated.

We reject the idea that any such narrow question is before us. Beneficial had ample notice of the issues in this case, which were, and are, whether the Instant Tax Refund advertising is unfair or deceptive under the Federal Trade Commission Act, and specifically whether the Instant Tax Refund advertising misrepresents that Beneficial is offering no more nor less than its normal consumer loan service with its normal finance charges. The complaint raises these issues by quoting Beneficial's advertising (Par. 5), charging that it seems to offer some "instant refund" (Par. 6(1)), and then alleging that in fact Beneficial is offering not a refund at all but a personal loan with finance charges (Par. 7(1)).[2] A clearer and more precise allegation is difficult to conceive. It certainly goes beyond the minimum standards of notice pleading acceptable in administrative hearings. *A.E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F.2d 453, 454 (7th Cir. 1943).

During litigation, Beneficial clearly understood that this case related to the total truth of its offer and not just to actual tax refunds. Consistent with the position taken in its prehearing brief before the

[2] The full charging paragraphs read:

PAR. 6. [Respondents have represented that]

* * * * *

1. Respondents will provide taxpayers who have their returns prepared by respondents and to whom a refund is owned by the Internal Revenue Service with an "instant refund" at the time their returns are prepared.

* * * * *

PAR. 7. In truth and in fact:

1. Respondents' "instant tax refund" is not a refund but a personal loan and the recipient of the loan is required to pay finance charges and other costs for such loan.

law judge that its advertisements "fairly and fully inform the public precisely what is involved,"[3] Beneficial asked each of its consumer witnesses if they realized consumer loans with normal finance charges were offered (*e.g.*, Tr. 364-65, 401, 460, 469-73). Beneficial also attempted to show that consumers understand the word "loan" to imply finance charges (*e.g.*, Tr. 56-58, 114-15). Even assuming that only the narrow issue of actual tax refunds was alleged in the complaint, which we do not find, we have consistently held that a party cannot subsequently challenge as beyond the pleadings an issue which was litigated, if he has had actual notice and opportunity to defend. *Grand Caillou Packing Co.*, 65 F.T.C. 799, 820-821 (1964), *rev'd in part on other grounds sub nom. LaPeyre* v. *Federal Trade Commission*, 366 F.2d 117 (5th Cir. 1966). *See also, e.g., Armand Co.* v. *Federal Trade Commission*, 84 F.2d 973 (2d Cir.), *cert. denied*, 299 U.S. 597 (1936); Rule 3.15(a)(2), 16 C.F.R. §3.15(a)(2). In short, Beneficial has had a full and fair opportunity to litigate whether its advertising misrepresented the total truth of its offer, and we will decide that point.

B.

Turning, therefore, to Beneficial's advertising, we conclude that the Instant Tax Refund advertisements, in both their plain and adorned forms, had a capacity and tendency to mislead the public about the truth of Beneficial's loan offer, and thus violated Section 5. We find this both on the basis of our own expertise and judgment, from having examined the advertising, *see, e.g., Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965), and on the basis of ample record evidence (*e.g.*, Tr. 53-55, 115-18, 506-07, CX 159).

The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special, is that this cash advance is different from a normal consumer loan.

Beneficial was acutely aware that the early advertising was misleading consumers about the nature of its offer, for it made all the subsequent changes in an attempt to clarify the real meaning (Tr. 53-55, 115-19, 504-08). The extent of the early advertising's deception is epitomized by a report from Beneficial's advertising agency on the consumer impact of its first Instant Tax Refund campaign (CX 159):

Results of this initial wave of interest depend on the office and its location. In center-

[3] Respondents' trial brief, before the law judge, Oct. 30, 1973, at 4.

city offices, particularly those near ghetto areas, the impression gathered from managers was that many of the phone calls came from totally uncreditworthy "riff-raff" * * * people with no steady job record, with very low incomes, whose sole concern was in the Instant Tax Refund. Many thought they could simply get their government checks immediately at Beneficial. Others didn't have the required $5 deposit. There were many loud arguments and unpleasantnesses * * * including one or two incidents of violence being threatened. Managers in these situations tend to agree that advertising should have dealt more directly with the qualifications required to obtain an Instant Tax Refund.

In other offices — in steady, stable white middle class neighborhoods — many customers also needed explanations about the loan aspects of the Instant Tax Refund. But naturally there were fewer hopeless applicants, and managers in places like that feel much better about the high response level and are much calmer about the advertising claim.[4]

In the face of this, we are unpersuaded that, as Beneficial argues, consumers could decipher the real meaning of its advertising because the Instant Tax Refund phrase was placed in quotations or because Beneficial's identity as a consumer loan business may have given a clue. At any rate, consumers are not obliged to guess about the meaning of advertising. *Cf. Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937).

Beneficial contends that it eliminated any early faults by adding the explanatory language characteristic of its later advertising. Although, as we discuss *infra*, the later advertising is not appreciably less misleading than the early, even assuming that Beneficial did discontinue its early deception in this case we find it an insufficient defense. Whether a cease and desist order should be entered when discontinuance is claimed rests within the discretion of the Commission. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966). And the Commission has required respondents to meet a heavy burden to prevail on such a claim. *Compare, e.g., Argus Camera, Inc.*, 51 F.T.C. 405 (1954), *with Fedders Corp.*, Dkt. 8932, 3 CCH Trade Reg. Rep. Par. 20,825 (Jan. 14, 1975) [85 F.T.C. 38]. Assuming discontinuance of the early deception to have occurred, we can detect no reason to accept that discontinuance as a defense here, for we have no assurance that the deception will not be resumed. Beneficial is still in the tax preparation business and could revert at any time to similar deceptive practices. *See Giant Foods*, 61 F.T.C. 326, 357 (1962), *aff'd.*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 967 (1964). Moreover, such changes as it made in its advertising came partly from the prodding of various regulatory agencies, so were not totally voluntary (Tr. 11, 55, 70-71, 506-07). *See*

[4] Although we have rejected Beneficial's narrow construction of the complaint, we note that this memorandum indicates some consumers at least did believe Beneficial actually would provide real tax refunds.

Eugene Dietzgen Co. v. *Federal Trade Commission*, 142 F.2d 321, 330 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944).

At any rate, no discontinuance occurred, for, as we have noted, despite continual revision Beneficial's later advertising did not succeed in shedding the deceptive and misleading characteristics. The addition of the words "loan" and "plan" and "qualify" was not, in our view, sufficient to clarify exactly what Beneficial was really offering. As the law judge noted, the advertising at best is open to two interpretations. Though some consumers may understand that regular consumer loans are offered,[5] another interpretation is that Beneficial is offering a special, tax-related service apart from its everyday loan business. Of course, where two interpretations of an advertisement are possible, one of which violates Section 5, the advertising is unlawful. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F.2d 270, 272 (2d. Cir. 1962).

Beneficial insists that we examine the later advertisements in their entirety, and consider the overall explanation of the Instant Tax Refund phrase. *Cf. Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (7th Cir. 1946). We have done so. But as noted we find the explanation confusing and misleading. For example, addition of the supposedly explanatory word "plan" seems to us to heighten the implication of the Instant Tax Refund's uniqueness, rather than clarify that it is not unique at all. Thus, we have no occasion to determine whether the explanation, considering the advertising as a whole, was sufficiently conspicuous to dispel the impression generated by the dominant Instant Tax Refund slogan, for nothing amounting to real explanation was included.

The testimony of consumers confirms our view that the later advertising has a capacity to mislead in a material respect. A number of consumers failed to understand that Beneficial was offering only its normal loan service with normal finance charges. Their reasonable impression was that they would pay only a small fee and that the main qualification for the Instant Tax Refund was being due an actual Government refund (Tr. 663, 691, 713-16, 775, 808-09). The consumers, had they realized from the advertising that the "Instant Tax Refund" was simply Beneficial's ordinary loan business, would not have gone to Beneficial's offices at all (Tr. 665, 729, 745-46, 778).

We may assume, as Beneficial would have us, that respondents never intended to deceive consumers. But intent is not an element of a deceptive advertising charge under Section 5. *Regina Corp.* v. *Federal*

[5] Beneficial produced a number of such consumers. It appears from their testimony, however, that most of them understood the Instant Tax Refund for what it was because of their prior dealings with loan companies and not because they independently comprehended the advertising (*e.g.*, Tr. 371, 391, 423, 472, 480-81, 495).

Trade Commission, 322 F.2d 765, 768 (3d Cir. 1963). The simple fact is that Beneficial's Instant Tax Refund advertising had a capacity and tendency to deceive, and did in fact deceive, the consuming public.

C.

The law judge's order bans the use of the Instant Tax Refund phrase or similar words. He found that no qualifying language could remedy the deception and that only purging Beneficial's advertisements of the phrase would suffice. Beneficial vigorously contends that explanatory language could cure any fault and that forced abandonment of its copyrighted and heavily promoted phrase is unwarranted.

In some instances, it is true, respondents have been allowed to retain trade names which had become valuable business assets, because the misleading qualities of the names could be dispelled by explanation *e.g.*, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933). But *Royal Milling* and its progeny are not limitations on the Commission's authority to enter a fully effective order. If explanatory language is insufficient to qualify a deceptive trade name or is inherently contradictory, its effect is simply to confuse the public and the Commission in framing a proper remedy must excise the offending phrase altogether. *See, e.g., Resort Car Rental Systems, Inc.* v. *Federal Trade Commission*, 518 F.2d 962 (9th Cir. Apr. 14, 1975); *Bakers Franchise Corp.* v. *Federal Trade Commission*, 302 F.2d 258, 262 (3d Cir. 1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States Navy Weekly, Inc.* v. *Federal Trade Commission*, 207 F.2d 17, 18 (D.C. Cir. 1953). Moreover, the Commission has wide latitude in judgment, particularly in determining whether qualifying words will eliminate a deceptive trade name. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946).[6]

In light of these principles, we see no reason for allowing Beneficial to retain the offending slogan. The Instant Tax Refund advertisements, we have held, have the capacity and tendency to mislead and have in fact misled consumers. In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to

[6] Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans. The Instant Tax Refund slogan is unlike the established company names in *Royal Milling*, for it is not the name of anything. It is an empty promotional phrase referring to nothing.

the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

Nor are we inclined to temper our conclusion to ban the phrase simply because Beneficial has copyrighted it and promoted it heavily. The phrase, which is only six years old, has been deceptive from the start, so to protect it is to protect Beneficial's investment in deception. We reject the idea that the more heavily a false claim is advertised, the more tenderly we must treat it.

Beneficial argues that excision of the Instant Tax Refund slogan and words of similar import would prevent any reference to the concept of tax refund loans. This is quite true. The record is absolutely clear that, in Beneficial's business at least, no such concept exists. If, however, Beneficial should begin offering a special loan service actually related in some way to income tax refunds, it may seek to reopen the order. For now we believe the absolute prohibition necessary.[7]

In light of what we have said we must affirm the law judge's order and reject Beneficial's offer of settlement.

III. MISUSE OF CONFIDENTIAL RELATIONSHIP

Finally, respondents appeal the law judge's conclusion that Beneficial misused confidential information gathered in the course of its tax preparation business, by using it to solicit loans without consent. The law judge held Beneficial's practices exploitative, unscrupulous, deceptive, and unfair.

The essential facts are not contested. Beneficial entered the tax preparation business for the explicit purpose of generating loan customers. (I.D. Par. 54; Tr. 84). In practice the tax service, which Beneficial operated from the same offices as its loan business, fulfilled this goal; it was in fact the greatest source of new borrowers which Beneficial had developed in some time (I.D. Par. 55; Tr. 508).

[7] We are likewise unpersuaded by Beneficial's argument that the First Amendment bars this order. It is too clear to warrant discussion that the First Amendment does not protect commercial speech which has been found to be deceptive and misleading. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, *supra*, 304 F.2d at 272. There is no constitutional right to disseminate false or misleading advertising. *E.F. Drew [Co.* v. *Federal Trade Commission*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

Beneficial used two different procedures to turn tax customers into borrowers. First, from the beginning of its tax preparation venture in 1969 until December 1971, Beneficial made no effort whatever to limit the use of customers' tax data to the preparation of tax returns. Under the procedure in effect during this period, Beneficial's employees prepared a tax interview sheet for each customer who presented himself for tax preparation. This sheet, which contained a variety of financial information, was sent to a computer firm for actual preparation of the return, and the customer frequently had to return a second time to pick up his completed return (I.D. Par. 58). Beneficial explicitly instructed its personnel to use the tax data appearing on the information sheet to solicit loans. For example, CX 26 states:

> Right on the Tax Interview Form it shows you what banks or loan companies the customer owes. It is an easy matter to go on from there and list other debts and show how all the bills can be consolidated, the bank loan can be paid off, the loan company can be paid off, the balance on the car can be cleared - all with a Bill Consolidation Loan.

In addition, if the customer were not sold a loan during the first interview, Beneficial solicited again during the second visit and continued to solicit thereafter by telephone and otherwise (I.D. Pars. 62, 64). Personnel were instructed to run a credit check on those who, on their first visit, were reluctant to borrow money, (I.D. Par. 63), and to present these customers on their second visit with completed loan papers awaiting only a signature (I.D. Par. 62).

After December 1971, Beneficial revamped its procedure because of the enactment of the Revenue Act of 1971. Section 316 of that Act, 26 U.S.C. § 7216, imposed criminal penalties upon commercial tax preparers for using customers' tax data for non-tax purposes without consent. Under the new procedure, Beneficial continued to stress turning tax customers into loan customers, but Beneficial's employees required each tax customer to sign a supposed consent form before soliciting any loan. The form, which Beneficial called a BOR-56 Authorization, purported to authorize Beneficial to solicit the customer for "any business" in which Beneficial may engage, and to stipulate that any data appearing on a loan application was not given for tax preparation. In addition to completing a tax interview sheet, Beneficial's employees were instructed to complete for each customer a loan interview sheet containing similar or identical financial information and to base their loan solicitation on the latter document. Beneficial maintained a separate "customer loan folder" for the loan information (I.D. Pars. 65, 66).

A.

Beneficial contends for two reasons that our consideration of its loan

solicitation practices should be limited. First, the pre-Revenue Act conduct is supposedly irrelevant, because, according to Beneficial, the law judge drew no legal conclusions from his extensive factual findings on this issue; apparently Beneficial argues that he tacitly dismissed this part of the case and the Commission should not alter his disposition. Second, the law judge's post-Revenue Act findings are, Beneficial says, beyond the scope of the complaint and thus should be dismissed.[8]

Neither of these arguments is supportable. As to the pre-Revenue Act conduct, the law judge's opinion clearly considered and drew legal conclusions from the record evidence. In addition to entering detailed factual findings (I.D. Pars. 53-64), the law judge explicitly held that Beneficial's pre-Revenue Act practices were "offensive to the public policy, unethical, unscrupulous, unconscionable and clearly unfair to the consumer." (I.D. at 36) [p. 148, herein]. Of course, even had the law judge actually ignored Beneficial's pre-Revenue Act conduct, the Commission on review could itself fully consider its lawfulness Rule 3.54(a), 16 C.F.R. §3.54(a).

Beneficial's second argument - that the law judge's theory of post-Revenue Act violation is beyond the scope of the complaint - must be rejected on the same grounds that its similar claim respecting the tax refund advertising was rejected. According to Beneficial, the complaint, which alleged misuse of the "tax return" and the tax "financial profile," does not encompass Beneficial's post-Revenue Act procedure of preparing a separate loan information profile for loan solicitation instead of referring directly to the tax documents. But we do not read the complaint so restrictively. It plainly alleges misuse of a confidential relationship by soliciting loans, without consent, using information given for tax purposes (complaint, Par. 8). Since the law judge explicitly found the post-Revenue Act consent form inadequate to differentiate tax information from so-called loan information in customers' minds, the law judge correctly construed the complaint when he applied it to the post-Revenue Act procedures. Moreover, even accepting the argument that the complaint does not by its explicit terms encompass the post-Revenue Act procedures, we see no indication that the real substance of the dispute was not clarified for Beneficial during adjudication. As we noted before, an administrative complaint is a flexible document; semantic deficiencies will not preclude full resolution of the issues where the party proceeded against has a reasonable opportunity to know the matters in controversy *Avnet* v. *Federal Trade Commission*, 511 F.2d 70, 76 (7th Cir. 1975). Beneficial has offered

[8] Apparently in connection with this second argument, Beneficial also seems to argue that the law judge was improperly influenced by a personal belief that a dual loan and tax business is *per se* unfair. However, the law judge offered no such opinion and in fact specifically declined to rule on the issue (I.D. at 37) [p. 149, herein]. The legality of dual operation was eliminated as an issue by complaint counsel on Mar. 13, 1974.

utterly no information suggesting it was prejudiced, or unfairly surprised, or otherwise unable to litigate the legality of its post-Revenue Act conduct. In fact, Beneficial itself highlighted the issue by raising the supposed lawfulness of its post-Revenue Act conduct as an affirmative defense.

We conclude, therefore, that the substantive lawfulness of Beneficial's conduct, both pre-Revenue Act and post-Revenue Act, is properly before us.

B.

We first consider Beneficial's pre-Revenue Act conduct. The law judge found this conduct unfair, because it violated basic public policy respecting the confidentiality of tax data, and deceptive, because it was premised on omission of material facts.

In determining whether Beneficial's conduct was unfair, the appropriate standard is a broad one. The Commission

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of unfairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Federal Trade Commission v. *Sperry & Hutchinson*, 405 U.S. 233, 244 (1972).

In accordance with this mandate, the law judge determined the applicable public policy relating to use of tax data from a wide range of relevant statutory and ethical sources. However Beneficial argues that applicable public policy can only be found in a law or canon running by its terms to Beneficial, and that public policy deduced and synthesized from analogous situations cannot govern its conduct. Accordingly, for the period before the Revenue Act explicitly applied a standard of confidentiality to its business, Beneficial would find no applicable policy.

This argument totally misapprehends the scope of unfairness under Section 5 of the Federal Trade Commission Act. There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law. Therefore, in this case, as in others, those who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934); *Federal Trade Commission* v. *Sperry & Hutchinson*, *supra*. The passage of the Revenue Act reiterated, but

certainly did not create, the policy of tax confidentiality which we apply here.[9]

The policy we apply is evident in the numerous incarnations of our society's concern for the confidentiality and proper use of personal tax data. This theme, broader than the letter of any one law, plainly links those public statutes which variously impose criminal penalties upon federal employees for revealing a tax return,[10] or allow disclosure of income tax returns only under Presidential order or regulation,[11] or forbid disclosure of state income tax returns.[12] The same policy of tax confidentiality is also manifested in the ethical standards of other commercial tax preparers. Accountants,[13] certified public accountants,[14] and lawyers[15] would all be in violation of their ethical canons if they used tax information received from a customer to solicit a loan without consent. While it is not our intent to inject entire professional ethics codes into Beneficial's business, we believe the various similar fiduciary requirements of professional income tax preparers reflect a basic ethical consideration which by its nature is equally applicable to anyone in a position to abuse the confidence of a client.[16]

The reason for this statutory and ethical concern is obvious. Personal financial data is the private business of the individual to whom it relates. Its inherent confidentiality requires that the relationship between the tax preparer and his customer be a fiduciary one. This basic fiduciary nature is reflected in the personal expectations of consumers (tr. 256, 778). Numerous witnesses testified that they expect confidentiality from tax preparers and regard loan solicitation based on tax data as breach of confidentiality (*e.g.*, 493-94, 666, 724-25, 809-10).

Beneficial argues, however, that its misuse of tax information was minimal because the information was not transferred out of the company. However, even putting aside the evidence that Beneficial did in fact transfer the names of its tax customers outside the company

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[9] In light of the pervasive and specific policy of tax confidentiality, we, like the law judge, have no need to decide whether a broader consideration of personal privacy could govern this case. In declining to reach that issue, however, we do not suggest that a generalized right of personal privacy and personal control over private data is an inadequate foundation on which to ground a finding of unlawfulness under Section 5. In fact, the right of privacy has become a widely-valued public policy, with constitutional and statutory underpinning. *Cf., e.g., Roe* v. *Wade*, 410 U.S. 113, 152 (1973); Privacy Act of 1974, 5 U.S.C. §552a. Its violation in a commercial context would likely be unlawful under the Federal Trade Commission Act.

[10] 26 U.S. §7213.

[11] 26 U.S. §6103.

[12] Code of Virginia, §58-46; *see also* I.D. at fn. 5 [p.146, herein].

[13] Tr. 134, 136, 148.

[14] Tr. 252, 255, 263.

[15] *See* Canon 4, Code of Professional Responsibility of the American Bar Association (Disciplinary Rule 4-101 and Ethical Consideration 4-5).

[16] Beneficial argues that some professional income tax preparers also solicit other business from their clients. However, in using tax data to identify other specialized needs of their clients, accountants and lawyers are fulfilling a professional obligation markedly different from Beneficial's practice of trying to sell loans to each of its tax customers (Tr. 142-45, 257-59). The point in looking to other income tax preparers is not to make Beneficial and them indistinguishable, but only to identify an irreducible minimum quantum of fairness and commercial integrity.

while running credit checks, (CX 27, 34d; Tr. 37, 721-22), this argument ignores the fact that the confidential relationship is breached whenever the customer's information is used for the financial gain of the preparer. Whether or not respondents brokered the confidential information to other businesses, or simply capitalized on it themselves, is thus unimportant. By the same token, respondents' argument that customers expected to be solicited for loans because of Beneficial's reputation as a consumer loan business, and were not shocked at being solicited, ignores the record evidence that customers would not approve of any such loan solicitation made on the basis of their confidential tax data (Tr. 667, 725). The fact that some tax customers initiated loan discussions themselves, typically by volunteering the amount of their anticipated refunds, demonstrates to us not their disinterest in the confidentiality of their tax data, but rather the effectiveness of the Instant Tax Refund slogan in falsely convincing them that a regular consumer loan was somehow tax-related.[17]

Thus, we conclude that Beneficial's loan solicitation practices were indefensible. In the face of the prevailing public policy, the common basic standards of ethical behavior, and the widespread expectations of consumers, Beneficial during the pre-Revenue Act period engaged in wholesale and intentional disregard of the privileged nature of its relationship with its tax customers, and the confidential status of their tax information. Its practices preyed on the vulnerability of customers who were entitled to expect, and did expect, that their information would be handled with integrity and discretion. We cannot disagree with the law judge's characterization of Beneficial's activities as exploitative, unscrupulous, and unconscionable. We find Beneficial's behavior legally unfair.

The same public expectation of confidentiality which makes Beneficial's conduct unfair also makes it deceptive. Although the public expects the fiduciary character of a taxpayer-tax preparer relationship to be honored, Beneficial entered such relationships with no intention of guarding tax information from unauthorized use, and in fact converted tax data for its own profit. Beneficial's failure to disclose these conditions had the capacity to mislead consumers into believing that the information they provided would only be used for preparing their tax returns. Such an omission of facts which are material to an intelligent purchasing decision is unlawful *see, e.g., P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 58 (4th Cir. 1950). The law judge also found that full disclosure of material facts is particularly

[17] One of the questions "most frequently asked," according to an instruction sheet issued [illegible], is "Do you have to see proof that the customer is really entitled to a tax refund loan?" (CX 143i). This question epitomizes the confusion generated by Beneficial's advertising, which seems to offer a special service based on income taxes, but in reality is not related to income taxes at all.

important in a confidential relationship. Though this is true, the general commercial duty to disclose material facts is sufficient to make Beneficial's actions deceptive.

Finally, the law judge found Beneficial's conduct deceptive because, in conjunction with the Instant Tax Refund slogan, it is analogous to bait and switch advertising. Although Beneficial's practices are not a classic bait and switch, the conceptual similarities are striking. Bait advertising is an enticing but insincere offer of goods or services, designed to obtain leads for a different product or service *see, e.g.*, 16 C.F.R. Part 238.0, *Guides Against Bait Advertising.* Beneficial's tax advertising was consciously designed to generate customers for the loan business and, even though the tax preparation service itself was a legitimate offer, the Instant Tax Refund advertised as part of the service was not a legitimate offer at all. Since Beneficial's tax advertising was designed to attract customers with an alluring offer, and the tax service was designed to switch the customers unwittingly to Beneficial's regular loan service, we find as an additional ground of deception that the loan solicitation practices were part of a pattern of conduct akin to bait and switch.

C.

We now turn to Beneficial's post-Revenue Act conduct, which on its face at least was an attempt to avoid use of confidential data. Beneficial argues that its new procedures cured the unfairness and deception in its early practices because it never used tax information to solicit loans after the Revenue Act became effective.

Even assuming this were true, it would not be an adequate defense to Beneficial's clear violations of law prior to the Revenue Act. As we noted earlier, discontinuance of unfairness or deception does not render a cease and desist order improper *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). We have in rare occasions refrained from entering an order where discontinuance was voluntary, prolonged, and likely to be permanent. But here the discontinuance, assuming there were any, occurred only after a criminal statute prodded Beneficial into making changes. Given Beneficial's dual business and its persistent desire to turn tax customers into loan customers, we find no reason to refrain from issuing an order in this case because of Beneficial's supposed curing of its unlawful conduct.

At any rate, the new procedures did not in fact cure the deception and unfairness. Although the uninhibited conversion of private information which characterized the earlier period gave way to purported authorization forms and separated "tax" and "loan" folders,

the net effect of the new procedure was to confuse consumers and continue to abuse their proper expectations concerning the use to which their confidential information would be put. We find Beneficial's post-Revenue Act practices unfair and deceptive in their own right.

The main factor distinguishing the new procedure from the old was the BOR-56 Authorization form which Beneficial required each tax customer to sign. Only if this paper were adequate to allow informed consumer consent to loan solicitation could a waiver of the fiduciary tax relationship occur. However, the law judge found the BOR-56 form totally inadequate on its face as a consent form, and we agree. It does not inform the customer that the fiduciary tax relationship is being terminated and that financial information given thereafter will be used for loan solicitation. Though it authorizes solicitation of "any business" it does not disclose what kind of business and it does not disclose that the solicitation is beginning even as the customer signs the form. Our independent view of the release form's inadequacy is reinforced by the testimony of consumer witnesses, some called by Beneficial, who had various opinions of the form's purpose, all wrong (*e.g.*, Tr. 372, 395, 410, 486).

Obviously consumers have a right to waive the confidentiality of their tax data if they choose. And, since Beneficial does offer a useful service in both the tax and loan businesses, some tax customers will presumably wish to forego their purely fiduciary relationship with Beneficial. But this decision must be based on full disclosure and informed consent.

In light of the inadequacy of the BOR-56 form, the other changes in procedure after the Revenue Act become purely formal and without significance. Though Beneficial prepared what it called a Loan Interview Sheet for each customer, from the unsuspecting customer's point of view the information being gathered was still subject to the fiduciary tax relationship. Though Beneficial scrupulously separated what it called "loan" folders from the "tax" folders, so far as the customer understood every folder was a tax folder. For these reasons, we see no essential difference between Beneficial's post-Revenue Act conduct and its pre-Revenue Act conduct.

D.

The law judge entered an order designed to allow consumers to make an informed choice over waiving the confidentiality of their tax data. Beneficial argues that for several reasons the order is inappropriate.

Beneficial first argues that the Revenue Act of 1971, which provides criminal penalties for tax preparers, as a matter of law preempts the Federal Trade Commission Act in this area and precludes entering an

order. Alternatively, Beneficial argues that, as a matter of administrative discretion, the Commission should defer to the Revenue Act either by entering an order coextensive with that Act or entering no order at all.

The contention that the Revenue Act has *pro tanto* deprived the Commission of authority over the commercial misuse of income tax information is not persuasive. The courts have repeatedly rejected the argument that the Federal Trade Commission Act is ousted because of the possibly concurrent operation of another statute enforced by a different agency. The jurisdiction of the Commission has been seen as cumulative *e.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 689-95 (1948) (Justice Department); *Warner-Lambert Co.* v. *Federal Trade Commission*, 361 F. Supp. 948, 953 (D. D.C. 1973) (Food and Drug Administration); *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 771 (6th Cir. 1966) (Patent Office); *Baldwin Bracelet Co.* v. *Federal Trade Commission*, 325 F.2d 1012, 1014 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (Tariff Commission). In *Baldwin*, as here, the supposedly preemptive law was a criminal statute implemented with Treasury Department regulations. *See also Brandenfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir.), *cert. denied*, 375 U.S. 824 (1963).

Had Congress intended to limit the jurisdiction of the Commission, it would have done so explicitly, as it has before *cf.*, *e.g.*, Packers and Stockyards Act, 42 Stat. 159, 169 (Aug. 15, 1921), *amended*, 72 Stat. 1749, 1750 (Sept. 2, 1958); McGuire Act, 66 Stat. 631, 632 (July 14, 1952). But the Revenue Act contains no repeal, and the legislative history does not refer to the Commission at all. Nor will we infer repeal, for repeals by implication are not favored. Only where two laws are clearly repugnant to each other and both cannot be carried into effect will the latter prevail. *U.S.* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *L. Heller & Son* v. *Federal Trade Commission*, 191 F.2d 954, 957 (7th Cir. 1951). Here, though the civil requirements of the Federal Trade Commission Act may impose more stringent demands than the criminal standards of the Revenue Act, there is no repugnancy. Like the law judge we view Beneficial's possible compliance with the Revenue Act as irrelevant, and do not decide that issue.

Since the standards of the Revenue Act are irrelevant to this case, we see no reason to enter an order coextensive with that Act or to defer altogether. Our concern is to purge Beneficial's unlawfulness under Section 5. Because the fault we have found lies in the undisclosed use of confidential data, the law judge was correct in entering an order provision requiring full disclosure and consent before loan solicitation may begin. Under the order, Beneficial may not use any information

given by a tax customer unless the customer has signed a consent form detailing, *inter alia*, the specific purpose for the consent, the exact information to be used, and the particular use intended. The lack of just this information is what makes the present BOR-56 form inadequate. Thus, the order provision is more than just reasonably related to the offense found, *Jacob Siegel Co.* v. *Federal Trade Commission*, *supra*, 327 U.S. at 613; it is the most obvious and direct way to cure Beneficial's practices.

Beneficial also argues that the lack of a time limit in the order would make it impossible ever to give a loan to any tax customer who signed no consent, even years later. If Beneficial wished to solicit such a loan using information obtained because of the tax relationship, this is absolutely true. But if the loan should arise from the customer's wholly independent action, in a context far removed in time from the income tax experience, making the loan would likely not violate the order. At any rate, Beneficial could cure its supposed problem by securing a signed consent before obtaining information for the loan.[18]

Finally, Beneficial argues that the order does not allow it to solicit tax customers for additional tax business. We will add appropriate language to remedy this.

IV. CONCLUSION

Having considered the entire record, the initial decision of the administrative law judge, and the briefs, the Commission affirms the law judge to the extent set forth in this opinion. An appropriate order accompanies this opinion.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied in part and granted in part the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion

[18] Beneficial has raised other hypotheticals which, it says, demonstrate that the order may deprive it of loan business even from willing tax customers. However, we are not persuaded to modify the order by "fantasies." *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 431. Beneficial has recourse to our compliance procedures if actual situations arise which may be presented in evidentiary form. But Beneficial must expect some fencing in, and foregoing the hypothetical loan business may be a necessary price of simultaneously engaging in two essentially contradictory businesses.

accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following cease and desist order be, and it hereby is, entered:

It is ordered, That respondents Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "instant tax refund," or any other word or words of similar import or meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return; *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors, *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are tax experts or unusually competent in the preparation of tax returns or the rendering of tax advice; or

misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name;
2. The name of the customer;
3. The specific purpose for which the consent is being signed;
4. The exact information which will be used;
5. The particular use which will be made of such information;
6. The parties or entities to whom the information will be made available;
7. The date on which such consent is signed;
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and;
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph.

Provided, however, That nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. L. 92-178, title III, §316(a), Dec. 10, 1971; 26 U.S.C. §7216 or regulations issued pursuant to it.

It is further ordered, That respondents herein shall notify the Commission at least 30 days prior to any proposed change in the structure of 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 respondent corporations which may affect compliance obligations arising out of this order.

It is further ordered, That respondents shall, within 60 days after

service of this order, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

CONTROL DATA CORPORATION, ET AL. D. 8940
ELECTRONIC COMPUTER PROGRAMMING INSTITUTE, INC., ET AL. D. 8952 LAFAYETTE UNITED CORPORATION, ET AL. D. 8963

Orders, July 15, 1975

Issues of Commission proceeding, in regard to consumer redress, and concerning relationship of administrative proceedings to later consumer redress actions placed on Commission's docket for review. Briefs to be submitted on two itemized questions.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondents: *Charles A. Price, Oppenheimer, Wolff, Foster, Shephard & Donnelly,* Minneapolis, Minn. and *James F. Hoff,* Bloomington, Minn.

ORDER PLACING MATTERS ON DOCKET FOR REVIEW

These matters are now before the Commission upon two applications for review and a certification by an administrative law judge[1] concerning the question of whether restitution, under the Federal Trade Commission Act, should be regarded as an option in formulating remedies in these matters inasmuch as: (1) a United States Court of Appeals has held in *Heater* v. *Federal Trade Commission,* 530 F.2d 321 (9th Cir. 1974) that the Commission lacks the authority to impose such

[1] In *Electronic Computer Programming Institute,* complaint counsel had moved for issuance of a *subpoena duces tecum* seeking, in part, evidence needed to support restitutionary relief. The administrative law judge in that matter denied the motion on the grounds that it sought information which might not be in furtherance of the legitimate statutory authority of the Commission based on *Heater* v. *F.T.C.,* 530 F.2d 321 (9th Cir. 1974). However, he granted complaint counsel leave to file an application for review of his ruling and to determine whether the matter should be placed on our suspense calendar pending the final outcome of the *Heater* case.

In *Lafayette United Corporation,* this question came to us under different circumstances. There, respondents had moved to strike and dismiss from the complaint the claim for restitution and to quash in part a *subpoena duces tecum* sought by complaint counsel. The law judge denied these motions but, in view of the Commission's decision not to appeal the *Heater* decision, he *sua sponte* certified to the Commission the question of whether it would be in the public interest to allow complaint counsel to continue to seek restitutionary relief.

Finally, in *Control Data Corp.,* the law judge denied respondents' motion to strike from the complaint Paragraph 11, which, they argued, was intended solely to obtain retroactive restitution, but granted them leave to file an application for review of this ruling. The only question approved for review was to be the policy question of how the Commission will proceed in the area of restitution in light of *Heater.*

relief; and (2) the Commission has determined not to seek review of that decision.[2] Furthermore, each of these matters expressly or by implication raises fundamental questions concerning the implementation of the recently enacted Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. 93-637 (Jan. 4, 1975).

Section 206 of the Magnuson-Moss Act authorizes the Commission to file actions for consumer redress in federal courts if a final Commission cease and desist order has been entered against respondents for engaging in acts or practices in violation of Section 5 of the Federal Trade Commission Act. The Commission intends to exercise that authority whenever appropriate and reserves the right to proceed under that section with respect to the respondents in these cases if the statutory conditions are met.

The three matters now before the Commission raise the general issue of how the Commission intends to proceed in regard to consumer redress and several specific issues concerning the relationship of the administrative proceedings to possible later consumer redress actions under the Magnuson-Moss Act. Therefore, in order to determine the questions presented, the Commission needs to consider carefully, as to each of these matters, the following questions, based on the assumption that the Commission intends to seek consumer redress, if at all, pursuant to Section 206 of the Magnuson-Moss Act.

(1) To what extent, if any, should evidence be presented and findings be made in the administrative proceedings regarding the nature and extent of the injuries sustained by consumers as a result of the challenged acts or practices?

(2) To what extent, if any, should evidence be presented and findings be made on the issue whether the challenged acts or practices are such that "a reasonable man would have known under the circumstances [that they are] dishonest or fraudulent"?

It is ordered, That the above-captioned matters be placed on the Commission's docket for review pursuant to Section 3.23(b) of the Rules of Practice; and

The parties are invited to submit additional briefs on the aforesaid questions within thirty (30) days of the service of this order. Answering briefs may be submitted within ten (10) days after service of the aforesaid briefs.

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[2] The complaints in these matters all contain a similarly worded paragraph which charges respondents with two distinct violations of Section 5: (1) unfairly retaining monies allegedly obtained by inducing persons, through false and deceptive representations, to pay for courses of instruction which will be virtually worthless in obtaining future employment; and (2) hindering competition by retaining monies obtained from consumers for their courses by false and deceptive representations. In each case, the notice order accompanying the complaint states that, if the facts as alleged therein are proved, the Commission may order restitution for past, present and future losses suffered by consumers.

IN THE MATTER OF

WORLD WIDE SYSTEMS, INC., ET AL.

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

Docket C-2683. Complaint, July 16, 1975 - Decision, July 16, 1975

Consent order requiring an Indianapolis, Ind., training school for truck drivers and heavy equipment operators, among other things to cease using deceptive and unfair means to sell instruction courses or any other product or service.

Appearances

For the Commission: *William M. Rice, Jr.*

For the respondents: *M. Daniel Friedland*, Indianapolis, Ind.

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 World Wide Systems, Inc., a corporation, and Francis J. Witherbee, individually and as an officer of said corporation, and also doing business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation, and Steven L. Bradshaw, individually and as a former officer of said corporation, and also doing business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others, and Eugene C. Kobylarz, individually and doing business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands, 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 World Wide Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1042 E. Washington St., Indianapolis, Ind.

Respondent Francis J. Witherbee is an individual and officer of respondent corporation and also does business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation. He formulates, directs and controls the acts and practices of the corporate respondent and said business entities,

including the acts and practices hereinafter set forth. His business address is the same as that of said corporate respondent.

Respondent Steven L. Bradshaw is an individual and former officer of said corporate respondent and also does business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others. He formulates, directs and controls the acts and practices of said business entities including the acts and practices hereinafter set forth. His address is 125 Belaire Dr., New Whiteland, Ind.

Respondent Eugene C. Kobylarz is an individual and does business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands. He formulates, directs and controls the acts and practices of said business entities including the acts and practices hereinafter set forth. His business address is 5140 S. Madison Ave., Indianapolis, Ind.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the advertising, offering for sale, sale or distribution of courses of study and instruction purporting to prepare graduates thereof for employment as heavy equipment operators, truck drivers, and related occupations. Said courses when pursued to completion include a series of lessons pursued by correspondence through the United States mails and a period of in-residence training at a place designated by respondents.

PAR. 3. In the course and conduct of their business, respondents now cause and for some time last past have caused, the publication of advertisements concerning the said courses in newspapers of general circulation and have caused the correspondence portion of their courses, when sold, to be sent from respondents' place of business in the State of Indiana to purchasers thereof located in various other States of the United States. Respondents utilized the services of salesmen and telephone solicitors who induced prospective purchasers of said courses located in States other than the State of Indiana to contact said salesmen at respondents' offices both within the State of Indiana and elsewhere, in person, by telephone, by mail, or otherwise. Said salesmen transmitted to and received from respondents contracts, checks, and other instruments of a commercial nature relating to the sale of said courses to said purchasers. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of study and instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have published or caused to be published in the "Help-Wanted" and other columns of newspapers advertisements containing statements regarding job opportunities, training and wages for persons

interested in becoming heavy equipment operators or truck drivers. Typical and illustrative, but not all inclusive of such advertisements, are the following:

SEMI-DRIVERS NEEDED

No experience necessary. Will Train. Earn $300 to $400 per week. For application call (317) 639-6138, or write to Associated Systems, 1040 East Washington St., Indianapolis, Indiana 46202.

GRADERS, SCRAPERS, BULLDOZERS, BACKHOES

No experience necessary. Will train. Earn $300.00 to $400.00 per week. For application call 317-545-6431, or write to World Wide Systems, 1042 East Washington St., Indianapolis, Indiana 46202.

PAR. 5. By and through the use of the statements contained in the advertisements set forth in Paragraph Four and others of similar import and meaning but not expressly set out herein, respondents represent directly or by implication, that:

1. Respondents operate, represent, or are affiliated with a construction company or a trucking company.

2. Respondents are offering employment to qualified applicants who will be trained as heavy equipment operators or truck drivers.

3. Persons receiving training from respondents will earn $300 - $400 per week as heavy equipment operators, truck drivers, or in related occupations upon completion of training.

4. There is a reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

PAR. 6. In truth and in fact:

1. Respondents do not operate or represent, and are not affiliated with a construction company or trucking company, but, to the contrary, are engaged in the sale of courses of instruction to prospective purchasers.

2. Respondents do not offer employment to persons who have been trained as heavy equipment operators or truck drivers, but attempt to and do sell courses of instruction to said purchasers.

3. Few, if any, persons who received training from respondents pursuant to said offer have earned amounts such as $300-$400 per week as truck drivers, heavy equipment operators, or in related occupations as a result of such training.

4. Respondents had no reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

Therefore, the statements and representations as set forth in

Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to advertisements to contact respondents' salesmen. For the purpose of inducing the sale of courses offered by respondents, such salesmen make to prospective purchasers many statements and representations, directly and by implication, regarding opportunities for employment as heavy equipment operators and truck drivers available to purchasers of said courses, the assistance furnished to graduates in obtaining employment and other matters. Some of the aforesaid statements and representations appear in brochures, pamphlets and other printed material furnished to said salesmen by respondents and in other statements and representations made orally by said salesmen. Among and typical, but not all inclusive, of such statements and representations are the following:

1. Respondents have been requested by construction and trucking companies to train operators and drivers for jobs as a heavy equipment operator or truck driver with their company upon completion of said training.

2. Graduates of said courses will thereby be qualified for employment as heavy equipment operators or truck drivers without further training or experience.

3. The nature of an initial payment by prospective enrollees of said courses prior to the undertaking of a formal obligation to respondents is not that of a nonrefundable tuition fee.

4. Respondents will permit enrollees of said courses to defer the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the graduate of said courses has obtained employment as a heavy equipment operator or truck driver.

5. Respondents will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid.

6. Respondents provide a placement service which will secure a job as a heavy equipment operator or truck driver for graduates of said courses who want to work in such capacities.

7. Graduates of said courses who want to work are assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

8. Respondents operate and maintain school facilities, and provide training and instruction for prospective heavy equipment operators and truck drivers at these school facilities.

9. Respondents will train enrollees on the best and most up-to-date equipment used in the construction and trucking industries.

PAR. 8. In truth and in fact:

1. Respondents have not been requested by construction or trucking companies to train people for jobs as heavy equipment operators or truck drivers, which jobs shall be offered by such companies to graduates of said training.

2. Graduates of said courses are not thereby qualified for employment as heavy equipment operators or truck drivers without further training or experience.

3. The sum of money that enrollees in said courses are required to pay prior to the undertaking of a formal obligation with respondents is a non-refundable fee.

4. Respondents generally do not permit enrollees of said courses to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after employment as a heavy equipment operator or truck driver has been obtained.

5. Respondents seldom if ever arrange financing to enable purchasers to pay the balance of the cost of said courses.

6. The placement service provided by respondents will not secure a job as a heavy equipment operator or truck driver for graduates of said courses who want to work in such capacities.

7. Graduates of said courses who want to work are not assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

8. Respondents do not operate and maintain any school facilities for either heavy equipment operator or truck driver training. Respondents have no resident training facilities and all enrollees are sent to an independent school for training.

9. The heavy equipment and trucks provided by the independent training school to which respondents send their enrollees are not the best and most up-to-date equipment used in the construction and trucking industries.

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

PAR. 9. Respondents offered for sale courses of instruction to prepare graduates thereof for jobs as heavy equipment operators and truck drivers without disclosing in advertising or through their sales representatives:

(1) The recent number and percentage of graduates of each school that were able to obtain the employment for which they were trained;

(2) the employers that hired any such graduates;

(3) the initial salary any such graduates received; and

(4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction.

Knowledge of such facts would indicate the possibility of securing future employment upon graduation and the nature of such employment. Thus, respondents have failed to disclose a material fact, which, if known to certain prospective enrollees, would be likely to affect their consideration of whether or not to purchase such course of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive, or unfair.

PAR. 10. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondents acting directly and furnishing the means and instrumentalities to their salesmen, directly or indirectly, have engaged in the following additional acts or practices:

Respondents have induced members of the general public to sign certain contracts entitled "Application." Respondents thereby have deceptively and misleadingly created the impression that said documents are not legally binding contractual agreements when in fact said documents are legally binding contractual agreements.

Therefore, respondents' statements, representations, acts or practices as set forth herein were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 11. Respondents have entered into contracts with purchasers of said courses of instruction which contain provisions for the cancellation of said contracts and the refund of tuition monies paid by said purchasers. In many instances, respondents have failed to offer to refund and refused to refund to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of said contracts.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 12. (a) Respondents have been and are now using the aforesaid unfair, false, misleading or deceptive acts and practices, which a reasonably prudent person should have known, under all of the facts and circumstances, were unfair, false, misleading or deceptive, to induce persons to pay or to contract to pay over to them substantial sums of money to purchase or pay for courses of instruction which to such purchasers in connection with their future employment and careers was, and is, virtually worthless. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to or to rescind such contractual obligations of substantial

numbers of enrollees and participants in such courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

(b) In the alternative and separate from Paragraph Twelve (a) herein, respondents, who are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, have been and are now using, as aforesaid, false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 13. By and through the use of the aforesaid acts, practices, statements and representations, respondents place in the hands of others the means and instrumentalities by and through which they mislead and deceive the public in the manner and as to the things hereinbefore alleged.

PAR. 14. 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 sale and distribution of similar courses of study and instruction.

PAR. 15. The use by respondents of false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts, as aforesaid, has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and complete and to induce a substantial number thereof to purchase said courses of study and instruction offered by respondents by reason of said erroneous and mistaken belief.

PAR. 16. 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

and deceptive acts and practices in commerce, in violation of Section 5 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 sixty (60) 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. Respondent Worldwide Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 1042 E. Washington St., Indianapolis, Ind.

Respondent Francis J. Witherbee is an officer of said corporation. He also does business as Associated Systems, Atlas Systems, Coastway American Systems, and Great Lakes Development Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and said business entities and his place of business is located at the above-stated address.

Respondent Steven L. Bradshaw was a former officer of said corporation and did business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others. He formulates, directs and controls the policies, acts and practices of said corporation and said business entities and his place of business is located at the above stated address.

Respondent Eugene C. Kobylarz does business as New Horizons

Unlimited, Rapidway Systems, Trailmasters, and Roads and Lands. He formulates, directs and controls the policies, acts and practices of said business entities and his business address is 5140 S. Madison Ave., city of Indianapolis, State of Indiana.

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 World Wide Systems, Inc., a corporation, its successors and assigns, and Francis J. Witherbee, individually and as an officer of said corporation and doing business as Associated Systems, Atlas Systems, Coastway American Systems and Great Lakes Development Corporation, and Steven L. Bradshaw, individually and as a former officer of said corporation and doing business as Associated Systems, Atlas Systems, Coastway American Systems, Great Lakes Development Corporation, New Horizons Unlimited and others, and Eugene C. Kobylarz, individually and doing business as New Horizons Unlimited, Rapidway Systems, Trailmasters and Roads and Lands, and respondents' officers, 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 courses of study and distribution of courses of study and instruction in heavy equipment operation, truck driving or courses of study and instruction in any other subject, trade or vocation, or in connection with any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, directly or by implication, orally or in writing, that:

A. They are, or represent, or are affiliated with, construction or trucking companies or any industry for which enrollees of any courses offered by respondents are being trained; or misrepresenting, in any manner, the nature of their business.

B. Persons receiving training will, or may, earn any specified amounts or misrepresenting in any manner the prospective earnings of such persons after completion of said training.

C. They have been requested by construction and trucking companies or any other business or organization to train persons for

specific jobs, or misrepresenting, in any manner, respondents' connection or affiliation with any industry or any member thereof.

D. Graduates of any courses offered by respondents will be qualified thereby for employment at jobs for which said graduates were purportedly trained when additional training or experience is required.

E. The nature of the initial payment by prospective enrollees of courses offered by respondents prior to the undertaking of a formal obligation to respondents is not that of a nonrefundable tuition fee; or misrepresenting in any other manner the nature of any payment made by prospective enrollees of any courses offered by respondents.

F. They, or others, will permit enrollees of any courses to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the enrollee has completed said courses and commenced employment; or misrepresenting in any other manner the terms or conditions under which payment is to be made for said courses.

G. They, or others, will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid, unless respondents, or others specifically named, will, in fact, handle or arrange said financing.

H. They, or others, provide a placement service which will secure a job for graduates of said courses.

I. Graduates of said courses are assured jobs as a consequence of graduating from said courses.

J. There is a substantial demand, or a demand of any size of proportion, for persons completing any of the courses offered by the respondents in the field of truck driving or heavy equipment operations, or any other field, or otherwise representing, orally or in writing, that opportunities of any type or number, are available to such persons, except as hereinafter provided in Paragraph 6 of this order. *Provided, however,* That respondents shall cease and desist making such representations unless the respondents in each and every instance:

(1) Until the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) Have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made, and

(B) have disclosed in immediate and conspicuous conjunction with any such representation, that:

All representations for potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(2) After the passage of a base period to be determined pursuant to Paragraph 6(b) of Part I of this order, and until two years after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) make any representations in the form and manner provided in Paragraph 6(b) of Part I of this order, and

(B) disclose in immediate and conspicuous conjunction with any such representation, that:

This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Placing ads in "Help-Wanted" columns or representing by any means that employment is being offered when such offer is not a bona fide offer of employment.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course offered by respondents, the full cost of such courses including the fee for any home study lessons and for any residential training.

4. Failing to place the title "CONTRACT," in bold face type, on any document which evidences an agreement between a person and respondents relating to the purchase of any of the courses offered by respondents; and failing to remove from any such document the word "application," or words of similar import or meaning.

5. Failing to show each prospective purchaser the home study portion of said courses and allow said prospective purchaser a reasonable time for examination of said home study materials before said prospective purchaser has paid any money or has signed any contract, or has obligated himself in any other way.

6. Failing to send by certified mail, return receipt requested, to each person that shall contract with respondents for the sale of any course of instruction, a notice, the specific provisions of which will be based upon the record in adjudicative proceedings in this matter, which shall disclose the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in bold face type across the top of the form.

(b) Paragraphs providing the following information computed in the manner and using a form and for a base period to be approved by the Commission:

(1) The placement rate, ratio or percentage for graduates, and also the numbers upon which such rates, ratios or percentages are based;

(2) A list of firms or employers which are currently hiring graduates of respondents' courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (b)(1) above;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (b)(1) above;

(4) The percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility.

(c) An explanation of the cancellation procedure provided in this order, namely that any contract or other agreement may be cancelled for any reason until midnight of the third business day after receipt by the customer, via the U.S. mails, of this notice.

(d) A detachable form which the person may use as notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

This notice shall be sent by respondents no sooner than the next day after the person shall have contracted for the sale of any course of instruction; respondents, during such period provided for in subparagraph (c) above, shall not initiate contact with such person other than that required by this Paragraph.

Provided, however, That subparagraph (b) above shall be inapplicable to any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above. The following statement shall be included in such notice during such period:

All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above, and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or the introduction of any new course by respondents, the following statement shall be included in such notice:

This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

7. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after the date of receipt by the customer of the form of notice provided for in Paragraph 6 above. Upon cancellation of any said sales contract or other agreement as provided in Paragraph 6(c) above, respondents are obligated to refund within three business days to any person exercising the cancellation right, all monies paid or remitted up until the notice of cancellation.

8. Failing to disclose, clearly and conspicuously, in advertisements, in catalogs, brochures and on letterheads that respondents' business is solely and exclusively that of a private school, not affiliated with any members of the construction industry, the trucking industry or any member of any other industry.

9. Failing to refund promptly to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of such contracts.

II

1. *It is further ordered*, That:

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order:

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement

of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (a) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance.

(h) Respondents herein 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.

2. *It is further ordered*, That respondents herein present to each interested applicant or prospective student immediately prior to the commencement of any interview or sales presentation during which the purchase of or enrollment in any course of instruction offered by respondents herein is discussed or solicited a 5 in. x 7 in. card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON

3. *It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

4. *It is further ordered*, That the respondent World Wide Systems, Inc., shall 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 respondents which may affect compliance obligations arising out of this order.

5. *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, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE STANDARD OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2684. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Cleveland, Ohio, energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Diamond Shamrock Corporation.

Appearances

For the Commission: *Barry L. Malter.*
For the respondent: *Richard M. Donaldson*, Cleveland, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent The Standard Oil Company (hereinafter referred to as Sohio) is a corporation organized and existing under and by virtue of the laws of the State of Ohio, maintaining its principal place of business at 101 W. Prospect Ave., Cleveland, Ohio. At all times relevant to this complaint, Sohio had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Sohio had sales and operating revenues of $1,446,636,000.

PAR. 2. Respondent Diamond Shamrock Corporation (hereinafter referred to as Diamond Shamrock) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at 1100 Superior Ave., Cleveland, Ohio. At all times relevant to this complaint, Diamond

Shamrock had capital, surplus and undivided profits aggregating in excess of $1 million. In 1972 Diamond Shamrock had sales and operating revenues of $617,337,000.

PAR. 3. In 1974, and previously thereto, Mr. Horace A. Shepard served simultaneously as a director of Sohio and Diamond Shamrock. Mr. Shepard resigned from the board of directors of Diamond Shamrock on July 26, 1974, after having been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. (a) The business of Sohio and Diamond Shamrock encompasses, but is not limited to, the exploration, production and sale of crude petroleum and natural gas.

(b) Respondents engage in the aforesaid activities in the same geographic areas of the United States including, but not limited to, Louisiana, Oklahoma, Texas and Wyoming.

PAR. 5. (a) Sohio and Diamond Shamrock have been and are, by virtue of their business and location of operations, competitors of each other.

(b) The elimination of competition by agreement or otherwise between Sohio and Diamond Shamrock would hinder, foreclose, and restrain competition or tend to create a monopoly in the exploration, production, and sale of crude petroleum and natural gas.

(c) Sohio and Diamond Shamrock each engages in commerce as that term is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 6. The director interlock, as herein alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 sixty (60) days, and having duly considered the comment 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 finding, and enters the following order:

1. Respondent, The Standard Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 101 W. Prospect Ave., Cleveland, Ohio.

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

ORDER

I

It is ordered, That The Standard Oil Company, an Ohio corporation (Sohio), its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of Diamond Shamrock Corporation.

II

It is further ordered, That Sohio shall, within thirty days after service of this order, and annually for a period ending five (5) years thereafter, request from each member of its board of directors a written statement which discloses the name, business, and location of operations of each other corporation of which such member is also a director, exclusive of The British Petroleum Company Limited, a United Kingdom Corporation, and any corporation in which Sohio or The British Petroleum Company Limited controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock; exclusive of any corporation which derives annual gross revenues of less than $1 million from the exploration, production, and sale of natural gas and crude petroleum and exclusive of any corporation not engaged in "commerce" as defined in Section 1 of the Clayton Act as amended or Section 4 of the Federal Trade Commission Act.

III

It is further ordered, That for a period ending five (5) years after service of this order, Sohio shall, at least thirty (30) days prior to any directors' meeting at which one or more directors will be elected or the mailing of proxy statements for any shareholder meeting at which one or more directors will be elected, request from each person who is being considered as a member of its board of directors, but has not been a member of the board of directors during the previous year, a written statement which discloses the information described in Paragraph II.

IV

It is further ordered, That for a period ending five (5) years after service of this order, Sohio shall not permit on its board of directors any individual who fails to submit a written statement pursuant to Paragraphs II and III, or any person who is a director of another corporation named in response to the statements required pursuant to Paragraphs II and III when said statement reveals or when a reasonably diligent investigation would reveal to respondent that such other corporation is a competitor of Sohio by virtue of its business and location of operations in the exploration, production, or sale of crude petroleum or natural gas. If compliance with Paragraphs I and IV requires any member of Sohio's board of directors to resign or to be removed from the board of directors of Sohio or such other corporation, Sohio shall be allowed a reasonable period of time within which to take any legal or other steps which are necessary to secure compliance with this order. For purposes of this order, Sohio, The British Petroleum Company Limited and any corporation which Sohio or The British Petroleum Company Limited controls, directly or indirectly through subsidiaries, more than 50 percent of the voting stock shall not be considered competitors.

V

It is further ordered, That Sohio notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of this order, such changes to include, but not be limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation.

VI

It is further ordered, That respondent Sohio shall, within thirty (30)

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 this order, and shall within sixty (60) days submit copies of those lists provided by all current directors of Sohio pursuant to Paragraphs II and III designating all other corporations of which they are directors.

IN THE MATTER OF

DIAMOND SHAMROCK CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2685. Complaint, July 17, 1975-Decision, July 17, 1975

Consent order requiring a Cleveland, Ohio, energy company, among other things to cease permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of The Standard Oil Company, an Ohio Corporation.

Appearances

For the Commission: *Barry L. Malter.*
For the respondent: *John A. Wilson,* Cleveland, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent The Standard Oil Company (hereinafter referred to as Sohio) is a corporation organized and existing under and by virtue of the laws of the State of Ohio, maintaining its principal place of business at 101 W. Prospect Ave., Cleveland, Ohio. At all times relevant to this complaint, Sohio had capital, surplus, and undivided profits aggregating in excess of $1 million. In 1972, Sohio had sales and operating revenues of $1,446,636,000.

PAR. 2. Respondent Diamond Shamrock Corporation (hereinafter referred to as Diamond Shamrock) is a corporation organized and existing under and by virtue of the laws of the State of Delaware,