IN THE MATTER OF

CHAMPION HOME BUILDERS CO.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9151. Complaint, Feb. 5, 1981—Decision, Feb. 17, 1983

This consent order requires a Drydon, Mich. manufacturer and seller of solar energy equipment, among other things, to cease making false or unsubstantiated representations concerning the performance, durability, quality and maintenance requirements of its solar energy equipment. Also prohibited are unsubstantiated claims concerning the energy- and money-savings potential realized from use of such equipment. The order requires the company to contact all purchasers of its equipment and inform them that the company is offering cash settlements to eligible persons. Those accepting the cash settlement would waive any legal claims they may have against the company, and any rights to receive service or repairs under the manufacturer's warranty. Additionally, the company must send a warning package to all purchasers of its equipment, notifying them of precautions that should be taken to minimize any potential for fire in Champion-manufactured solar energy equipment.

Appearances

For the Commission: *Marilyn J. Holmes, Joel Winston, T. Bringier McConnell, Anne V. Maher, Lewis Morris* and *Michael Dershowitz.*

For the respondent: From *Dykema, Gossett, Spencer, Goodnow & Trigg, Howard E. O'Leary,* Washington, D.C. and *Fred Woodworth,* Detroit, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Champion Home Builders Co., a corporation, hereinafter sometimes referred to as respondent, has 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. For the purposes of this complaint, *solar energy equipment* shall mean any device or piece of equipment designed to collect and store heat from the sun's rays and transfer the heat for use in heating water or air space indoors, or any component thereof,

manufactured, sold or distributed by respondent, including the "Solar Furnace."

PAR. 2. Respondent Champion Home Builders Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 5573 E. North Street, Dryden, Michigan.

PAR. 3. Respondent has been engaged in the manufacture, offering for sale, sale, and distribution of solar energy equipment. Respondent has operated through distributors and dealers in more than 30 states.

PAR. 4. In the course and conduct of its business, respondent has caused the said solar energy equipment, when sold, to be transported from manufacturing plants located in various States of the United States to dealers and distributors thereof located in various other States of the United States. In the further course and conduct of its business, respondent has disseminated and caused to be disseminated by its dealers and distributors advertisements, promotional literature, and other written materials concerning respondent's solar energy equipment by various means, including the insertion of advertisements in magazines with national circulation and the distribution of promotional materials to consumers, for the purpose of inducing and in a manner likely to induce, directly or indirectly, the purchase of said products in commerce. Respondent at all times mentioned herein has maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business respondent has, directly or by implication, through advertisements, promotional literature or other written materials, made representations as to the performance, durability, reliability, and quality of its solar energy equipment. Typical and illustrative of these statements and representations, but not all-inclusive thereof, are the following:

Respondent's Solar Furnace "should work automatically with little or no maintenance;"

Respondent's Solar Furnace is "virtually maintenance free;"

* * * * * * *

Respondent's Solar Furnace is built "with quality longlife materials;"

* * * * * * *

Respondent's Solar Furnace collector is built of "high temperature

materials" and can withstand temperatures "up to 375° F." without damage;

* * * * * * *

Consumers "can have confidence in the Solar Furnace built and backed by Champion Home Builders Company! . . .—60 Factories from Coast to Coast!—22–Year Record of High Quality Mass-Production!—3,200 Dealers Nationwide to Provide Prompt Service!;"

Respondent's Solar Furnace is "backed by a national network of trained dealers;"

* * * * * * *

Respondent's Solar Furnace has been "independently tested—3rd party verification tests [were] completed by two professional engineering firms;" and

Respondent's Solar Furnace "has been completely tested by two independent third-party engineering firms—Midwest Engineering and Barber Nichols, both of Denver, Colorado."

PAR. 6. Through the use of the statements and representations set forth in Paragraph Five, respondent has represented directly or by implication that:

(1) Respondent's Solar Furnace does not have any defect which substantially impairs the reliability, durability, or performance of the Solar Furnace;

(2) Little or no maintenance is required to keep Solar Furnaces in operating condition;

(3) All Solar Furnaces and the materials and components therein are durable and reliable;

(4) Respondent's Solar Furnace collector is not adversely affected by high temperatures;

(5) Respondent has 60 factories producing solar energy equipment, has a 22-year record of mass producing high-quality solar energy equipment, and has 3,200 trained dealers nationwide to provide prompt service on its solar energy equipment; and

(6) Competent, independently-conducted tests have verified the performance or quality of respondent's Solar Furnaces.

PAR. 7. In truth and in fact:

(1) Respondent's Solar Furnace suffers or may suffer from one or

more defects, including but not limited to controller malfunctions, foam insulation expansion, and wood frame outgassing, which substantially impair or may substantially impair the reliability, durability, or performance of the Solar Furnace;

(2) Respondent's Solar Furnace and the components thereof experience a high rate of failure and require extensive maintenance and repairs on a regular and continuing basis;

(3) Several of the materials and component parts in respondent's Solar Furnace are not durable or reliable;

(4) Respondent's Solar Furnace collector is adversely affected by high temperatures;

(5) Respondent does not have and has never had 60 factories producing solar energy equipment; does not have and has never had a 22-year record of mass producing high-quality solar energy equipment; does not have and has never had 3,200 trained dealers nationwide to service its solar energy equipment; and

(6) The performance or quality of respondent's Solar Furnace has not been verified by competent, independently conducted tests.

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

PAR. 8. In the course and conduct of its business, respondent has, directly or by implication, through advertisements and other promotional materials, made representations as to the thermal performance and cost recovery or "payback" potential of its solar energy equipment. Typical and illustrative of these statements and representations, but not all-inclusive thereof, are the following:

Respondent's Solar Furnace "has been shown to replace 45% to 90% of annual home fuel needs of any present forced-air heating system when used in conjunction with" respondent's "Solar Insulation Package;"

Respondent's Solar Furnace "provides 45% to 90% of your heat;"

* * * * * * *

Respondent's model 96 Solar Furnace will supply a projected 56 to 76 percent of the fuel requirements of a 5,000 degree day house in Washington, D.C.;

Respondent's Solar Furnace has an "estimated percentage capability" of providing 72 percent "of average heating requirements for the 270 day heating season" for a 1,000 square foot, 5,000 degree day house in Washington, D.C.;

* * * * * * *

Respondent's model 96 Solar Furnace, "installed on a solar insulated 1,000 square foot home in Dover, Delaware," will pay for itself in eight years;

* * * * * * *

"Dollar for dollar, Btu for Btu," respondent's Solar Furnace "is the best solar heating system available today;"

Respondent's Solar Furnace "is an investment in real property, a home improvement which has a tendency to become worth more and more;" and

Respondent's Solar Furnace tends "to go up in value year by year."

PAR. 9. At the time the representations and statements set forth in Paragraph Eight were made, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, the representations set forth in Paragraph Eight were and are deceptive, misleading, or unfair.

PAR. 10. The advertisements and promotional materials referred to in Paragraph Eight represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Eight. In truth and in fact, respondent had no reasonable basis for such representations. Therefore, the representations set forth in Paragraph Eight were and are deceptive, misleading, or unfair.

PAR. 11. A significant number of Solar Furnaces are subject to or potentially subject to one or more conditions which are costly to correct or may significantly affect the quality, reliability, durability or performance of the Solar Furnaces. Such conditions include but are not limited to controller malfunctions, motor malfunctions, foam insulation expansion and air leakage, and wood frame outgassing. Respondent knew or should have known and failed to disclose to purchasers of Solar Furnaces facts which relate to the existence, nature and extent of these conditions. Respondent's failure to disclose these material facts which, if known to prospective purchasers, would have been likely to affect their purchasing decisions, was and is deceptive or unfair.

PAR. 12. The use by respondent of the aforesaid false, misleading, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid

false, misleading, unfair, or deceptive statements, representations, acts, and practices, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations are true and complete, and to induce a substantial number of such persons to purchase from respondent said solar energy equipment by reason of said erroneous and mistaken belief.

PAR. 13. The acts and practices of respondent as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, 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, 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(f) of its Rules; and

Respondent and complaint counsel having thereafter submitted modifications to the consent agreement by letter dated January 14, 1983;

Now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Champion Home Builders Co. is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 5573 East North Street, in the City of Dryden, State of Michigan.

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

For purposes of this Order, the following definitions shall apply:

(1) *Solar energy equipment* shall mean all space heating or cooling or water heating equipment utilizing energy from the sun, including but not limited to Solar Furnaces and solar collectors manufactured by respondent, whether sold under the Champion brand name or another brand name.

(2) *Solar Furnace* shall mean the solar heating equipment manufactured by respondent between approximately 1976 and 1979, consisting of a self-contained A-frame structure with a collector and storage compartment, including but not limited to equipment designated by respondent, or possessing the same design and physical characteristics as equipment designated by respondent, as models 96, 128, 160, 1500, 2000, and 2500, whether sold under the Champion brand name or another brand name.

(3) *Solar collector* shall mean the solar heating equipment manufactured by respondent between approximately 1976 and 1979, consisting of a glass-covered box with a dark absorber surface over which air can pass, including but not limited to the product marketed under the name "Champion Vertafin Collector."

(4) *Solar collector system* shall mean each distinct system of solar collector(s), air handlers, and controls.

(5) As used in this Order, the requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting orally, visually, in writing, or in any other manner, directly or by implication.

(6) *Competent and reliable scientific test* shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate and reliable results.

(7) *Purchaser* shall mean any person who purchased a Solar Furnace or solar collector for his or her own use as heating equipment or as a demonstrator, and who did not sell any Solar Furnace or solar

collector (except for second-hand resale of the Solar Furnace or solar collector purchased by such person for his or her own use). This term shall include any dealer as defined below who did not sell any Solar Furnace or solar collector (except for second-hand resale of the Solar Furnace or solar collector purchased by such dealer for his or her own use).

(8) *Dealer* shall mean any person authorized by respondent, by a distributor of respondent, or by a licensee or a distributor of a licensee of International Solarthermics Corporation, to sell Solar Furnaces or solar collectors to purchasers.

(9) *Eligible direct purchaser* shall mean any purchaser who purchased a Champion brand name Solar Furnace or solar collector, as new. This term shall not include any purchaser who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

(10) *Eligible direct dealer* shall mean any dealer who purchased a Champion brand name Solar Furnace or solar collector, as new, for his or her own use as heating equipment or as a demonstrator, and who sold at least one but less than three Solar Furnaces and solar collectors to purchasers. This term shall not include any dealer who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

(11) *Eligible licensee purchaser* shall mean any purchaser who purchased a Solar Furnace or solar collector of a brand name other than Champion, as new. This term shall not include any purchaser who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

PART I

It is ordered, That respondent Champion Home Builders Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any solar energy

equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in any manner that:

(1) Respondent's solar energy equipment does not have any defect which substantially impairs the reliability, durability, or performance of the equipment;

(2) Little or no maintenance is required to keep respondent's solar energy equipment in operating condition;

(3) Respondent's solar energy equipment, or any material or component thereof, is durable or reliable;

(4) Respondent's solar energy equipment, or any material or component thereof, is not adversely affected by high temperatures;

(5) Respondent has 60 factories producing solar energy equipment, has a 22-year record of mass producing solar energy equipment, or has 3,200 trained dealers nationwide to provide prompt service on its solar energy equipment; or

(6) Competent, independently conducted tests have verified the performance or quality of respondent's solar energy equipment;

unless such representation is true, and unless, at the time that the representation is made, respondent possesses and relies upon a competent and reliable scientific test or other objective material which substantiates the representation.

B. Representing in any manner the thermal or economic performance or efficiency, energy savings, heat output, cost recovery, "payback" potential, or investment potential of respondent's solar energy equipment unless such representation is true, and unless, at the time that the representation is made, respondent possesses and relies upon a competent and reliable scientific test or other objective material which substantiates the representation.

C. Misrepresenting in any manner:

(1) The reliability, durability, performance capabilities, or maintenance requirements of respondent's solar energy equipment;

(2) The production capabilities, manufacturing experience, or service capabilities of respondent relating to solar energy equipment; or

(3) The results or conclusions of any test upon which respondent relies to substantiate any representation relating to solar energy equipment.

PART II

It is further ordered, That respondent shall:

A. Within 45 days after the date of service of this Order, determine the names and last known addresses of all purchasers and the names and last known addresses of all dealers. In making these determinations, respondent shall search all relevant records in its possession, custody, or control, and shall obtain and search all relevant service and repair records maintained by International Solar Technologies, Inc. as of the date of service of this Order.

B. Send by first-class mail, address correction requested, within 45 days after the date of service of this Order, to the last known address of each purchaser and dealer identified by respondent pursuant to Subpart A of this Part or identified by the Federal Trade Commission or its staff, a notice package consisting of: (i) a copy of the letter attached to this Order as Attachment A, incorporated herein by reference, with the return date filled in; (ii) a copy of the questionnaire form attached to this Order as Attachment B, incorporated herein by reference, with the return date filled in; (iii) a self-addressed, postage-paid envelope; and (iv) an envelope containing the materials described in subsections (i) through (iii) and bearing the legend "CHAMPION SOLAR PROGRAM, IMPORTANT CASH SETTLEMENT OFFER." For the purposes of this Subpart, the return date shall be the date 90 days after the date of service of this Order.

Respondent shall also send by first-class mail a notice package to each person who, within 85 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a purchaser or dealer, and who has not received a notice package or received a notice package but subsequently lost it. The notice package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent may refrain from sending a notice package to any person identified pursuant to Subparts A or B of this Part who respondent's records conclusively show is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser.

C. Determine all eligible direct purchasers, eligible direct dealers, and eligible licensee purchasers. These determinations shall be based upon all information received by respondent from returned Attachment B questionnaires, and all other information in respondent's possession, as of the date 105 days after the date of service of this Order.

Provided that respondent may determine that a person is or is not an eligible direct purchaser, eligible direct dealer, or eligible licensee

purchaser notwithstanding the information provided by such person in an Attachment B form if respondent's records conclusively show that the person does or does not meet the definition of eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser as set forth in Definitions (9), (10), and (11) of this Order.

D. Determine a tentative cash settlement amount for each eligible direct purchaser and eligible direct dealer identified pursuant to Subpart C of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector and shall consist of the following:

(1) $1500 for each Solar Furnace or solar collector system purchased by an eligible direct purchaser who currently owns the unit(s) or who disposed of the unit(s) not for value;

(2) $1000 for each Solar Furnace or solar collector system purchased by an eligible direct purchaser and subsequently disposed of for value; and

(3) $750 for each Solar Furnace or solar collector system purchased by an eligible direct dealer which was purchased for the dealer's own use, either as heating equipment or as a demonstrator.

Provided that if the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) through (3) of this Subpart exceeds $375,000, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement amount by the ratio of $375,000 to the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) through (3).

E. Determine a tentative cash settlement amount for each eligible licensee purchaser identified pursuant to Subpart C of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector and shall consist of the following:

(1) $750 for each Solar Furnace or solar collector system purchased by an eligible licensee purchaser who currently owns the unit(s) or who disposed of the unit(s) not for value; and

(2) $500 for each Solar Furnace or solar collector system purchased by an eligible licensee purchaser and subsequently disposed of for value.

Provided that if the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) and (2) of this Subpart exceeds $150,000 plus any remaining portion of the $375,000 amount provided in Subpart D, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement

amount by the ratio of $150,000 plus any remaining portion of the $375,000 amount to the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) and (2).

F. Send by first-class mail, within 125 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser who is determined pursuant to Subpart C of this Part: (i) a copy of the letter attached to this Order as Attachment C, incorporated herein by reference, with the tentative cash settlement amount and the return date filled in; (ii) a copy of the acceptance and waiver form attached to this Order as Attachment D, incorporated herein by reference, with the tentative cash settlement amount, the return date, and the date of the Attachment C letter filled in; and (iii) a self-addressed, postage-paid envelope. The tentative cash settlement amount shall be determined as provided in Subparts D and E of this Part. For the purposes of this Subpart, the return date shall be the date 155 days after the date of service of this Order.

G. Send by first-class mail, within 180 days after the date of service of this Order, a cash settlement check to each eligible direct purchaser and eligible direct dealer who returned to respondent a signed Attachment D form which was received by respondent on or before the date 170 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart D, subsections (1) through (3) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $375,000, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $375,000 to the aggregate dollar value of all cash settlements as determined above.

H. Send by first-class mail, within 240 days after the date of service of this Order, a cash settlement check to each eligible licensee purchaser who returned to respondent a signed Attachment D form which was received by respondent on or before the date 170 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart E, subsections (1) and (2) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $150,000 plus any undistributed portion of the $375,000 fund provided in Subpart G of this Part, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $150,000 plus any undistributed portion of the

$375,000 fund to the aggregate value of all cash settlements as determined above.

I. Send by first-class mail to each person who, within 86 to 270 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a purchaser or dealer, and who has not received a notice package as provided in Subpart B or who received a notice package as provided in Subpart B but subsequently lost it, a notice package consisting of: (i) a copy of the letter attached to this Order as Attachment E, incorporated herein by reference, with the return date filled in; (ii) a copy of Attachment B, with the return date filled in; (iii) a self-addressed, postage-paid envelope; and (iv) an envelope containing the materials described in subsections (i) through (iii) and bearing the legend "CHAMPION SOLAR PROGRAM, IMPORTANT CASH SETTLEMENT OFFER." For the purposes of this Subpart, the return date shall be the date 275 days after the date of service of this Order. The notice package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent may refrain from sending a notice package to any person who respondent's records conclusively show is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser.

J. Determine all additional eligible direct purchasers, eligible direct dealers, and eligible licensee purchasers. These persons shall include (i) persons whose Attachment B forms were received by respondent subsequent to the date 105 days after the date of service of this Order, and (ii) persons whose Attachment D forms were received by respondent subsequent to the date 170 days after the date of service of this Order. The determinations shall be based upon all information received by respondent from returned Attachment B questionnaires, and all other information in respondent's possession, as of the date 290 days after the date of service of this Order.

Provided that respondent may determine that a person is or is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser notwithstanding the information provided by such person in an Attachment B form if respondent's records conclusively show that the person does or does not meet the definition of eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser as set forth in Definitions (9), (10), and (11) of this Order.

K. Determine a tentative cash settlement amount for each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser identified pursuant to Subpart J of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector

and shall consist of those amounts specified in Subpart D, subsections (1) through (3) and Subpart E, subsections (1) and (2) of this Part.

Provided that if the aggregate dollar value of all tentative cash settlements determined above exceeds $25,000 plus any undistributed portion of the $375,000 and $150,000 funds provided in Subparts G and H of this Part, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement amount by the ratio of $25,000 plus any undistributed portion of the $375,000 and $150,000 funds to the aggregate value of all cash settlements as determined above.

L. Send by first-class mail, within 310 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer and eligible licensee purchaser who is determined pursuant to Subpart J(i) of this Part: (i) a copy of Attachment C, with the tentative cash settlement amount and the return date filled in; (ii) a copy of Attachment D, with the tentative cash settlement amount, the return date, and the date of the Attachment C letter filled in; and (iii) a self-addressed, postage-paid envelope. The tentative cash settlement amount shall be determined as provided in Subpart K of this Part. For the purposes of this Subpart, the return date shall be the date 340 days after the date of service of this Order.

M. Send by first-class mail, within 310 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer and eligible licensee purchaser who is determined pursuant to Subpart J(ii) of this Part and whose new tentative cash settlement amount is less than the tentative cash settlement amount previously determined for that person pursuant to Subpart D or E of this Part: (i) a copy of the letter attached to this Order as Attachment F, incorporated herein by reference, with the new tentative cash settlement amount and the return date filled in; (ii) a copy of Attachment D, with the new tentative cash settlement amount, the return date, and the date of the Attachment F letter filled in; and (iii) a self-addressed, postage-paid envelope. The new tentative cash settlement amount shall be determined as provided in Subpart K of this part. For the purposes of this Subpart, the return date shall be the date 340 days after the date of service of this Order.

N. Send by first-class mail, within 365 days after the date of service of this Order, a cash settlement check to each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser who did not receive a cash settlement check as provided in Subparts I and J, and who returned to respondent a signed Attachment D form which was received by respondent on or before the date 355 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart D, subsections (1) through (3) and

Subpart E, subsections (1) and (2) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $25,000 plus any undistributed portion of the $375,000 and $150,000 funds provided in Subparts G and H of this Part, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $25,000 plus any undistributed portion of the $375,000 and $150,000 funds to the aggregate value of all cash settlements as determined above.

O. Send by first-class mail a copy of the letter attached to this Order as Attachment G, incorporated herein by reference, with the appropriate box checked, to each person who is determined to be ineligible for a cash settlement under the provisions of this Order or whose Attachment D form was not received by respondent on or before the date 355 days after the date of service of this Order. The copy of Attachment G shall be sent within ten days after the determination of ineligibility is made or the Attachment D form is received by respondent.

P. Use all reasonable efforts to determine the correct and complete name and last known address of a purchaser or dealer in each instance where the records searched by respondent do not provide correct or complete information, and use all reasonable efforts to determine the correct eligibility and status of a person in each instance where the returned Attachment B form contains insufficient, ambiguous, or conflicting information. Such efforts shall include, but not be limited to, searches of respondent's records and requests for additional information by mail or telephone calls.

Q. In each instance where a letter or notice package provided for by Part II of this Order is returned by the Post Office undelivered and respondent is provided with a corrected address, remail the letter or notice package to the corrected address within five days after respondent's receipt of the corrected address from the Post Office.

R. Establish and maintain a telephone number which persons may call to receive information and materials relating to the programs provided in this Part and in Part III of this Order.

PART III

It is further ordered, That respondent shall:

A. Within 45 days after the date of service of this Order, determine the names and original addresses of all persons who purchased Solar Furnaces or solar collectors, including purchasers, dealers, distribu-

tors of respondent, licensees of International Solarthermics Corporation, and distributors of licensees of International Solarthermics Corporation. In making these determinations, respondent shall search all relevant records in its possession, custody, or control.

B. Send by third-class mail, within 45 days after the date of service of this Order, to the original address of each person who purchased a Solar Furnace or solar collector identified by respondent pursuant to Subpart A of this Part or identified by the Federal Trade Commission or its staff, a warning package consisting of: (i) a copy of the letter attached to this Order as Attachment H, incorporated herein by reference; (ii) two copies of the sign attached to this Order as Attachment I, incorporated herein by reference, consisting of a white self-adhesive label of latex impregnated material, no smaller than four inches by six inches, with the first line printed in red in thirty-six point type and the second line printed in red in twenty-four point type; and (iii) an envelope containing the materials described in subsections (i) and (ii) bearing the legend "IMPORTANT SOLAR EQUIPMENT WARNING" and addressed as follows: "(Name of Person) or Current Resident."

Respondent shall also send by first-class mail a warning package to each person who, within 365 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a current owner of a Solar Furnace or solar collector, and who has not received a warning package or who received a warning package but subsequently lost it. The warning package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent shall substitute on the envelope containing copies of Attachments H and I the name of the current owner of the Solar Furnace or solar collector for the name of the person who purchased the Solar Furnace or solar collector, if respondent's records show that the person who purchased the Solar Furnace or solar collector no longer owns the unit and if respondent's records contain the name of the current owner.

Provided that respondent may refrain from sending a warning package to any person identified pursuant to Subpart A of this Part who respondent's records conclusively show is not a current owner of a Solar Furnace or solar collector.

C. Use all reasonable efforts to determine the correct and complete name and original address of a person who purchased or owns a Solar Furnace or solar collector in each instance where the records searched by respondent do not provide correct or complete information. Such efforts shall include, but not be limited to, searches of

respondent's records and requests for additional information by mail or telephone calls.

PART IV

It is further ordered, That:

A. Respondent shall maintain documents and records demonstrating the manner and form of respondent's compliance with Part I of this Order, including:

(1) Documentation in support of and upon which respondent relies in making any representation concerning the reliability, durability or performance of solar energy equipment, and any other documentation which contradicts, qualifies, or otherwise calls into question any representation concerning the reliability, durability or performance of solar energy equipment, included in advertising or sales promotional materials disseminated by respondent or by any officer, representative, agent, employee, subsidiary, or division of respondent;

(2) Documentation or written results of tests performed in connection with carrying out the provisions of Part I, Subparts A and B of this Order.

Such documentation shall be retained by respondent for a period of three (3) years from the date such advertising or sales promotional materials were last disseminated, and may be inspected by the Commission or its staff upon reasonable notice.

B. Respondent shall maintain documents and records demonstrating the manner and form of respondent's compliance with Parts II and III of this Order, including but not limited to those reflecting:

(1) Efforts made and actions taken by respondent to identify, locate, contact, and provide cash settlements to persons as provided in Part II of this Order;

(2) Efforts made and actions taken by respondent to identify, locate and mail notices to addresses and persons as provided in Part III of this Order;

(3) The names, original addresses, and last known addresses of all persons required to be determined as provided in Part II, Subparts A and P and Part III, Subparts A and C of this Order;

(4) The name and address of each person to whom a notice package is sent as provided in Part II, Subparts B and I of this Order;

(5) The name and address of each person who is determined to be eligible and each person who is determined to be ineligible for a cash settlement as provided in Part II, Subparts B, C, I and J of this Order;

(6) The name and address of each person who receives a cash settle-

ment as provided in Part II, Subparts G, H and N of this Order, and the amount of each refund;

(7) The Attachment B and Attachment D forms returned to respondent as provided in Part II, Subparts C, G, H, J and N of this Order;

(8) Any information used in making determinations of eligibility and ineligibility as provided in Part II of this Order;

(9) The name and address of each person who disputes a determination of ineligibility or cash settlement amount made as provided in Part II of this Order, the nature of such person's dispute, and the resolution of the dispute;

(10) All written communications, and a log of all telephonic communications which includes a summary of the communications, between respondent and any person relating to the programs provided in Parts II and III of this Order;

(11) The name and address of each person to whom an Attachment H letter is sent as provided in Part III of this Order.

Such documents and records shall be maintained by respondent for a period of three (3) years from the date of the creation of the document or record, and may be inspected by the Commission or its staff upon reasonable notice.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its operating divisions, to its successors and assigns, and to each of its officers, agents, representatives, or employees who have sales, marketing, advertising, servicing, warranty, or policy responsibilities with respect to the subject matter of this Order.

PART VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in 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 this Order.

PART VII

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this Order, and within eighteen months after the date of service of this Order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form in which it has complied with this Order.

ATTACHMENT A

[Champion letterhead] [Date]

Dear :

Our records show that you may have purchased a Solar Furnace or solar collector manufactured by Champion Home Builders Co. Champion has recently started a program to offer cash settlements of at least several hundred dollars each to certain people who purchased solar energy equipment sold under the "Champion" and other brand names. You may be eligible for a cash settlement under this program. Please read this letter and follow the steps listed below.

This program is part of an agreement between the Federal Trade Commission (FTC) and Champion. The FTC had alleged that Champion's Solar Furnaces and solar collectors did not provide as much heat as represented and required a great deal of maintenance and repairs. Although Champion does not admit this is true, we have agreed to offer these cash settlements.

HOW TO APPLY

In order to apply for a cash settlement, you *must* do the following:

(1) Fill out the enclosed questionnaire completely. This will be used to determine your eligibility for the cash settlement.

(2) If you owned more than one Solar Furnace or solar collector system, make extra copies of the questionnaire and fill out one for each Solar Furnace or solar collector system you owned.

(3) Return the completed questionnaire to us in the enclosed envelope. You must mail the questionnaire back to us by [return date] to make sure you are considered for the full settlement for which you may be eligible. If you are eligible for a cash settlement but we do not receive your completed questionnaire in time, you may get a lesser amount or you may get nothing.

Even if you no longer own the Solar Furnace or solar collector, or you were a dealer, or you bought a non-Champion brand, you may still be eligible for a cash settlement. Please fill out the questionnaire so that you may be considered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

Once we receive your completed questionnaire, we will determine if you are eligible for a cash settlement and let you know in writing within the next three months. If you are eligible, we will also tell you how much the settlement will be. Please let us know if you change your address in the next several months, so we can contact you again.

You will *not* have to return your Solar Furnace or solar collector if you decide to take the cash settlement. However, you *will* have to sign a waiver form which we will send you. By signing the waiver you will give up any rights you may have remaining under

a warranty if you got a warranty from Champion. You will also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you have any questions about this program, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the completed questionnaire to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT B

QUESTIONNAIRE

Please print your name, address, and telephone number. Then, answer the questions below by putting an "X" in the proper box.

Fill out a separate questionnaire form for each Solar Furnace or solar collector system you have owned. If you were a dealer, fill out a questionnaire form for each Solar Furnace or solar collector system you had for your own use as heating equipment or as a demonstrator.

Name: _____ Telephone: _____
Address: _____
_____ Zip Code: _____

1. Have you or your family ever bought a Solar Furnace or solar collector for your own use as heating equipment or as a demonstrator? (Answer yes if you bought the unit by itself or with your home.)
   [ ] Yes [ ] No
   If yes, from whom did you buy it?
   _____
   _____

   NOTE: If you answered yes, please answer the following questions. If you answered no, please skip to Question 11.
2. Did you buy the Solar Furnace or solar collector as new?
   [ ] Yes [ ] No
3. What is the brand name of the Solar Furnace or solar collector?
   [ ] Champion [ ] Other (please specify): _____.
4. If you own or owned a Solar Furnace, does the outside surface look like
   [ ] Aluminum or metal with a brown wood-grain pattern?
   [ ] Wood, fiberglass or other non-metallic material?
   [ ] Other (please specify): _____.
5. What is the serial number of your Solar Furnace or solar collector?
   _____.

NOTE: The serial number should appear on your warranty registration form. If you can't find your serial number, leave this answer blank.

6. Do you still own the Solar Furnace or solar collector?
[ ] Yes [ ] No

7. If the answer to question 6 is no, did you:
[ ] Sell the unit (either by itself or with your home)?
[ ] Dispose of the unit without selling it or receiving any compensation?
NOTE: If you sold the unit to someone else, please provide the name and address of the buyer: _____
_____.

8. Were you ever a dealer for Solar Furnaces?
[ ] Yes (please specify brand name of equipment you sold): _____.
[ ] No
NOTE: If you answered yes, please answer the following questions. If you answered no, please skip to Question 11.

9. Did you buy the Solar Furnace or solar collector described above before you became a Solar Furnace dealer?
[ ] Yes [ ] No

10. How many Solar Furnaces and Champion solar collector systems did you sell? (Do not count any units you bought for your own use and later sold second-hand.)
[ ] None [ ] One or two [ ] More than two

11. Do you know anyone else who bought a Solar Furnace or Champion solar collector? If so, please provide their names and addresses:
_____ _____
_____ _____
_____ _____

This completes our questions. If you have a copy of your bill of sale, warranty form, or other evidence of purchase, please enclose it with this form in the envelope we have provided. If you do not have anything like this, please return the form anyway. Evidence of purchase is *not* required for you to be eligible for a cash settlement, but will help us in reviewing your eligibility.

REMEMBER: YOU MUST FILL OUT THIS FORM AND MAIL IT TO US BY [return date] TO BE ELIGIBLE FOR A FULL CASH SETTLEMENT.

ATTACHMENT C

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission (FTC), Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. We have reviewed our records and the questionnaire that you returned and have determined that you are eligible for a cash settlement under this program.

AMOUNT OF YOUR CASH SETTLEMENT

The tentative amount of your cash settlement is [tentative cash settlement amount]. This amount was determined based on the number of Solar Furnaces or solar collectors you purchased and the circumstances under which you purchased them. The amount

of money you will actually receive may increase slightly if someone who is eligible decides not to accept a settlement, but this amount will *not* be lowered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

In order to obtain your cash settlement, you must sign and return the enclosed form entitled "Notice of Acceptance of Cash Settlement and Waiver of Claims." Please read this form and make your decision carefully. By signing and returning this form and accepting your cash settlement, you give up any rights you may have remaining under a warranty if you got a warranty from Champion. You also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you decide to accept the cash settlement and give up these rights, please sign the form and return it to us in the enclosed envelope. You *must* mail the signed form back to us by [return date] to make certain you receive your settlement. We will then mail you a check within the next two to four months. If we do not receive your signed form in time, you may get a smaller cash settlement or you may get nothing.

If you decide not to accept the cash settlement, please do not return the form. You will not give up any rights and you will not receive any money.

If you have any questions about this program, or if you change your address, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the signed waiver form to us by [return date].

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT D

NOTICE OF ACCEPTANCE OF CASH SETTLEMENT AND WAIVER OF CLAIMS

I hereby accept Champion's offer of a cash settlement, as contained in its letter of [date of Attachment C or F letter], in an amount not less than [tentative cash settlement amount].

In consideration of this cash settlement, I hereby release and discharge Champion Home Builders Co., its successors and assigns, and its directors, officers, agents, representatives, and employees, and its divisions and other subsidiaries, from any and all claims of every name and nature relating to solar energy equipment manufactured and sold by Champion Home Builders Co., including any claims I may have under any express or implied warranty, including any warranty of merchantability or fitness for particular use, from the beginning of time to the date of this instrument and forever after, except any claims for future personal injury or future property damage relating to the solar energy equipment.

(Date) (Signature)

(Name)

(Address)

(City, State and Zip Code)

REMEMBER: YOU MUST SIGN THIS FORM AND MAIL IT TO US BY [return date].

ATTACHMENT E

[Champion letterhead] [Date]

Dear :

Our records show that you may have purchased a Solar Furnace or solar collector manufactured by Champion Home Builders Co. Champion has recently started a program to offer cash settlements of at least several hundred dollars each to certain people who purchased solar energy equipment sold under the "Champion" and other brand names. You may be eligible for a cash settlement under this program. Please read this letter and follow the steps listed below.

This program is part of an agreement between the Federal Trade Commission (FTC) and Champion. The FTC had alleged that Champion's Solar Furnaces and solar collectors did not provide as much heat as represented and required a great deal of maintenance and repairs. Although Champion does not admit this is true, we have agreed to offer these cash settlements.

HOW TO APPLY

In order to apply for a cash settlement, you *must* do the following:

(1) Fill out the enclosed questionnaire completely. This will be used to determine your eligibility for the cash settlement.

(2) If you owned more than one Solar Furnace or solar collector system, make extra copies of the questionnaire and fill out one for each Solar Furnace or solar collector system you owned.

(3) Return the completed questionnaire to us in the enclosed envelope. You must mail the questionnaire back to us by [return date] to make sure you are considered for the full cash settlement for which you may be eligible. If you are eligible for a cash settlement but we do not receive your completed questionnaire in time, you will receive no cash settlement.

Even if you no longer own the Solar Furnace or solar collector, or you were a dealer, or you bought a non-Champion brand, you may still be eligible for a cash settlement. Please fill out the questionnaire so that you may be considered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

Once we receive your completed questionnaire, we will determine if you are eligible for a cash settlement and let you know in writing within the next several months. If you are eligible, we will also tell you how much the settlement will be. Please let us know if you change your address in the next several months, so we can contact you again.

You will *not* have to return your Solar Furnace or solar collector if you decide to take the cash settlement. However, you *will* have to sign a waiver form which we will send

you. By signing the waiver you will give up any rights you may have remaining under a warranty if you got a warranty from Champion. You will also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you have any questions about this program, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the completed questionnaire to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT F

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission, Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. Some time ago, we sent you a letter notifying you of your eligibility for a cash settlement under this program. We also sent you a form to sign in order to accept your cash settlement.

We have received back your signed acceptance form. Unfortunately, we did not receive it in time to include you in the first group of people eligible for cash settlements. For that reason, the amount of the cash settlement you can receive has changed. We are sending you this letter to notify you of the change in your cash settlement, and to obtain your approval of the new amount.

AMOUNT OF YOUR CASH SETTLEMENT

The tentative amount of your cash settlement is now [tentative cash settlement amount]. The amount of money you will actually receive may increase slightly if someone who is eligible decides not to accept a settlement, but this amount will *not* be lowered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

In order to obtain your cash settlement, you must sign and return the enclosed form entitled "Notice of Acceptance of Cash Settlement and Waiver of Claims." You must do this even though you previously signed and returned a form.

Please read this form and make your decision carefully. By signing and returning this form and accepting your cash settlement, you give up any rights you may have remaining under a warranty if you got a warranty from Champion. You also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you decide to accept the cash settlement and give up these rights, please sign the form and return it to us in the enclosed envelope. You *must* mail the signed form back to us by [return date] to make certain you receive your settlement. We will then mail you a check within the next two months. If we do not receive your signed form in time, you will receive no cash settlement.

If you decide not to accept the cash settlement, please do not return the form. You will not give up any rights and you will not receive any money.

If you have any questions about this program, or if you change your address, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the signed waiver form to us by [return date].

Sincerely,

Champion Home Builders Co.

Enclosures

ATTACHMENT G

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission (FTC), Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. We have reviewed our records and the questionnaire that you returned and have determined that you are *not eligible* for this program, for the following reason:

[ ] Your Solar Furnace or solar collector was not manufactured by Champion.
[ ] You are not the original purchaser.
[ ] You were a Champion dealer and sold three or more Solar Furnaces or solar collectors.
[ ] You were a dealer of an International Solarthermics Corporation licensee and sold one or more Solar Furnaces or solar collectors.
[ ] You previously received a refund or monetary award from Champion.
[ ] Your information was received after the program had ended.
[ ] Other: _____
_____ .

If you believe that our determination is incorrect, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

For a copy of the FTC agreement, write:

Federal Trade Commission
Public Reference Branch
Room 130
Washington, D.C. 20580

We regret that we cannot be of assistance to you.

Sincerely yours,

Champion Home Builders Co.

ATTACHMENT H

[Champion letterhead] [Date]

Dear Sir/Madam:

Our records indicate that you may own solar energy equipment manufactured by Champion Home Builders Co. As a result, we are sending you this important notice about your equipment.

IMPORTANT WARNING

Your Champion solar equipment contains wood and other flammable materials. Federal Government Agencies have recently expressed concern that wood in solar collectors may ignite when exposed to excessive heat over a long period of time. Although we do not expect a fire would occur under normal operating conditions, we recommend that these precautionary steps be taken.

1. CLOSE THE REFLECTOR SHIELD WHEN YOUR SOLAR EQUIPMENT IS NOT IN USE.

Always cover the collector when the unit is not operating to prevent build-up of excessive heat. Close the reflector shield to cover the collector during months you are not using your equipment. The reflector shield should also be closed if a motor or controller stops working, or if you have a power outage. If you do not have a reflector shield, use a tarpaulin or similar material to cover the collector.

2. NEVER SMOKE OR USE AN OPEN FLAME NEAR THE EQUIPMENT OR DUCTWORK.

Your Champion solar equipment and ductwork contain organic materials such as wood and polyurethane foam which can release toxic smoke if ignited. Therefore, you should never smoke or use an open flame, such as a butane torch, near the equipment or ductwork. The two warning labels enclosed with this letter should be glued to the outside of the Solar Furnace at the motor maintenance opening, and to the exposed ductwork inside your house.

3. INSTALL A SMOKE DETECTOR.

We believe that all homes should be equipped with smoke detectors. If you don't already have one, you should consider purchasing and installing a smoke detector in your home.

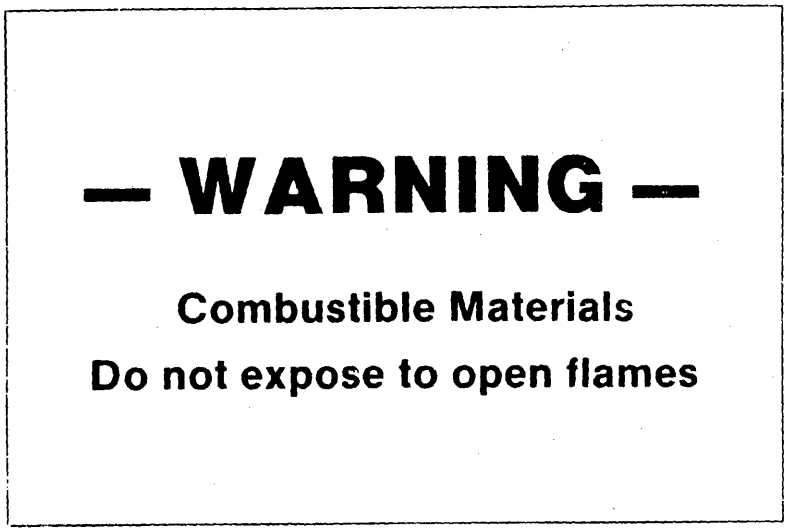
If you have any questions about this notice, you may call us at [telephone number].

Sincerely,

Champion Home Builders Co.

Enclosures

ATTACHMENT I



IN THE MATTER OF

FOREMOST DAIRIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-1161. Consent Order, Jan. 23, 1967—Modifying Order, Feb. 17, 1983

This order reopens the proceeding and modifies the Commission's order issued on Jan. 23, 1967 (71 F.T.C. 56), by deleting Paragraph V from the order, so as to relieve respondent of the obligation of obtaining Commission approval prior to making certain acquisitions.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JANUARY 23, 1967

By a petition dated July 9, 1982, and supplements thereto dated October 14, 1982, November 16, 1982, and January 11, 1983, respondent Foremost-McKesson, Inc. (successor to Foremost Dairies, Inc.) ("Foremost") requests that the Commission reopen the proceeding in Docket No. C–1161 and delete Paragraph V of the order issued by the Commission on January 23, 1967. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Foremost's petition and supporting materials, and other relevant information, the Commission now finds that the public interest warrants reopening and modification of the order. The Commission has determined that absent special circumstances an order provision that requires prior Commission approval of acquisitions by the respondent should not exceed ten years in duration. The order in this case has been in effect for 16 years and the record does not demonstrate that continued prior approval of respondent's acquisitions is necessary.

Accordingly,

It is ordered, That this matter be, and it hereby is reopened and that Paragraph V of the Commission's order be and it is hereby deleted.

IN THE MATTER OF

PLASKOLITE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3104. Complaint, Feb. 23, 1983—Decision, Feb. 23, 1983

This consent order requires a Columbus, Ohio manufacturer and seller of interior-mounted plastic storm windows, among other things, to cease misrepresenting the performance capabilities of storm windows; the amount of savings that will result from installation of storm windows on a house already equipped with prime and storm windows; and the purpose, content or conclusions of tests or surveys used by the company to substantiate energy-related claims. Respondent is further barred from using the words "up to" or similar terms in energy-related claims, unless the maximum level of performance can be achieved by a significant number of consumers under normal circumstances, and the class of persons who can achieve this level of performance is disclosed. Additionally, respondent is required to retain documentation for energy-related claims for a period of three years.

Appearances

For the Commission: *Marilyn J. Holmes* and *Robert C. Cheek.*

For the respondent: *Eric F. Stoer,* Washington, D.C. and *G. Robert Lucas, Porter, Wright, Morris & Arthur,* Columbus, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Plaskolite, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Plaskolite, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1770 Joyce Avenue, Columbus, Ohio.

PAR. 2. Respondent has been engaged in the manufacture, advertising, promotion, offering for sale, sale and distribution of interior mounted plastic storm windows under the brand name "In-Sider."

PAR. 3. In the course and conduct of its business, respondent has

caused its interior mounted plastic storm windows, when sold, to be shipped from its manufacturing plants in Columbus, Ohio, to its distributors and retailers in various States of the United States. For the purpose of inducing the purchase of its interior mounted plastic storm windows by the consuming public, and in a manner likely to induce the purchase of said products in commerce, respondent has disseminated and caused the dissemination of certain advertisements and promotional materials through various means, including the insertion of advertisements in magazines with national circulation, and the distribution of promotional materials through the use of the United States mail. Respondent at all times mentioned herein has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. When installed with a double hung window, the In-Sider will cut heat loss through the window by 88%!

b. Triple glaze with the In-Sider (install the In-Sider in addition to a storm window or insulating window) and cut your heat loss by an additional 26%!

c. Actual test results show how much typical homes saved with In-Sider storm windows. . . . Heating $ Saved by Adding In-Sider: Boston, $156.62; Dallas, $49.97; Detroit, $87.33; Philadelphia, $54.63. Cooling $ Saved by Adding In-Sider: Boston, $85.00; Dallas, $170.00; Detroit, $45.00; Philadelphia, $31.00.

d. How much can you save? Field tests in three different American cities clearly show how much In-Siders can slash off a heating bill [in 1979]. . . . Projected Fuel Bill Savings Adding In-Siders to Prime Windows only: Philadelphia, $88.05; Boston, $252.20; Dallas, $52.53.

PAR. 5. In truth and in fact, contrary to respondent's representations set forth in Paragraph Four:

a. The In-Sider will not cut heat loss through many double hung windows by 88 percent.

b. The In-Sider will not cut heat loss by 26 percent in many instances where it is installed in addition to a storm window or insulating window.

c. The savings on heating and cooling costs set forth in Paragraph Four, subparagraph c. above are not actual test results. The test results referred to do not establish heating cost savings of $156.62 by installing In-Sider storm windows on a typical home in Boston. At the time the representations set forth in Paragraph Four, subparagraph c. above were made, a typical home in Boston would not have saved $156.62 on heating costs by installing In-Sider storm windows.

d. The field tests referred to in Paragraph Four, subparagraph d. above do not establish heating cost savings of $252.20 by installing In-Sider storm windows on a typical home in Boston. A typical home in Boston would not have saved $252.20 on heating costs in 1979 by installing In-Sider storm windows.

Therefore, said representations are deceptive or unfair.

PAR. 6. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. Installation of the In-Sider will "Save up to 88% of heat loss through windows."

b. Installation of the In-Sider "cuts heat loss through your window by up to 98.5%."

c. "And, if you have outside storm windows, the In-Sider increases their efficiency by up to 26%!"

PAR. 7. By and through the use of these and other representations, respondent has represented directly or by implication that:

a. Installing In-Sider storm windows will save an appreciable number of consumers 88 percent or close to 88 percent of heat loss through windows under circumstances normally and expectably encountered by consumers.

b. Installing In-Sider storm windows will reduce heat loss through windows for an appreciable number of consumers by 98.5 percent or close to 98.5 percent under circumstances normally and expectably encountered by consumers.

c. Installing In-Sider storm windows on a house that already has prime and storm windows will reduce heat loss for an appreciable number of consumers by 26 percent or close to 26 percent under circumstances normally and expectably encountered by consumers.

PAR. 8. In truth and in fact, contrary to respondent's representations set forth in Paragraph Seven:

a. Few, if any, consumers, under circumstances normally and expectably encountered, will save 88 percent or close to 88 percent of heat loss through windows by installing In-Sider storm windows.

b. Few, if any, consumers, under circumstances normally and expectably encountered, will reduce heat loss through windows by 98.5 percent or close to 98.5 percent by installing In-Sider storm windows.

c. Few, if any, consumers, under circumstances normally and expectably encountered, will reduce heat loss by 26 percent or close to

26 percent by installing In-Sider storm windows on a house that already has prime and storm windows.

Therefore, said representations are deceptive or unfair.

PAR. 9. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. "The In-Sider Storm Window substantially outperforms outside storm windows."

b. In-Sider storm windows "insulate far better than outside storm windows."

c. "The In-Sider is 1/3 more effective than a triple track window!!!"

PAR. 10. In truth and in fact, contrary to respondent's representations set forth in Paragraph Nine:

a. In-Sider storm windows do not substantially outperform many outside storm windows.

b. In-Sider storm windows do not insulate far better than many outside storm windows.

c. The In-Sider is not one-third more effective than many triple track windows.

Therefore, said representations are deceptive or unfair.

PAR. 11. At the time respondent made the representations alleged in Paragraphs Four, Six, Seven, and Nine, respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent's test protocols and calculations were not designed or conducted to assess product performance in a manner appropriate and relevant to the representations made. Therefore, said representations are deceptive or unfair.

PAR. 12. Respondent's advertisements and promotional materials represent, directly or by implication, that respondent possessed and relied upon a reasonable basis for making, at the time they were made, the representations alleged in Paragraphs Four, Six, Seven, and Nine. In truth and in fact respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent's test protocols and calculations were not designed or conducted to assess product performance in a manner appropriate and relevant to the representations made. Therefore, said representations are deceptive or unfair.

PAR. 13. The use by respondent of the aforesaid deceptive or unfair statements, representations, and practices, and the placement in the hands of its distributors and retailers of the means and instrumentali-

ties by and through which others may have used the aforesaid deceptive or unfair statements, representations, and practices, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of respondent's interior mounted storm window products by reason of said erroneous and mistaken belief.

PAR. 14. The acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 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 thereafter considered the matter and having determined that it had reason to believe that the respondent has 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 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Plaskolite, Inc. 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 1770 Joyce Avenue, in the City of Columbus, State of 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

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to energy savings, efficiency or conservation, fuel savings, fuel cost savings, air infiltration, window or door sealing capabilities, conduction of heat, or heat gain or loss.

A *competent and reliable test* means any scientific, engineering, or other analytical report or study prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation, and analytical procedures that ensure accurate and reliable results.

Storm window means any transparent window covering, whether placed outside or inside an ordinary window, made of any material which is used to prevent or reduce air infiltration or exfiltration.

PART I

It is ordered, That respondent Plaskolite, Inc., a corporation, its successors and assigns, and its 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 any storm window in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Misrepresenting in any manner, directly or by implication, the performance capabilities of any storm window or the ability of any storm window to reduce air infiltration, heat loss through the window, or heating costs.

(2) Misrepresenting in any manner, directly or by implication, the amount of savings that will result from installation of any storm window on a house that already has prime and storm windows.

(3) Making any energy-related claim unless, at the time that the claim is made, respondent possesses and relies upon a competent and reliable test or other objective material which substantiates the claim.

(4) Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test or study upon which re-

spondent relies as substantiation for any energy-related claim, or making any statement or representation which is inconsistent with the results or conclusions of any such test or study.

(5) Making any energy-related claim which uses the phrase "up to" or words of similar import, unless, (a) the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectably encountered by consumers, and (b) the class of persons who can achieve the maximum level of performance claimed is disclosed.

PART II

It is further ordered, That respondent maintain all documentation in support of and upon which respondent relies in making any energy-related claim and any other documentation that contradicts, qualifies, or otherwise calls into question any energy-related claim included in advertising or sales promotional material disseminated by respondent or by any officer, representative, agent, employee, subsidiary, or division of respondent, concerning the performance, efficiency or quality of any storm window. Such documentation shall be retained by respondent for a period of three years from the date such advertising or sales promotional materials were last disseminated, and may be inspected by the Commission staff upon reasonable notice.

PART III

It is further ordered, That, for a period of three years from the date of service of this Order, respondent forthwith deliver a copy of this Order to all present and future employees, personnel, or agents and representatives of respondent engaged in the creation, design, or dissemination of any advertisement promoting respondent's storm windows.

PART IV

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

PART V

It is further ordered, That respondent 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

SOUTHWEST SUNSITES, INC., ET AL.

Docket 9134. Interlocutory Order, Feb. 24, 1983

ORDER ESTABLISHING PROCEDURES FOR SUBMISSION OF PORTER REALTY CONSENT AGREEMENT

On February 11, 1981, complaint counsel and respondents, Irvin Porter and Porter Realty, Inc. ("broker respondents") executed an Agreement Containing Consent Order to Cease and Desist ("consent"). Thereafter, pursuant to a joint motion by the parties, the Administrative Law Judge ("ALJ") stayed the litigation with respect to these respondents. Trial of the remaining respondents ("subdivider respondents") was conducted from April 1981 into February 1982. On July 29, 1982, the ALJ issued an initial decision dismissing the complaint as to subdivider respondents. However, complaint counsel has acknowledged that the executed consent and supporting staff recommendation were not submitted to the Bureau of Consumer Protection for final approval so that the matter, as to broker respondents, could be withdrawn from adjudication in a timely fashion. *See* Complaint Counsel's January 24, 1983 Response to Commission's Order Directing Submission of Briefs at 2, Rules of Practice, Section 3.25(c), 16 C.F.R. 3.25(c).

Section 4.7(f) of the Commission's Rules of Practice, 16 C.F.R. 4.7(f), permit *ex parte* communications between complaint counsel and the Commission for the purpose of evaluating proposed consent settlements that are executed by some, but not all, respondents. However, to avoid any appearance that complaint counsel has obtained an advantage because of the status of the proposed consent, *it is hereby ordered* that all communications from complaint counsel to the Commission concerning the proposed consent signed by Porter Realty, Inc. and Irvin Porter be made on the record. Complaint counsel is also ordered to submit the consent agreement and any recommendations concerning it within sixty (60) days following issuance of this order. The proposed consent agreement will then be considered in conjunction with the adjudicative case now pending before the Commission.

IN THE MATTER OF

MORTON THIOKOL, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2707. Consent Order, July 21, 1975—Modifying Order, Feb. 28, 1983

This order reopens the proceeding and modifies the Commission's order issued on July 21, 1975 (86 F.T.C. 299). The modified order eases certain restrictions concerning the advertising of Lite Salt; gives the company more flexibility when making disclosures in advertising; and requires that Lite Salt labels state that it is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician."

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On July 23, 1982, Morton-Norwich Products, Inc.[1] and Needham, Harper & Steers Advertising, Inc., respondents in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered on July 21, 1975.

The consent order involves Morton Lite Salt® Mixture (Lite Salt)[2], a blend of equal amounts of sodium chloride and potassium chloride, or any product of similar composition. Petitioners marketed Lite Salt for people who desire to or should limit their sodium intake. The order prohibits claims that medical research has established a connection between sodium intake and high blood pressure or water retention, and that a reduction in sodium intake would promote or maintain good health. The Complaint charged that these claims had not been established to the satisfaction of the scientific community. In addition, the order requires a warning in all Lite Salt advertisements that the product is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician."

The petition of July 23, 1982, requests five changes in the consent order, which it summarized as follows:

(1) a change in the consent order's preamble to make clear that the order's advertising and labeling restrictions apply only to Morton's consumer-oriented promotional efforts and sales, rather than to the industrial food processing trade;

[1] Morton-Norwich, Inc., changed its name to Morton Thiokol, Inc., after it filed the petition.

[2] Petitioners requested a change in the preamble language substituting "Morton Lite Salt® Mixture" for "Morton Lite Salt" to protect their trademark. The Commission has no objection to the change.

(2) the inclusion of a requirement that packages be labeled, "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician";

(3) a change in the advertising disclosure provisions which allows Morton the option of using in its advertising the cautionary statement "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician" or the statement "Read Label, Including Warnings";

(4) a change in the advertising disclosure provisions which removes the phrase "clear and conspicuous" and substitutes more specific disclosure requirements for television, radio, and print advertisements; and

(5) a change in the second proscriptive paragraph of the consent order to make clear that the order does not prohibit Morton from stating accurately the opinions of medical researchers and doctors concerning the effects of sodium consumption, provided that such representations are based on reliable and competent scientific evidence.

The petition included a Proposed Order that petitioners requested the Commission to substitute for the original order.

The change requested in the preamble language would result in the order applying only to the advertising and sale of Lite Salt or any product of similar composition "in a package intended to be purchased and used by consumers (*e.g.*, the 11 ounce container sold in grocery stores) and not to the advertising and sale of the product in institutional packages (*e.g.*, 80 pound sacks sold to food processors)." Morton did not market the product in institutional size sacks in 1975.

The Commission agrees that this change is justified. As petitioners point out,

> a food processor using the Product as an ingredient in its product would be sufficiently sophisticated to easily recognize that it should not be used in preparing a sodium-free or a potassium-free food. Moreover, food manufacturers are required to adhere to food labeling regulations as promulgated by the FDA, including regulations regarding the disclosure of ingredients in the order of predominance.

Petition at 17.

The second suggested change would add the following proscriptive paragraph to the modified order:

> 1. Failing to disclose on the label of such container, in the following words, or words of similar import, that such product is "Not To Be Used By Persons On Sodium or Potassium Restricted Diets Unless

Approved By A Physician." Such disclosure must be enclosed within a boxed outline and printed in type size that can clearly be read.

This provision is desirable because it requires, with minimal burden, the dissemination to interested consumers of important health information. Petitioners now include this warning on the product pursuant to an agreement reached with the Food and Drug Administration in 1974. Including this provision in the order gives the Commission clear authority to enforce the warning, and to ensure its prominence.

The third requested modification is that petitioners be allowed in advertising to substitute the warning "Read Label, Including Warnings" for the more extensive warning that the product is "Not To Be Used By Persons On Sodium or Potassium Restricted Diets Unless Approved By A Physician." Petitioners argue that so long as the more extensive warning appears in labeling, a requirement that it also appear in advertising is unnecessarily burdensome.

The Commission recognizes that all mandatory disclosures impose costs, occupy advertising space and compete with other useful information in advertisements—such as the benefits of the product—for consumers' attention. Consequently, disclosure requirements serve the public interest only if their benefits outweigh their costs and they are no more burdensome than necessary than to convey the intended message. The Commission has concluded that if advertising for Lite Salt discloses that the product contains sodium, more extensive warnings are not necessary in advertising.[3] The sodium content disclosure should be sufficient to alert consumers on sodium restricted diets to read the label of the product. There they will find a statement of the amount of sodium in the product, as well as the now required warning not to use the product without physician approval. The Commission does not believe it has a sufficient basis to require an advertising warning for this product directed only to persons on potassium restricted diets.

Accordingly, the Commission has modified the advertising disclosure requirement, with petitioners' agreement, to allow a disclosure of sodium content in lieu of the more extensive warning originally required.

Petitioners next ask the Commission to change the order's disclosure guidelines. The current order requires that disclosures be "clear and conspicuous." Petitioners' propose alternative definitions setting forth criteria for television, radio, and print advertising. Petitioners have agreed to modify the proposed television disclosure standards to

[3] The Commission does not, however, accept petitioners' argument that it should alter the health warnings because of alleged competitive disadvantages they impose.

require audio disclosure. With this change, the Commission believes these standards will ensure that the required information is adequately communicated.

The final modification concerns the order provisions prohibiting petitioners from representing that medical researchers or doctors have established (a) a connection between sodium intake and high blood pressure or water retention, or (b) that reducing the level of sodium intake will promote or maintain good health. The petition cites extensive evidence indicating that the vast majority of medical and scientific experts in this country are sufficiently certain of a link between sodium consumption and the development of high blood pressure to recommend a reduction in sodium consumption for the general population. This represents a change from the state of medical and scientific opinion in 1975 when the order was issued. At that time, many doctors and researchers were not prepared to take a position on the existence of a link between sodium consumption and the development of high blood pressure, and reduced sodium consumption was not widely recommended for the general public. Because the situation has changed dramatically since 1975, however, the Commission believes the evidence contained in the petition justifies modifying the order. The evidence indicates, however, that most experts do not believe that the link between sodium consumption and the development of high blood pressure has been conclusively established. Consequently, the Commission has, with petitioners' agreement, modified the order to allow respondents to make representations about the relationship between sodium consumption and high blood pressure or water retention if they posses a reasonable basis consisting of competent and reliable scientific documentation supporting the representations.

The modified order also prohibits claims that Lite Salt is a sodium-free salt substitute or that it is intended for use by persons on sodium or potassium restricted diets unless approved by a physician.

For the foregoing reasons, the Commission believes petitioners have made a satisfactory showing that changes in facts and the public interest require modifying the order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued July 21, 1975, in Docket No. C–2707 is hereby modified to read as follows:

ORDER

It is ordered, That respondent Morton Thiokol, Inc., a corporation, and respondent Needham, Harper & Steers Advertising, Inc., a corporation, their successors and assigns, either jointly or individually, 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 in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of Morton Lite Salt® Mixture or any product of similar composition, packed in a container intended to be sold to, distributed to, or used by consumers, do forthwith cease and desist from:

1. Failing to disclose on the label of such container, in the following words or words of similar import, that such product is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician." Such disclosure must be enclosed within a boxed outline and printed in type size that can clearly be read.

2. Disseminating any advertising for such product packed in such container that fails to disclose:

a. The following words, or words of similar import: "Not For Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician"; or

b. That such product contains sodium. This disclosure may be accomplished satisfactorily by describing such product as a mixture of salt (or sodium chloride) and potassium chloride or as containing one-half (1/2) the sodium of table salt.

For television advertisements, the required disclosure must be presented in the audio portions of the advertisement. The disclosure must be made in a manner such that it may be heard without undue distracting noise.

For print advertisements, the required disclosure must be of a type size that can clearly be read, and must appear enclosed in a boxed outline or otherwise appear prominently. If a coupon for such product is offered as part of any advertisement, the required disclosure need appear only in the main portion of the advertisement. If such product is advertised in conjunction with other products, the required disclosure need appear as part of or in close proximity to only that portion of the advertisement in which such product appears most prominently.

For radio advertisements, the required disclosure must be made in a manner such that it may be heard without undue distracting noise.

3. Making any representation, directly or indirectly, regarding the relationship between sodium consumption and high blood pressure or water retention unless, at the time the representation is made, respondents have in their possession a reasonable basis consisting of

competent and reliable scientific documentation to support such representation.

4. Making any representation, directly or indirectly, that Morton Lite Salt® Mixture is a sodium-free salt substitute.

5. Making any representation, directly or indirectly, that Morton Lite Salt® Mixture is intended for use by persons on sodium or potassium restricted diets, unless the representation is expressly limited to use approved by a physician.

Nothing in this order shall be construed to prohibit respondents from disseminating any advertisement of Morton Lite Salt® Mixture or any product of similar composition, that:

A. indicates that the product contains one-half the sodium of regular salt; or

B. indicates that the product is intended for persons (not including those on sodium or potassium restricted diets) who desire to reduce their intake of salt or sodium.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each officer or employee having direct responsibility for either the marketing or advertising of Morton Lite Salt® Mixture.

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

It is further ordered, That the foregoing modification shall become effective upon service of this order.

IN THE MATTER OF

NORTH AMERICAN PHILIPS CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3105. Complaint, March 7, 1983—Decision, March 7, 1983

This consent order requires a New York City corporation, among other things, to cease misrepresenting that the Black Pro Shaver or any other drug or device will cure or minimize "razor bumps." The company is required to have a reasonable basis for representations relating to the efficacy, performance or benefit of any drug, device or other product; barred from making statements which are inconsistent with reliable scientific or medical evidence; and prohibited from misrepresenting the extent or results of product testing. The order also requires that the company maintain specific records for a period of three years and provide its sales and advertising personnel with a copy of the order.

Appearances

For the Commission: *Mitchell Paul* and *Grace Polk Stern.*

For the respondent: *William B. Gerwig,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North American Philips Corporation and McCaffrey and McCall, Inc., 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 North American Philips Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 100 East 42 Street, New York, New York.

PAR. 2. Respondent McCaffrey and McCall, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 575 Lexington Avenue, New York, New York.

PAR. 3. Respondent North American Philips Corporation is now, and for some time in the past has been, engaged in the manufacture,

importation, distribution, advertising and sale of electric shavers and other products to the public.

PAR. 4. Respondent North American Philips Corporation causes said products, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent North American Philips Corporation maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent North American Philips Corporation at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations in the sale and distribution of electric shavers and other products.

PAR. 6. Respondent McCaffrey and McCall, Inc. has been and now is an advertising agency of respondent North American Philips Corporation. Respondent McCaffrey and McCall has prepared, and has placed for dissemination, advertising material to promote the sale of various products of respondent North American Philips Corporation, including the Black Pro shaver.

PAR. 7. Respondent McCaffrey and McCall, Inc. at all times mentioned herein has been and now is in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. Respondent North American Philips Corporation is now, and for some time in the past has been, engaged in the manufacture, importation, distribution, advertising and sale of the Black Pro shaver, a product advertised as curing, mitigating, treating or preventing a shaving problem common to black men, specifically pseudofolliculitis barbae (hereinafter "razor bumps"), a skin disease primarily induced by shaving. As advertised, the Black Pro shaver is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their businesses, and for the purpose of inducing the sale of electric shavers and other products, respondents have disseminated and caused the dissemination of advertising for the Black Pro shaver in national magazines distributed by the mail and across state lines, and in radio broadcasts transmitted by radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondents have disseminated across state lines advertising for the Black Pro shaver in newspapers and catalogues, and have distributed by mail or other means, product brochures and other sales literature directly to con-

sumers or to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 10. Typical of the statements in the advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:

a. With the . . . Black Pro, razor bumps go away. And stay away.

b. [North American Philips Corporation] . . . and a leading black university have found a dramatic cure for your shaving problems. . . . Even in *daily* shaving. (emphasis in original)

c. The one that really works . . . Other companies have tried to come up with a razor bump cure. But only . . . [North American Philips Corporation] has succeeded. . . .

d. Razor bumps go away and stay away as proven in tests at a leading black university.

e. In a study conducted at a leading black university, black men suffering from razor bumps tested the . . . Black Pro Rotary Razor in daily shaving.

f. These unretouched photos prove that after shaving for six weeks with the . . . Black Pro, your skin can be free of razor bumps.

PAR. 11. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that:

a. Use of the Black Pro shaver will cure the condition of razor bumps.

b. Tests conducted at a leading black university prove that the Black Pro shaver will cure the condition of razor bumps.

c. The photographic demonstration depicted constitutes proof that the Black Pro shaver will cure the condition of razor bumps.

d. The efficacy of the Black Pro has been tested in a *daily* shaving regimen.

PAR. 12. In truth and in fact:

a. Use of the Black Pro shaver will not cure the condition of razor bumps.

b. Tests conducted at a leading black university do not prove that the Black Pro shaver will cure the condition of razor bumps.

c. The photographic demonstration depicted does not constitute proof that the Black Pro shaver will cure the condition of razor bumps.

d. The efficacy of the Black Pro has not been tested in a *daily* shaving regimen.

Therefore, the advertisements referred to in Paragraphs Eight and Nine were and are misleading in material respects, and constituted and now constitute false advertisements, and the representations set forth in Paragraph Eleven were and are false, deceptive or unfair.

PAR. 13. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that:

a. The Black Pro is effective in the treatment of razor bumps.

b. In six weeks, the typical user of the Black Pro will see his razor bumps disappear.

PAR. 14. At the time respondents made the representations alleged in Paragraphs Eleven and Thirteen, respondents did not possess and rely on a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations as alleged, constituted and now constitute unfair or deceptive acts or practices.

PAR. 15. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that they possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Eleven and Thirteen at the time of the representations' initial dissemination and each subsequent dissemination. In truth and in fact, respondents did not possess and rely on a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair or deceptive acts or practices.

PAR. 16. Respondents' use of the aforesaid deceptive or unfair statements and representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that such statements and representations are true, and into the purchase of substantial quantities of Black Pro shavers sold by respondent North American Philips Corporation by reason of such erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute unfair or deceptive acts or practices and unfair methods of competition, in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; 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 aforesaid draft of complaint, a statement that the signing of such 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 Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent North American Philips Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 100 East 42nd Street, New York, New York.

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

Part I

It is ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division

or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae (hereinafter sometimes referred to as "razor bumps").

2. Making any statement or representation, directly or by implication, that tests, studies or demonstrations prove or constitute proof that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae ("razor bumps").

Part II

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, by persons afflicted with "razor bumps" will reduce or minimize that condition or is efficacious for the treatment of "razor bumps", unless at the time of each dissemination of such statement or representation respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such statement or representation. Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

Part III

For purposes of Part IV and Part V of this order, the term *product* shall be defined as follows: electric and cordless shavers, microwave ovens and toaster ovens.

Part IV

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "product" as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, concerning the performance, or any other characteristic, feature, attribute or benefit of any product unless respondent possesses and relies upon a reasonable basis for such statement or representation at the time of its initial dissemination and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable evidence which substantiates such statement or representation.

2. Advertising any product by referring to or presenting evidence, including a test, survey, experiment, demonstration, study or report, or the results thereof, which evidence is represented, directly or by implication, as supporting, showing or proving the existence or nature of any fact or feature respecting such product when such evidence does not support, show or prove such fact or feature.

3. Making any statement or representation, directly or by implication, by reference to a test, survey, experiment, demonstration, study or report, unless such work has been designed, executed, and analyzed in a competent and reliable scientific manner and unless its purpose, content, validity, reliability, results, or the conclusions which may be drawn therefrom, are fairly and accurately represented.

Part V

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product, as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order.

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials, or post purchase materials making such claim or representation were last disseminated. Such records will be made available to the Commission staff for inspection upon reasonable notice.

Part VI

It is further ordered, That respondent shall forthwith, relative to the products specified in Part III, distribute a copy of this order to each of its concerned operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements or other sales materials concerning said products.

Part VII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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 this order.

Part VIII

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

MCCAFFREY AND MCCALL, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3106. Complaint, March 7, 1983—Decision, March 7, 1983*

This consent order requires a New York City advertising agency, among other things, to cease misrepresenting in advertisements that the Black Pro Shaver or any other drug or device will cure or minimize "razor bumps." The company is required to have a reasonable basis for advertising representations relating to the efficacy, performance or benefit of any drug, device or other product; barred from making statements which are inconsistent with reliable scientific or medical evidence; and prohibited from misrepresenting the extent or results of product testing. The order also requires that the company maintain specific records for a period of three years and provide its sales and advertising personnel with a copy of the order.

Appearances

For the Commission: *Mitchell Paul* and *Grace Polk Stern.*

For the respondent: *Arthur M. Klebanoff, Janklow, Traum & Klebanoff,* New York City.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; 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 aforesaid draft of complaint, a statement that the signing of such 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 thereafter considered the matter and having determined that it had reason to believe that the respondent has

*Complaint previously published at 101 F.T.C. 359.

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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent McCaffrey and McCall, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its executive office and principal place of business at 575 Lexington Avenue, New York, New York.

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

Part I

It is ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae (hereinafter sometimes referred to as "razor bumps").

2. Making any statement or representation, directly or by implication, that tests, studies or demonstrations prove or constitute proof that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae ("razor bumps").

Part II

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and

employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, by persons afflicted with "razor bumps" will reduce or minimize that condition or is efficacious for the treatment of "razor bumps", unless at the time of each dissemination of such statement or representation respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such statement or representation. Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

Part III

For purposes of Part IV and Part V of this order, the term *product* shall be defined as follows: electric and cordless shavers, microwave ovens and toaster ovens.

Part IV

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "product" as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, concerning the performance, or any other characteristic, feature, attribute or benefit of any product unless respondent possesses and relies upon a reasonable basis for such statement or representation at the time of its initial dissemination and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable evidence which substantiates such statement or representation.

2. Advertising any product by referring to or presenting evidence, including a test, survey, experiment, demonstration, study or report, or the results thereof, which evidence is represented, directly or by implication, as supporting, showing or proving the existence or nature of any fact or feature respecting such product when such evidence does not support, show or prove such fact or feature.

3. Making any statement or representation, directly or by implication, by reference to a test, survey, experiment, demonstration, study or report, unless such work has been designed, executed, and analyzed in a competent and reliable scientific manner and unless its purpose, content, validity, reliability, results, or the conclusions which may be drawn therefrom, are fairly and accurately represented.

Part V

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product, as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order.

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials, or post purchase materials making such claim or representation were last disseminated. Such records will be made available to the Commission staff for inspection upon reasonable notice.

Part VI

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements or other product-related sales materials.

Part VII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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 this order.

Part VIII

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2755. Consent Order, Oct. 24, 1975—Modifying Order, March 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on Oct. 24, 1975 (86 F.T.C. 1002), by modifying Paragraph I(11), so as to allow the company to impose non-discriminatory standards on the kind of retailers its distributors and dealers can serve.

ORDER MODIFYING DECISION AND ORDER

The Commission on November 5, 1982 having reopened the order and issued an order against respondent to show cause why the consent order to cease and desist entered on October 24, 1975 should not be modified as set forth therein; and respondent thereafter having answered that it has no objection to modification of the consent order as set forth in the order to show cause;

Accordingly, *it is ordered* that Paragraph I(11) of the order in this matter is modified to read:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and nondiscriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2492. Consent Order, March 18, 1974—Modifying Order, March 9, 1983

This order reopens the proceeding and modifies the Commission's order issued on March 18, 1974 (83 F.T.C. 1374). The modification deletes the order's "fencing-in" provision, including the requirement that prohibited Occidental from preparing statistical data comparing its purchases from a company to its sales to that company, and vacates the order in its entirety 10 years after its March 1974 issue date.

REOPENING AND VACATING IN PART AND MODIFYING IN PART ORDER ISSUED MARCH 18, 1974

On November 8, 1982, respondent Occidental Petroleum Corporation ("Occidental") filed a "Request To Reopen And Vacate Or Modify Consent Order" ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Petition asks the Commission to reopen the consent order, issued on March 18, 1974 ("the Order"), and either: vacate the Order in its entirety; modify to limit the duration to a ten-year period; or modify "to bring it in line with current case law and enforcement attitudes."

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order at the request of a respondent upon a "satisfactory showing that changed conditions of law or fact require" modification. In addition, Section 5(b) provides that the Commission has discretion to modify orders whenever, in its opinion, the public interest requires.

After reviewing respondent's Petition, the Commission has concluded that respondent has not made a satisfactory showing that changed conditions of law or fact have occurred that require the modification or vacation of the Order. However, the Commission has determined that the public interest warrants modifying the pending Order in two respects.

First, a number of the Order's provisions are aimed at "fencing-in" respondent's future conduct. *See FTC* v. *National Lead Co.,* 352 U.S. 419 (1957). Although some of these provisions may have been justified at the time the Order was initially approved, their continued existence unnecessarily inhibits respondent from engaging in conduct which, in and of itself, is innocuous and may, in certain circum-

stances, be procompetitive. In addition, there no longer appears to be any need for continuing the "fencing-in" provisions of the Order. No adverse comments were received indicating any special need to retain them and the Commission has no reason to believe that the Order has or is being violated in any respect.

These same arguments support vacating the remaining provisions of the Order at the end of a ten year period. In certain cases, perpetual conduct orders are appropriate in order to insure that violations of Commission orders are subject to civil penalties rather than forcing the Commission to initiate proceedings *ab initio*. However, we have no evidence in this record that would support retaining the provisions of this Order in perpetuity.

Accordingly, *it is ordered* that Paragraphs I(f), (g), (h) and II of this Order be vacated at this time and the remaining provisions be vacated ten years from date of their initial entry, *i.e.*, March 18, 1974.

Commissioner Bailey voted in the affirmative as to elimination of the fencing-in provisions and in the negative as to sunsetting the Order. Commissioner Pertschuk voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I agree that the broad "fencing-in" provisions in the order are no longer necessary and should be narrowed to prohibit only anticompetitive reciprocal dealing. The Commission goes further, however, by terminating the order completely after ten years.

Our general policy in the past has been to issue perpetual conduct orders as to conduct which actually violates Section 5 unless there are persuasive reasons to create an exception. Here, however, the Commission appears to reverse that presumption by requiring "evidence in this record" supporting a perpetual order. It is not clear that the Commission is making a change in policy for future cases, but, in any event, I dissent from the result in this case.

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8899. Final Order, Oct. 1, 1974—Modifying Order, March 11, 1983

This order reopens the proceeding and modifies the Commission's order issued on Oct. 1, 1974 (84 F.T.C. 547). The modified order permits respondents to make claims that environmental surfaces play a significant role in the transmission of viruses and bacteria associated with colds and that household disinfectants can reduce the incidence or prevent the spread of colds, if supported by competent and reliable scientific evidence.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 20, 1982, Sterling Drug, Inc. and SSC&B, Inc., respondents in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered therein. By letter dated January 17, 1983, respondents agreed to modify their original proposal.

The consent order, which was issued in 1974, applies to Lysol or any other household disinfectant products. Sterling Drug manufactures and markets Lysol Brand Disinfectants. SSC&B prepared and distributed the advertising for Lysol Brand Disinfectants which was challenged in the complaint. The advertising represented that Lysol Brand Disinfectants could be used to kill influenza viruses and other germs and viruses on environmental surfaces and in the air, and that such use would be of significant medical benefit in reducing the incidence or preventing the spread of colds, influenza, and other upper respiratory diseases within the home. However, the prevailing view among scientists at the time the advertising was disseminated was that airborne germs and viruses were the known cause of most colds, influenza, and other upper respiratory diseases, that germs and viruses on environmental surfaces did not play a significant role in the transmission of colds, influenza, and other upper respiratory diseases, and that Lysol Brand Disinfectants would not be of medical benefit in reducing the incidence or preventing the spread of these diseases. Consequently, paragraphs I.A and I.B of the consent order prohibited the following claims:

A. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza, colds, or streptococcal throat infection;

B. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza, colds, or streptococcal throat infection.[1]

In their petition, respondents allege that there has been a dramatic change in scientific opinion since the order was issued in 1974 with respect to the manner in which colds are transmitted. Consequently, they request a change in those provisions of paragraphs I.A. and I.B. of the order which relate to colds.[2] The request, as set forth in the letter of January 17, 1983, is that those paragraphs be changed to prohibit the following claims:

A. 1. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza or streptococcal throat infection;

2. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds;

3. it has been established that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds, unless such representation is true.

B. 1. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza or streptococcal throat infection;

2. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use will be of medical benefit in reducing the incidence or preventing the spread of colds;

3. it has been established that use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless such representation is true.

Respondents presented impressive evidence indicating that most scientists no longer believe that "airborne germs and viruses are the known cause of most colds," as paragraph 9 of the complaint filed in

[1] The order also contains certain other provisions discussed below.

[2] In their petition, respondents also requested a change in order provisions relating to influenza and streptococcal throat infection. However, by letter dated January 17, 1983, they modified their request. As modified, the request does not seek a change in the existing prohibitions on claims relating to the role of environmental surfaces in the transmission of these diseases or the use of household disinfectants in reducing the incidence of preventing the spread of these diseases.

this matter indicates they did in 1974.[3] Rather, there is mounting scientific evidence that, at least for rhinoviruses (which are the major cause of colds in adults), hand contamination with virus and subsequent self-inoculation with the virus may be a more important route of infection than the airborne route.[4] Similar findings have been made for respiratory syncytial virus, the major cause of colds in children.

The evidence indicates that hands can become contaminated with virus in two ways—through contact with viruses on the skin of another person or through contact with viruses which have survived on environmental surfaces. Evidence has been presented which indicates that rhinoviruses can survive for as long as three or four days on environmental surfaces, and respiratory syncytial viruses for as long as six hours. The evidence indicates that most scientists are no longer certain that "germs and viruses on environmental surfaces do not play a significant role in the transmission of colds," although paragraph 9 of the complaint indicates they did believe this proposition in 1974.[5] Furthermore, while there is certainly controversy on the subject, some eminent scientists have taken the affirmative position that environmental surfaces probably do play some role in the transmission of colds.[6] Finally, while some scientists still support the statement set forth in paragraph 9 of the complaint that disinfectants "will not be of significant medical benefit in reducing the incidence or preventing the spread of colds," some eminent scientists have said that the use of disinfectants may be of benefit.[7]

Thus, we are presented with a change in scientific opinion with respect to issues on which the complaint and order in this matter were based. Most of these issues are now controversial, and there are reputable scientists on both sides of the controversy. We believe that an absolute ban on claims for which there may be reputable scientific support is inappropriate. On the other hand, we believe that such claims must not be made in such a way that they assert or imply that the propositions in question have been established to the satisfaction of the scientific community, unless such is the case.[8] Consequently, we

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[3] *See, Sterling Drug, Inc.*, 84 F.T.C. 547, 551 (1974).

[4] Indeed, the evidence indicates that experimenters have been unable to demonstrate that it is possible to transmit a rhinovirus cold via the airborne route.

[5] 84 F.T.C. at 551.

[6] *See, e.g.*, letter of December 2, 1982 to Ernst Zander, M.D. from R. Gordon Douglas, Jr., M.D., Professor and Chairman, Department of Medicine, New York Hospital-Cornell Medical Center; letter of Jan. 7, 1983 to Ernst Zander, M.D., from Robert B. Couch, M.D., Professor of Microbiology and Immunology and Medicine, Baylor College of Medicine. It should be noted that Doctors Douglas and Couch were both designated by complaint counsel as witnesses in the trial scheduled in 1973 for this matter. (Neither testified since the matter was settled before trial.) Both have obviously changed their opinions on the relevant issues since that time.

[7] *Id.*

[8] *See, e.g., American Home Products Corporation*, D.8918 (Sept. 9, 1981), *modified*, No. 81-2920 (3rd Cir. Dec. 3, 1982); *National Commission on Egg Nutrition*, 88 F.T.C. 89 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

have modified the order to allow claims that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds to be made if they are supported by competent and reliable scientific evidence. Similarly, we have modified the order to allow claims that the use of a household disinfectant will be of medical benefit in reducing the incidence or preventing the spread of colds to be made if they are supported by competent and reliable scientific evidence. However, claims that either of these propositions have been established can only be made if it is true that the propositions have been established.

In addition, in the letter of January 17, 1983, respondents have requested that we modify section I.D. of the order "for uniformity of language" with sections I.A. and I.B., as modified. Paragraph D, as presently written, prohibits any representation that

> D. use of any household disinfectant product kills germs associated with disease[s], unless such representation expressly mentions the name[s] of the disease[s]; the representation is true; and respondent[s] making such representation has [have] competent and reliable scientific evidence that such use reduces the incidence or prevents the spread of the named disease[s].

The change requires that a respondent can only make the claims listed in paragraph I.D. if it has and *relies on* competent and reliable scientific evidence for the claims. We believe this is a desirable change which will clarify the meaning of paragraph I.D. of the order.

Finally, respondents requested in their petition that paragraph I.E. of the order be modified to eliminate the requirement that any representation that "use of any household disinfectant kills viruses associated with influenza, colds, streptococcal infection, staphyloccal infection, or other respiratory diseases" must be accompanied by a statement that "there is no evidence that the product portrayed will protect the family against flu or strep throat." (This request is unchanged by the letter of January 17, 1983). Respondents point out that paragraph I.D. of the order guarantees that no representation that a product kills cold viruses will be made unless there is scientific evidence that the product is of benefit in preventing the spread or reducing the incidence of colds. Respondents contend that "[s]uch a well-founded and substantiated statement about *colds* would be confused, not clarified, by a disclaimer directed to other more serious diseases," and that the existing I.E. "would impose an unwarranted and confusing burden upon valid and useful statements reflecting the new scientific knowledge and opinion on colds." Petition, p.20. We agree that the disclosure required by I.E. is not necessary in advertisements relating only to colds. Consequently, we have modified I.E. so as to delete this requirement.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued October 1, 1974 in Docket No. 8899 is hereby modified to read as follows:

ORDER

I

It is ordered, That respondents Sterling Drug Inc., a corporation, and SSC&B, Inc., a corporation, their successors and assigns and their 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 Lysol Brand Products or any household disinfectant product, shall forthwith cease and desist from representing, directly or by implication, that:

A. 1. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza or streptococcal throat infection;

2. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds;

3. it has been established that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds, unless such representation is true.

B. 1. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza or streptococcal throat infection;

2. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use will be of medical benefit in reducing the incidence or preventing the spread of colds.

3. it has been established that use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless such representation is true.

C. use of any household disinfectant product kills airborne viruses or bacteria associated with influenza, colds, streptococcal throat infection, or other upper respiratory disease, *provided,* that nothing in this

subparagraph shall be construed to otherwise restrain demonstrations of aerosol products as room deodorizers or air fresheners;

D. use of any household disinfectant product kills germs associated with disease[s], unless such representation expressly mentions the name[s] of the disease[s]; the representation is true; and respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use reduces the incidence or prevents the spread of the named disease[s];

E. use of any household disinfectant product kills viruses or bacteria associated with influenza, streptococcal infection, staphylococcal infection, or other upper respiratory diseases other than colds, unless the advertisement in which such representation appears clearly and conspicuously discloses that there is no evidence that the product portrayed will protect the family against flu or strep throat, *provided,* that nothing in this subparagraph shall be construed to apply to a representation that Lysol Brand Disinfectants kill bacteria which cause streptococcal or staphylococcal skin infections.

II

It is further ordered, That nothing herein contained shall be construed to require any alteration of, or deletion from the labeling of any of Sterling's household disinfectant products of legends, claims or information heretofore specifically accepted by the Environmental Protection Agency or its predecessor agency pursuant to the Federal Insecticide, Fungicide and Rodenticide Acts, as amended, 7 U.S.C. 135, *et seq.*

III

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, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondents forthwith distribute a copy of this order to each of its operating divisions or subsidiaries involved in the advertising, promotion, distribution or sale of Lysol Brand Disinfectants.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

SEPARATE STATEMENT OF CHAIRMAN JAMES C. MILLER III

I concur in the Commission's unanimous decision to modify the existing order in this matter and require a reasonable basis for Sterling's advertising claims for Lysol. Sterling will now be permitted to make truthful claims, subject to proper substantiation, that environmental surfaces can play a significant role in transmitting colds and that using a household disinfectant may reduce the incidence or prevent the spread of colds.

Sterling has presented to the Commission a significant amount of new scientific evidence on how cold viruses are spread. This evidence represents a change in the facts underlying the original order and forms the justification for the current modification. In 1974, when the Commission issued the original order, the prevailing view in the scientific community was that airborne germs and viruses were the primary cause of colds. Accordingly, the Commission prohibited any claims that environmental surfaces play a significant role in transmitting colds, and that using household disinfectants such as Lysol can help prevent colds.

Sterling's detailed petition indicates that, contrary to the Commission's premise in bringing this case, there is a substantial body of reputable scientific evidence indicating that environmental surfaces play a significant role in spreading colds. Indeed, at least two of the three experts on whom the Commission relied in bringing the case now support Sterling's position. Moreover, no one disputes that Lysol effectively cleans environmental surfaces. Although Sterling's evidence does not show, nor have they claimed, that spraying Lysol absolutely prevents colds, this should not preclude Sterling from making properly qualified, substantiated efficacy claims.

In moving from a total prohibition of certain claims to allowing those for which there is a reasonable basis, I believe the Commission is recognizing that Sterling currently has a reasonable basis for making some advertising claims concerning the product's effectiveness. If a majority of the Commission did not agree with this, it would have been more appropriate to deny the order modification. Of course, the Commission has not seen any specific advertising claims, and we will scrutinize any Sterling claim to be certain it is substantiated.

As with most medical and many other types of claims, absolute certainty is not feasible. The proper role of the Federal Trade Commission is not to ban all claims unless they can be shown to be true beyond a shadow of a doubt,[1] but to weigh the costs and benefits of

[1] As the Commission indicated in *Pfizer*, 81 F.T.C. 23, 64 (1972), the amount of testing necessary to support a claim depends on the circumstances, including the type of claims, the cost of obtaining the supporting evidence, and the possible consequences of a false claim. Particularly given Commissioner Pertschuk's description of the testing procedure here, obtaining empirical evidence of absolute proof of efficacy would be far more costly than the attendant risks and benefits warrant.

allowing or banning the dissemination of information about which some uncertainty may exist. Here, if the Commission allows claims for which there is a reasonable basis and they are later determined to be false, consumers are injured only to the extent of the cost of their Lysol purchases.[2] If the Commission bans the claims and they turn out to be *true,* consumers will be prevented from learning of an effective method to reduce the incidence and spread of colds, America's most prevalent disease.

Sterling has made a strong showing that its theory of how colds are spread is valid, and that the Commission's theory in bringing this case is not. Sterling has also provided evidence that Lysol kills cold viruses. Therefore, Sterling should be permitted to make adequately substantiated claims at least on these two points. Prohibiting such claims, as Commissioner Pertschuk apparently prefers (although he supported the change) would not strengthen the advertising substantiation doctrine. It would instead deprive consumers of valuable, truthful information.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

Sterling wants out of a 1974 consent order which prohibits it from claiming that spray Lysol can prevent colds. It says that it now has proof that, contrary to prior scientific understanding, cold viruses can be picked up from environmental surfaces and that Lysol can help prevent colds by killing surface viruses. It now seeks to modify the order to permit it to claim that Lysol can help prevent colds.

I have reluctantly voted in favor of the order modification, simply because the only alternative under consideration by a majority of the Commission would have eroded the advertising substantiation doctrine even further. At the very least, Sterling is cautioned by the Commission letter accompanying the modified order that the modification in no way indicates that Sterling in fact presently has a "reasonable basis" for any claim, express or implied, that Lysol actually prevents colds.

The Commission's concern (however mildly expressed in the letter) is well-founded. The primary piece of evidence which Sterling cites is a study, partly funded by Sterling, conducted by two eminent scientists at the University of Virginia. They directed volunteers with colds to blow their noses on their hands and wipe them on some plastic tiles. Ten minutes later, some tiles were given a three second shot of Lysol; others were not. After fifteen minutes, healthy volunteers were directed to rub their fingers on the tiles, and then pick their noses and rub their eyes. Lo and behold, about half of the healthy volunteers

[2] Because the product has other values, the expenditures will not be totally wasted for many consumers.

touching the untreated tiles got colds; fewer got colds from touching the tiles that had been sprayed with Lysol, although the results were not statistically significant.

Largely on the basis of this laboratory evidence, demonstrating simply that Lysol killed cold viruses on surfaces that otherwise might be transmitted to people, at least some scientists are now of the opinion that Lysol "may" be of value in reducing colds in the home environment, on the logical assumption that a reduction in the number of viruses will lead to a reduction in colds. Most scientists, however, remain skeptical. They note that, while Lysol might work in *theory,* there's just no *proof* that in fact it does—and reason to think it doesn't. Laboratory results might well be meaningless in the home environment, which is, of course, the only environment consumers care about. (After all, any family that duplicates the bizarre laboratory procedure described above in its own home needs more than a shot of Lysol to solve its problems.) Practical constraints that exist in home environments limit the applicability of the findings. For example, household surfaces are continually being re-infected. Many surfaces which harbor viruses—like skin and clothing—can't be safely sprayed. And perhaps more fundamentally, scientists just don't know the *significance* of the role of surface contamination. Assigning a family member the chore of spraying doorknobs and telephones every ten minutes just isn't likely to be of much help when other sources of cold viruses—such as direct contact with people with colds—may be even more likely to cause colds.

The modified order would require Sterling to prove that an unqualified medical efficacy claim, such as "Lysol reduces the incidence of colds," is in fact recognized by the scientific community to be an established fact. The effect of this standard is properly to prohibit such claims, since it is evident that there is simply no proof that Lysol works to reduce colds. All that Sterling has is an unproved theory.

Nevertheless, apparently motivated by the belief that *all* information has inherent value, the Commission has modified the Order to permit Lysol to make certain "qualified" claims, as long as those claims are supported by "competent and reliable scientific evidence" —in other words, a reasonable basis. In my opinion, the only claim for which Sterling has a reasonable basis goes something like this: "While many scientists disagree, some scientists are of the opinion that in certain circumstances, Lysol may, with an unknown probability, reduce the incidence of colds to an unknown extent in a home environment."

The mischief with this elegant formulation is that the only claims which Sterling is actually likely to make in a typical 30-second television ad will fall far short of giving consumers the complete context

they need to properly interpret the claim. After all, Sterling isn't interested in making these claims to educate the public to the possible health hazards of cold viruses harboring on doorknobs and countertops. It wants to make them to sell more Lysol.

Simply put, any "qualified" claim Sterling is likely to make by permission of the revised order must invariably make an implied claim that Lysol reduces colds—precisely the claim for which Sterling lacks proof. As a result, such "qualified" claims have a capacity to mislead which far outweighs their capacity to inform. For that reason, I would have preferred to retain the existing prohibitions on making even qualified claims. As an alternative, I would have been willing to support these modifications with a letter that plainly stated that Sterling presently does not have a reasonable basis for any claim, express or implied, that Lysol reduces colds.

I would note, however, that even under the modified order, the burden will be on Sterling to make sure that their "qualified" claims do not make an implied claim that Lysol reduces the incidence of colds. To that end, Sterling would be well-advised, to the extent that it wishes to avoid making any implied efficacy claims when it makes the qualified claims permitted by the order modification, to disclose that Lysol has not been proven to reduce colds in actual home settings.

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC.

Docket 9149. Interlocutory Order, March 11, 1983

ORDER ON RESPONDENT'S APPLICATION FOR INTERLOCUTORY REVIEW

It has long been the Commission's policy to provide to the respondents in its administrative proceedings copies of all prior statements of complaint counsel's witnesses, for use in cross-examination. *Inter-State Builders, Inc.,* 69 F.T.C. 1152 (1966); *Ernest Mark High,* 56 F.T.C. 625 (1959). While the Commission is not bound by the Jencks Act, 18 U.S.C. 3500, or compelled to adhere to its principles, it does look to court decisions interpreting it for guidance in enforcing its own policy. *USLife Credit Corp.,* 91 F.T.C. 984, 1036–37 (1978).

On April 30, 1979, the Federal Rules of Criminal Procedure were amended, effective December 1, 1980, to require the production of "Jencks-type" prior statements of *all* witnesses (except the defendant) in criminal trials, on motion of the opposing party. Fed.R.Crim.P. 26.2(a), 18 U.S.C. Rule 26.2 (1982 Supp.). On July 5, 1982, the trial in this proceeding began. On July 30, 1982, complaint counsel moved for an order directing respondent to produce Jencks-type statements of its witnesses, consistent with the amended Rules. The Administrative Law Judge ("ALJ") concluded on August 19, 1982, that the circumstances of this particular case justified an order for the production of such statements by respondent's *expert* witnesses. On September 15, 1982, respondent applied for review of the order, and on October 21 the ALJ certified the review to the Commission under Section 3.23(b) of the Commission's Rules of Practice, 16 U.S.C. 3.23(b), as involving a controlling question of policy as to which there is substantial ground for differences of opinion. The ALJ further concluded that immediate appeal may materially advance the ultimate disposition of the litigation. The trial continued, with respondent tendering all required statements of its expert witnesses, subject to an agreement that this would not be deemed a waiver of respondent's rights to pursue its appeal. On December 17, 1982, respondent completed the presentation of its witnesses.

The Commission has determined to grant review of the order because it presents a controlling question of policy on which the Commission has as yet provided no guidance, and there is substantial ground for differing views. Furthermore, resolution of the question will facilitate the ultimate resolution of this case.

In establishing the defendant's right to examine and use in cross-

examination the prior statements of government witnesses in federal criminal prosecutions, the Supreme Court emphasized the value of eyewitness accounts, and particularly contemporaneous eyewitness accounts, of events in controversy: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States,* 353 U.S. 657, 667 (1956). Similarly, in upholding a trial judge's order that the report of an investigator for the defendant be revealed to the prosecution for use in the cross-examination of the investigator, the Court reasoned that his contemporaneous report of eyewitness' accounts of an armed robbery "might provide critical insight into the issues of credibility that the investigator's testimony would raise." *United States* v. *Nobles,* 422 U.S. 225, 232 (1975). The Jencks Act and revised Rule 26.2 were adopted to clarify and circumscribe the authority of the federal judiciary to exercise their inherent power, recognized in the *Jencks* and *Nobles* decisions, to enhance the truth-finding process in criminal proceedings by ordering the discovery of witnesses' prior statements. *Palermo* v. *United States,* 360 U.S. 343 (1959); Notes of Advisory Committee on Rules, 18 U.S.C. Rule 26.2 (1982 Supp.).

The Commission has concluded that it is unnecessary to adopt the principle of Rule 26.2 to assure adequate cross-examination of expert witnesses in its proceedings, even assuming *arguendo* that the need to uncover prior inconsistent statements of witnesses is as compelling in such proceedings as it is in criminal trials. The Commission's Rules of Practice already provide for extensive discovery concerning expert witnesses. Section 3.31(b)(4)(i) provides that discovery of facts known and opinions held by expert witnesses may be obtained as follows:

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

This section is nearly identical to Rule 26(b)(4) of the Federal Rules of Civil Procedure.[1]

[1] Rule 26(b)(4) provides:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other

(footnote cont'd)

There is a division among the courts as to the appropriate scope of discovery under subsection (b)(4)(a)(ii) of Rule 26, which is analogous to subsection 3.31(b)(4)(i)(B) of the Commission's Rules. It has been held that in order to obtain "further discovery" beyond interrogatories under this subsection (specifically, in these cases, copies of reports written by experts), the moving party must show "unique or exceptional circumstances"[2] or a "compelling" need for such discovery.[3] One court has explicitly incorporated into subsection (b)(4)(a)(ii) the "substantial need" standard contained in Rule 26(b)(3)—the analog to Section 3.31(b)(3) of the Commission's Rules—in considering a discovery request for documents prepared by an expert in anticipation of litigation.[4] However, the prevailing view is more liberal: further discovery should be granted when a request is reasonably framed to enable the movant to prepare for effective cross-examination of the expert or rebuttal.[5]

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party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

[2] *Breedlove* v. *Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). The decision here may have turned on the fact that discovery of the witnesses' reports was requested before discovery under subsection (b)(4)(a)(i) had been completed. The courts have uniformly agreed that Rule 26 establishes a two-step process for discovery regarding expert witnesses. *E.g., Shackelford* v. *Vermeer Mfg. Co.*, 93 FRD 512 (W.D. Texas 1982); *United States* v. *Int'l Business Machines Corp.*, 72 FRD 78 (S.D.N.Y. 1976); *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 65 FRD 528 (D. Conn. 1975); *United States* v. *John R.—Piquette Corp.*, 52 FRD 370, 372 (E.D. Mich. 1971).

[3] *United States* v. *145.31 Acres of Land*, 54 FRD 359, 360 (M.D. Pa. 1972).

[4] *Wilson* v. *Resnick*, 51 FRD 510 (E.D. Pa. 1970). The court also applied the standard of Rule 26(b)(3) in evaluating the discoverability of experts' reports in *Breedlove* v. *Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). However, it is not clear that the court considered that standard to be incorporated into 26(b)(4)(a)(ii); it may have (erroneously) considered 26(b)(3) to offer an alternative ground for discovery of the reports.

The approach in *Resnick* has been criticized as "interject[ing] the work-product doctrine into an area of discovery in which the Advisory Committee [to the Rules of Civil Procedure] explicitly rejected the doctrine." Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U.Ill.L.F. 895, 927. This approach has also been defended as logical, if the expert has taken on a consulting role in the litigation. Comment, Discovery of Expert Information Under the Federal Rules, 10 U.Rich.L.Rev. 706, 719–21 (1976). *See also,* Connors, A New Look at an Old Concern—Protecting Expert Information From Discovery Under the Federal Rules, 18 Dusquesne L.Rev. 271 (1980).

[5] *Sea Colony West Phase I Condominium Ass'n* v. *Sea Colony, Inc.*, 438 A.2d 1233 (Super. Ct. Del. 1981) (decided under state court rules, but relying on the Advisory Committee Note on the Federal Rules and the federal case law on Rule 26(b)(4)(a)(ii)); *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 77 FRD 39 (N.D. Cal. 1977); *Quadrini* v. *Sikorsky Aircraft Div., United Aircraft Corp.*, 74 FRD 594 (D. Conn. 1977). In *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 65 FRD 528, 530 (D. Conn. 1975), the court went so far as to conclude that "[o]nce the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness." Unlike the other cases, *Herbst* concerned a request for deposition rather than the production of a report prepared by an expert. In another case involving requests for both reports and depositions, the court expressed the view that Rule 26(b)(4) provides for "quite liberal" discovery of the opinions of experts; however, the court did not reveal specifically what test it would apply in evaluating requests under (a)(ii) after discovery under (a)(i) was completed. *United States* v. *John R.—Piquette Corp.*, 52 FRD 370 (E.D. Mich. 1971).

In addition to these reported cases, a survey of federal district judges, magistrates, government attorneys, and private practitioners indicates that:

> the actual practice of discovery of expert witnesses expected to be called at trial varies widely from the two-step procedure of Rule 26(b)(4)(A). The interrogatory overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal. In practice, full discovery is the rule, and practitioners use all available means of disclosure including both the discovery of expert's reports and depositions.

(footnote cont'd)

The Advisory Committee to the Rules of Civil Procedure did not expressly explain how "further discovery" should be evaluated. However, the Committee emphasized in its Explanatory Statement that "[e]ffective cross-examination of an expert witness requires advance preparation. * * * Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side." On the other hand, the Committee recognized the fear, reflected in the caselaw, that "one side will benefit unduly from the other's better preparation," and it advised that the procedure it recommended would minimize the risk of that happening:

> Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.
>
> Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse.

Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 503–04 (1970). This suggests that "the primary purpose of this subsection is to permit the opposing party to prepare an effective cross-examination" and, further, that discovery should be granted when the court is persuaded that "the party seeking discovery is not abusing the procedure and the information sought would prove helpful in providing for a full and fair adjudication."[6]

Thus, the Commission has concluded that the more liberal view of discovery of experts under the Federal Rules is the one that should apply in Commission adjudications.[7] It is most consistent with the desire of the Commission in 1978 to "balance a somewhat broadened range of discovery with firm control by Administrative Law Judges of the pace and scope of adjudicative proceedings." 43 FR 56862 (1978).

Accordingly, it is already well within the broad discretion of the

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Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal, 1977 U.Ill.L.F. 169, 172. The author recommends that Rule 26(b)(4) be amended to provide "full discovery" to prepare for cross-examination and rebuttal, "to comport with actual practice and with the intentions of the drafters of the Federal Rules of Evidence." *Id.* at 202.

[6] *Sea Colony West Phase I Condominium Ass'n* v. *Sea Colony, Inc.*, 438 A.2d 1233, 1235 (Super. Ct. Del. 1981). *See also* discussions of the Explanatory Statement in the *IBM* and *Herbst* cases cited in note 5; Graham, supra note 4, at 921–927; and 8 C. Wright & A. Miller, Federal Practice and Procedure Section 2031 (1970).

[7] When the Commission revised its discovery rules in 1978 and adopted Section 3.31(b)(4)(i) in its current form, it explained how judicial interpretations of the Federal Rules would influence the application of its own rules:

> Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission's rules must be tailored to the circumstances of Commission proceedings.

43 FR 56862, 56863 (1978).

Administrative Law Judges to order the disclosure of prior statements of expert witnesses such as those described in the Jencks Act.[8] This being the case, it is unnecessary to transplant to civil administrative proceedings procedures that have been developed for criminal litigation.

Although the ALJ did not reach his decision here under Section 3.31(b)(4)(i)(B), his analysis was appropriate for a determination under that rule. Clearly, it was his judgment from reviewing the summaries of anticipated testimony that effective cross-examination of expert witnesses could be critical to a proper resolution of this case, and that the disclosure of prior statements of those witnesses could allow for more effective cross-examination than would otherwise be possible. An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse. *General Foods Corp.*, 95 F.T.C. 306 (1980); *Warner-Lambert Co.*, 83 F.T.C. 485 (1973); *Boise Cascade Corp.*, Docket No. 9133 (order of Oct. 15, 1982) [100 F.T.C. 512]. Since his order is sustainable under Section 3.31(b)(4)(i)(B), respondent's motion that it be reversed is hereby denied.

[8] *See, e.g., Xidex Corp.*, Docket No. 9146, (order of Aug. 27, 1981).

IN THE MATTER OF

MEREDITH CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3107. Complaint, March 15, 1983—Decision, March 15, 1983

This consent order requires a Des Moines, Iowa franchisor and operator of the Better Homes and Gardens Real Estate Service (Service), among other things, to cease making false or misleading representations regarding the Service, its members, or services offered. The order prohibits the dissemination of advertisements and promotional materials which represent that all Service members offer consumers "settling-in" services; participate in a home-building program; and offer "exclusive" home-protection insurance, unless the advertisement clearly discloses that not all members offer these services. The corporation is also barred from making unsubstantiated representations concerning the Service's selectivity in choosing members; training of sales associates of Service members; market size, rank and leadership in terms of sales volume of Service members; or any statement which compares Service members to other real estate franchisors as to calibre of members or membership standards. Further, respondent must send to all members of the Better Homes and Gardens Real Estate Service a letter recalling certain advertising and promotional materials, and an acknowledgement form.

Appearances

For the Commission: *Andrew B. Sacks* and *Matthew L. Myers.*

For the respondent: *Perry Bradshaw,* Des Moines, Iowa and *William Cerillo, McDermott, Will & Emery,* Washington, 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 Meredith Corporation, a corporation, hereinafter referred to as respondent, has 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 Meredith Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its office and principal place of business located at 1716 Locust Street, Des Moines, Iowa.

Better Homes and Gardens Real Estate Service ("respondent's real estate service") is an operating group of Meredith Corporation.

PAR. 2. Respondent is now and at all times relevant to this complaint has been engaged in the operation of a network of independently owned real estate agencies, under the title Better Homes and Gardens Real Estate Service. Individual real estate firms join Better Homes and Gardens Real Estate Service as franchise members by signing a franchise agreement and paying specified fees to the service.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising referred to herein, to promote consumer use of real estate firms which are members of Better Homes and Gardens Real Estate Service, and to promote real estate firms' joining that service.

PAR. 4. Respondent's operation of Better Homes and Gardens Real Estate Service at all times mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent's members at all times mentioned herein have been and now are in competition with individuals, firms, and corporations engaged in the sale of real estate.

PAR. 6. In the course and conduct of its business, and for the purpose of promoting consumer utilization of real estate firms which belong to Better Homes and Gardens Real Estate Service, respondent has disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and in television and radio broadcasts transmitted by television and radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical statements and representations in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits, A, B, C, D, E, F, G, and H.

PAR. 8. Through the use of the statements and representations referred to in Paragraph Seven, and other representations contained in advertisements not specifically set forth herein, respondent has represented, directly or by implication, the following claims concerning member participation in respondent's programs.

(a) All respondent's real estate service members offer consumers "settling-in" services.

(b) All respondent's real estate service members participate in a home-building program.

(c) All respondent's real estate service members offer consumers a home-protection insurance plan, in states where it is legal to do so.

(d) The home-protection plan offered by respondent's real estate service members is "exclusive".

PAR. 9. In fact, not all members offer the services referred to in Paragraph Eight (a), (b), and (c) above. Offering the services referred to in subparagraphs (a) through (c) of Paragraph Eight is optional for respondent's real estate service members, and those services can only be offered to consumers by a member if the member participates in the program.

In addition, the home-protection insurance plan referred to in Paragraph Eight (d) offered by some of respondent's members is not exclusive, but rather, comparable home-protection insurance is available from other sources.

PAR. 10. Through the use of the statements and representations referred to in Paragraph Seven, and other statements and representations contained in advertisements not specifically set forth herein, respondent has represented, directly or by implication the following claims concerning respondent's real estate service's selectivity in choosing members:

(a) Included in the selection process for all prospective members is screening based on: the prospective firm's training programs for its sales associates; the excellence in training of sales associates employed by the prospective member; and the firm's ability to obtain financing for consumers.

(b) Respondent's real estate service received over 18,000 "inquiries" from prospective members, and only one out of every seventy-two "inquiries" or "applicants" is "good enough" to become, or only one out of every 72 "inquiries" or "applicants" did become a member of respondent's real estate service.

PAR. 11. In fact,

(a) Screening of prospective members based on the prospective members' training programs for sales associates, the excellence in training of sales associates, and the firms' ability to obtain financing, is not conducted for a number of members before they are selected.

(b) (1) Respondent has not received 18,000 inquiries from prospective members; the actual number of inquiries received is significantly smaller than 18,000. The formula utilized by respondent's real estate service in calculating this figure was inadequate to yield an accurate result, and did not yield an accurate result.

(2) The ratio of prospective firms accepted by respondent or good

enough to become respondent members to "inquiries" or "applicants" from prospective firms is not one out of every seventy-two, but in fact is significantly smaller. The formula by which respondent's real estate service calculated this ratio was inadequate to yield an accurate result, and did not yield an accurate result.

PAR. 12. Through the use of the statements and representations referred to in Paragraph Seven, and other representations contained in advertisements not specifically set forth herein, respondent has represented that all of its members are market leaders in terms of sales volume in their respective markets.

PAR. 13. In fact, not all members are among the leaders in their respective communities in terms of sales volume.

PAR. 14. Through the use of the statements and representations referred to in Paragraph Seven, and other statements and representations contained in advertisements not specifically set forth herein, respondent has represented directly or by implication, that the sales associates of all of its members receive advanced training in addition to the basic training required to obtain a real estate license.

PAR. 15. In fact, respondent's real estate service provides training to sales associates of members only if the members purchase such training from the service and not all members have purchased such advanced training. Further, a number of sales associates of respondent's real estate service members have not received any advanced training from other sources.

PAR. 16. As the representations referred to in Paragraphs Eight, Ten, Twelve, and Fourteen are contrary to fact, such representations are false, deceptive or unfair, and, therefore, constituted unfair or deceptive acts or practices.

PAR. 17. At the time respondents made the representations alleged in Paragraphs Eight, Ten, Twelve, and Fourteen, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted unfair or deceptive acts or practices.

PAR. 18. Through the use of the advertisements referred to in Paragraph Seven, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Eight, Ten, Twelve, and Fourteen at the time of the representations' initial dissemination and each subsequent dissemination. In fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted unfair or deceptive acts or practices.

PAR. 19. The use by respondent of the aforesaid false, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have the capacity and tendency to mislead a substantial number of consumers into the erroneous and mistaken belief that said statements and representations are true and complete, and to induce such persons to utilize real estate firms which belong to Better Homes and Gardens Real Estate Service by reason of this erroneous and mistaken belief.

PAR. 20. The aforesaid acts or practices of respondent, herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

OUT OF EVERY 72 INQUIRIES, ONLY ONE MAKES IT AS A BETTER HOMES AND GARDENS™ REAL ESTATE SERVICE MEMBER.

YOU SHOULD BE SO PARTICULAR.

When we share the Better Homes and Gardens® name with someone, we are very particular.

We set the highest standards for our real estate members. And we ask tough questions about business reputation, successful track record, size and leadership, aggressive promotion, excellence in sales training, finance. The quality of the member is more important to us than pushpins on a map.

Out of 18,000 inquiries, only a few hundred... one out of 72... become Better Homes and Gardens® members.

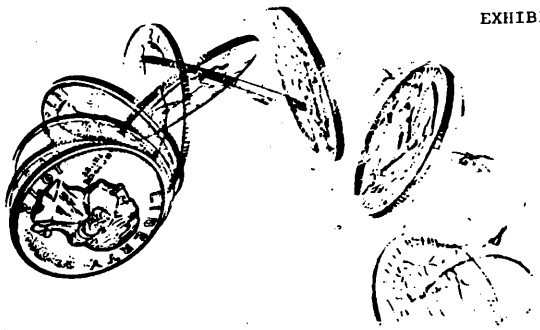
It's as simple as this. People have come to expect quality when they see the Better Homes and Gardens® name.

So go with the sign that has two names you can trust: Better Homes and Gardens® and our real estate leader in your community.

For relocation service call:
1-800-247-5050
(In Iowa call: 1-800-532-1430)

*Each Member an Independent Broker

EXHIBIT B



THE WAY A LOT OF AMERICANS SELECT A REAL ESTATE PERSON IS SHOCKING.

They don't select at all. They guess. Or start working with the first real estate person they meet and guess it will be all right.

They guess all real estate people are pretty much the same. That's too bad. They're not. And a bad guess can mean thousands of dollars. Or a slow sale. Or no sale.

Here's how Better Homes and Gardens® selects real estate firms as members.

We look for a leader in the market.

We look for firms that promote aggressively and take the time to train their sales associates.

We look into business reputation, ethics, and the ability to help buyers get financing.

We look so carefully, in fact, that only a few hundred...one out of 72...are good enough to become Better Homes and Gardens® Real Estate Service Members.

The point is this: if Better Homes and Gardens® takes such care in selecting member firms, you might do well to select one of our members.

So go with the sign that has two names you can trust: Better Homes and Gardens and our real estate leader in your community.

For relocation service call:
1-800-247-5050
(In Iowa call: 1-800-532-1430)

An association of independent brokers.

THE REAL ESTATE MEMBERS OF

Better Homes and Gardens®

Campbell-Mithun
Southdale Center, Minneapolis · 55402 ·
ADVERTISING

MC: 0031
Apprvd By:

EXHIBIT C

Client/Prod: BETTER HOMES AND GARDENS REAL ESTATE SERVICE

Code No/Title: QMBY0061 - Crowd/Roy Wheeler Associates

Length: :10
LIVE ANNOUNCER

Mkt/Station: Charlottesville

Air Date:

		LIVE ANNCR:
1.	LONG SHOT OF CROWD	1. Of every 72 who apply ...
2.	ALL BUT SPOKESMAN TURN SO BACKS FACE CAMERA	2. only one makes it as a Better Homes and Gardens Real Estate Member. In the Charlottesville area
3.	LOGO: ROY WHEELER ASSOCIATES.	3. that one is Roy Wheeler Associates.

12/1/80 dmo

He seemed like a nice guy-and your cousin knew him in college so you picked him to sell your house.

That's not a very good reason to trust someone with one of your most important investments. But that seems to be reason enough for a lot of Americans. For some reason, they assume that all real estate people are pretty much alike.

This is more than a bad assumption. It's a notion that can cost a home seller thousands of dollars . . . or a slow sale . . . or no sale.

Discover the vast difference between the quality, competence and professionalism of various real estate people — ask some very tough questions.

EXHIBIT D

Seven Tough Questions You Should Ask Before You Select A Real Estate Person To Sell Your House:

1 Are they part of a strong national referral system?

If so, it means instant access to buyers moving from cities all across the country. The names generated through a national referral system often are people transferred by their companies and are excellent prospects. Usually they already have equity from the sales of a previous home — they're buyers, not lookers.

2 Do they keep up with the availability of home financing?

There's no sale if the buyer can't get mortgage money. Leading real estate firms understand your needs and know how to find financing for home buyers when conventional mortgages are unattractive. Loan assumptions, second mortgages, refinancing, contract for deed . . . are just a few of the financing options they can suggest. And in these days of a fluctuating money market, knowing what's available and how to get financing is important for a quick sale.

3 How many homes do they have listed for sale?

The real estate firm with a lot of listings means a high volume of business activity. You won't get lost in the shuffle. Rather, it means that more sales people are working on your behalf with many qualified buyers. Simply stated, the people with the listings usually get the buyer you want.

4 Will they make accurate home value estimates?

A critical factor. After all, how much you expect to get from your home is the basic reason for selling it. A value set too high means ultimate disappointment. A value set too low is even worse: it means you lose money. It's not always easy to accept . . . but a good firm will set a realistic selling price for your home. And that's what you should expect.

Better Homes and Gardens®
Real Estate Service

5 Are their sales people well-trained?

Training makes a difference. A well-trained real estate person knows how to consider all factors when establishing a selling price for your home. They know zoning, taxes, and finance requirements of lending institutions. A person with this kind of ongoing training means a smooth, quick sale at a fair price. And a good real estate company takes the time and money to train its people.

6 Do they advertise and promote homes aggressively?

A few lines in the classified ads of the newspaper alone will not sell your home. Good real estate firms actively promote and advertise on a regular basis in a variety of media. They promote themselves. They promote your home. And this promotes business and traffic that makes a house sell faster. The best firm won't put your home on the market, they'll market your home.

7 Are they a leader in the market?

It's not that any size real estate firm can't be good and professional. They can. But there's usually only one reason a leader becomes a leader . . . by successfully matching up homes and people. It's a good sign when you're with a firm with a track record of success.

So go ahead. Ask. Selling a home is serious business and it pays to ask tough questions. We know. Because if we weren't tough enough to stand up to these questions, we couldn't be a Better Homes and Gardens® Real Estate Service member.

EXHIBIT E

Campbell-Mithun, Inc. ADVERTISING

CLIENT: Better Homes & Gardens®-Real Estate Service
PRODUCT: Real Estate Services
CODE NO./TITLE: QMBY8092/"Crowd/Financing"
JOB NO.: 0-192-103 DATE: June, 1980 LENGTH: :30

1. Before you select a real estate firm, you ought to ask some important questions.

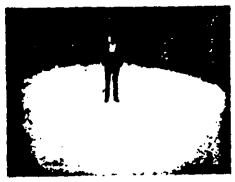
2. Can they help you with financing alternatives?

3. Are they a part of a respected national organization?

4. Do they have a strong relocation service?

5. Do they have exclusive Settling-In Services to help you after the sale?

6. Go ahead and ask.



7. Because if a real estate firm can't stand up to all of these questions...

8. ...it can't be a Better Homes and Gardens member.

9. Go ahead. Ask.

EXHIBIT F

Put 56 years of trust right in your front yard.

Now the magazine that has earned the trust of millions of American families since 1922 can help when you sell or buy a home. The Better Homes and Gardens™ Real Estate Service is a natural extension of the trust and confidence we've established through decades of service to homeowners.

You'll find our sign displayed by leading real estate professionals across the country. We carefully choose these firms for their integrity, for their business reputation, for their record of client satisfaction.

Help when you sell

When you offer your home through a member of the Better Homes and Gardens™ Real Estate Service, you can count on reaching a large market of qualified buyers. You'll be served by a firm that has advanced real estate education programs. And information sources directly from Better Homes and Gardens. Even a Home Protection Plan,™ subject to state regulation, which provides protection against unexpected replacement or repairs for specified systems or appliances in your home.

Help when you buy

If you're looking for a new home within the same community, your Better Homes and Gardens™ Real Estate Service member can offer a complete selection of styles, prices and locations. If you're planning a longer move, our national Relocation Service will put you in touch with real estate professionals in the community where you're moving. They'll provide you with advance information on homes which fit your needs and budget, as well as vital information on your new community.

Two names you can trust

The Better Homes and Gardens™ Real Estate Service gives you two names you can trust. Ours and the name of the firm selected in your community. To identify our member closest to you, or in your new community, call this toll-free number:

1-800-247-5050

In Iowa, call 1-800-532-1430

Better Homes and Gardens™

Real Estate Service

Locust at 17th, Des Moines, Iowa 50336

Already more than 500 offices, each member independently owned.

EXHIBIT G

Fultz, LaCasse & Associates, Inc./Advertising 6/27/79 pj Revised
Offices: Des Moines/Dubuque revised 6/21/79 CW-sr

CLIENT BH&G RES DATE 6/19/79 MRL/pj

JOB NUMBER 88-27-79

COPY FOR: :60 Radio: Paul Harvey ABC Network News

FOR BROADCAST JULY 16, 1979

PAUL HARVEY:

When you have a trusted name like "Better Homes and Gardens"...a name you've developed and protected for 57 years as a source of reliable information on housing...well, you just don't share it loosely. That's why the Better Homes and Gardens name means so many positive, good things when you see it teamed up with the name of a real estate firm in your own community. The Better Homes and Gardens Real Estate Service...yes, I said Real Estate Service...is an association of independent real estate brokers. Member firms are selected--they just don't sign up--they are selected for their own high standards of professional service. As a member of the Real Estate Service, your local Better Homes and Gardens broker can offer many exclusive programs...such as the Home Protection Plan, a national relocation service, exclusive building programs and much more. So, if you're buying or selling a home, look for the sign of "two names you can trust"...Better Homes and Gardens...and their member firm in your community.

EXHIBIT H

Radio

"GOOD SELECTION" 60 SECONDS

ANNCR: If you were selling your home within the next three years - and the records say one-third of you will be doing just that - how would you pick a real estate firm to help you? On the basis of a nice smile or the recommendation of a friend of a friend, or maybe they went to school with your cousin. Don't laugh - most Americans select a real estate company for no better reasons than these and that just doesn't make sense. The purchase or sale of a home is the most important single financial transaction most people ever make. And the differences between real estate people can mean a difference of thousands of dollars - or a home that sells quickly or sits on the market. Alright, here's how Better Homes and Gardens® selects their own real estate members. Track record - are they a successful real estate company? Business reputation - do they have the highest standards of integrity? Imagination - do they take the time to understand a home and market that home creatively? In fact, far more firms have applied to become a Better Homes and Gardens® Real Estate Service member than have been accepted. Conclusion? Obvious! A Better Homes and Gardens member is a good selection. Each member an Independent Broker.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection 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, their attorneys, 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 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Meredith Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 1716 Locust Street, in the City of Des Moines, State of Iowa.

Respondents are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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

ORDER

I

It is ordered, That respondent Meredith Corporation ("Meredith"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising and promotional materials for Better Homes and Gardens Real Estate Service ("Respondent's real estate service"), in or affecting "commerce" as defined in the FTC Act, do forthwith cease and desist from making the statements or representations, directly or by implication, listed below, contrary to fact at the time of their dissemination:

(A) The following statements or representations concerning services offered consumers by respondent's real estate service members:

1. All respondent's real estate service members offer consumers "settling-in" services.

2. All respondent's real estate service members participate in a home-building program, and offer this program to consumers.

3. All respondent's real estate service members offer consumers a home-protection insurance plan, in states where it is legal to do so.

4. The home-protection plan offered by respondent's real estate service members is "exclusive," *provided,* that, for purposes of this order, a representation, direct or indirect, that a home-protection plan is exclusive shall mean that home-protection insurance providing comparable coverage is not available from other sources.

5. Any statements or representations that settling-in services, the home-building program, or the home-protection plan are offered to consumers by respondent's real estate service members, unless it is clearly and prominently disclosed within the advertisement where the representation appears that not all members offer the services. Such disclosure shall be in close proximity to the representation or noted by an asterisk to the representation referring to the disclosure.

(B) The following statements or representations concerning respondent's real estate service selection of members.

1. Included in the selection process for all prospective members is screening based on: the prospective firm's training programs for its sales associates employed by the prospective member; the excellence in training of sales associates employed by the prospective member; or the firm's ability to obtain financing for consumers.

2. Respondent's real estate service received over 18,000 "inquiries" from prospective members.

3. Only one out of every seventy-two "inquiries" or "applicants" is "good enough" to become, or only one out of 72 "inquiries" or "applicants" did become a member of respondent's real estate service.

(C) That all members of respondent's real estate service are "market leaders" in terms of sales volume in their respective communities.

(D) That the sales associates of members of respondent's real estate service all receive training in addition to the basic training required to retain a real estate license.

II

(A) *It is further ordered,* That Meredith, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising and promotional materials, for Better Homes and Gardens Real Estate Service, an operating group of Meredith Corporation, in or affecting commerce as defined in the Federal Trade Commission Act, do forthwith cease and desist from making any statements or representations, directly or by implication, concerning: programs offered by respondent's real estate service members; respondent's real estate service's selection process or selectivity in choosing members; market size, market rank, or market leadership in terms of sales volume of respondent's real estate service members; training of sales associates of respondent's real estate service members; or any statement or representations comparing, directly or by implication, respondent's real estate service to other real estate franchisors as to membership standards or member calibre, unless respondent possesses and relies upon a reasonable basis for such statements or representations.

(B) (1) For purposes of paragraph II(A), a reasonable basis shall consist of reliable and competent evidence that substantiates such statements.

(2) To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of paragraph II(B)(1) only if those tests, analyses, research, studies, or other evidence,

(a) are conducted and evaluated in a disinterested and sufficiently skilled fashion; and

(b) use procedures generally accepted in the profession or science, so that accurate and reliable results are best insured.

III

It is further ordered, That the respondent shall initiate and pay the cost of sending, within thirty (30) days of the date this order is final, to all members of the real estate service, a copy of this order and consent agreement, an accompanying cover letter (attached, and hereto incorporated, as Attachment A) and an acknowledgement form (attached, and hereto incorporated, as Attachment B). No liability will be imposed on respondent on account of any member of respondent's real estate service which willfully, or otherwise, refuses in any manner to comply with said request, or which engages in any advertising or utilizes promotional material which respondent is prohibited from disseminating or utilizing under Paragraph I above, provided respondent has complied with this paragraph, and paragraph IV (D) of this order.

IV

(A) *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in 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.

(B) *It is further ordered,* That respondent shall, within ninety (90) days after this Order becomes final, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

(C) *It is further ordered,* That respondent shall maintain files and records of all substantiation related to the requirements of this order for a period of three (3) years after the dissemination of any advertisement, which shall be made available to the Commission upon request for inspection and copying.

(D) *It is further ordered,* That respondents shall maintain files and records of all acknowledgement forms (Attachment B) and advertising and promotional materials returned to its real estate service's members pursuant to Paragraph III of this order for a period of six (6) months after this order becomes final, which shall be made available to the Commission upon request for inspection and copying.

ATTACHMENT A

Dear _____:

Enclosed please find a copy of a provisionally accepted consent order entered into between Meredith Corporation and the Federal Trade Commission. The agreement stems from an FTC investigation of certain advertisements and promotional materials for Better Homes and Gardens Real Estate Service. The agreement is for settlement purposes only and does not constitute an admission by Meredith Corporation or the Real Estate Service that the law has been violated or that the facts are true as alleged in a proposed complaint submitted by the Federal Trade Commission to Meredith.

Please review the enclosed consent order which we have entered into with the Federal Trade Commission. As part of our settlement, we request that you no longer use, and return to us, the following promotional and advertising materials:

I. *Ads To Be Returned:*

A. *Openings/Anniversaries*
1. "Important News"—60-second radio

B. *Front Yard*
1. "Front Yard"—60-second radio

C. *Myth/Fact*
1. "Five Myths" (1–5) - print—local and national
2. "More Myths" (6–10), (11–15) - print—local and national
3. "Four Myths" (1–4) - print—local

D. *Selection*
1. "Crowd"—30-second - television - local and national
2. "Crowd"—10-second - television - local
3. "Finance II"—30-second radio
4. "Finance III"—60-second radio
5. "Mortgage"—60-second radio
6. "Leaders"—30-second radio
7. "Good Selection"—60-second radio
8. "Out Of Every 72 . . ." crowd print—national
9. "He Seemed Like . . ." crossed fingers print—national
10. "The Way A Lot Of Americans . . ." coin print—national
11. "Out Of Every 72 . . ." crowd print—local
12. "He Seemed Like A Nice Guy . . ." crossed fingers print—local
13. "The Way A Lot Of Americans . . ." coin print—local
14. "It's A Buyer's Market" print—local
15. "Seven Tough Questions . . ." print—local
16. "We Can Help You Find Financing" print—local

II. *Promotional Materials To Be Returned:*
1. "Selecting A Real Estate Firm" coin brochure—local
2. "Out Of Every 72 . . ." ad reprints
3. "He Seemed Like A Nice Guy . . ." ad reprints
4. "The Way A Lot Of Americans . . ." ad reprints
5. "The Home Protection Plan . . ." (buyer) brochure
6. "The Home Protection Plan . . ." (seller) brochure
7. "Fifty-six Years Of Trust" ad reprints
8. "This Means A Lot More . . ." (clock) print—national

You should be advised that the Federal Trade Commission may treat the dissemination of any such advertising or promotional materials as a violation of Section 5 of the Federal Trade Commission Act. We further request that you return the attached acknowledgment form, which must be made available to the Federal Trade Commission staff upon request.

Thank you for your prompt attention to this matter.

Sincerely,

Meredith Corporation

ATTACHMENT B

I hereby acknowledge receipt of the consent agreement entered into between Meredith Corporation and the Federal Trade Commission. Pursuant to that order, I am returning to Meredith Corporation the following advertising and promotional materials (identified by number):

_____

_____

_____

_____

_____

I understand that dissemination of any of the advertising or promotional material covered by the order may be found to violate the Federal Trade Commission Act.

By _____

For _____
(Name of Member Firm)

IN THE MATTER OF

ILLINOIS CENTRAL INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-2370. Consent Order, March 26, 1973—Modifying Order, March 16, 1983

The Federal Trade Commission has reopened this matter and declared that Paragraph VI of the order issued on March 26, 1973 (82 F.T.C. 1097) shall be of no further force and effect. Paragraph VI barred Midas-International Corp., an IC subsidiary, from purchasing any product containing automotive brake friction material manufactured by Abex Corp., another IC subsidiary.

ORDER MODIFYING DECISION AND ORDER

On November 16, 1982, respondent IC Industries, Inc. (formerly Illinois Central Industries, Inc.) ("IC") filed its "Petition Pursuant To Rule 2.51 To Reopen And Modify Consent Order" ("Petition"). The Petition asked that the Commission reopen the consent order that issued on March 26, 1973 in this matter ("the order") and set aside Paragraph VI thereof. Paragraph VI of the order perpetually bans IC's subsidiary, Midas-International Corporation ("Midas") from purchasing, directly or indirectly, any products containing automotive brake friction materials manufactured by Abex Corporation ("Abex"), another subsidiary of IC. It also bans Midas from selling or distributing such products. Paragraph VI likewise perpetually bars Midas from purchasing automotive flashers from IC or from selling or distributing such flashers manufactured by IC. IC's Petition was on the public record for thirty days and no comments were received.

Based on respondent's Petition and on other information available to it, the Commission has determined that IC has made a satisfactory showing that the public interest warrants reopening and modification of the order in the manner requested by respondent. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph VI of the Commission's order shall be of no further force and effect as of the effective date of this modifying order.

IN THE MATTER OF

GOLDEN TABS PHARMACEUTICAL CO., INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8792. Final Order, March 16, 1970—Modifying Order, March 17, 1983

This order reopens the proceeding and modifies the Commission's order issued on March 16, 1970 (77 F.T.C. 277), by allowing respondent to disclose, clearly and conspicuously any place in advertisements, that there are conditions and obligations attendant upon acceptance of free or nominally priced offers. The modified order also reflects the company's new name and deletes from the order the name of the company's founder, Michael Posen.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On November 17, 1982 Golden Tabs Pharmaceutical Co., Inc., respondent in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the order entered therein.

The order, which was entered in 1970, covers "Golden 50 Tabulets" or any food, drug, device or cosmetic. The complaint, which was issued on July 17, 1969, alleged, among other things, that respondent had represented in advertisements that Golden 50 Tabulets would be sent free to persons responding to respondents' advertisements and that persons answering said advertisements will be under no obligation to purchase additional supplies of respondents' products. In truth and in fact, the Hearing Examiner found that the 30 day supply of respondents' product were not free for the reason that the offer was an inseparable part of a plan under which respondents, after the receipt of the 30 day supply by those who accepted the offer, shipped additional monthly supplies of the product and attempted to collect the price for these shipments. Furthermore, the Examiner found that persons answering the ads are under an obligation to purchase additional supplies or to notify respondents to cancel further shipments. After sending the 30 day supply, respondents shipped additional supplies each month, mailed statements requesting payment and threatened visits by company representatives in an attempt to collect payment. The Examiner also found that in many cases even if persons notified respondents that they did not wish additional supplies to be sent, respondents continued to ship supplies of said product to those persons and attempted to collect the price.

The Examiner issued an order, which, among other things, prohibited respondent in paragraph 1(b) of the order from representing that "any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the 'free' or other offer." The respondents did not appeal from the initial decision and the Commission thereafter adopted the decision and order.

Petitioner now seeks to modify one provision of that order, by adding a provision to paragraph 1(b) of the order which would permit respondent to have the option of clearly and conspicuously disclosing, when the free or other offer is made, that there are obligations attendant upon acceptance of the free or nominally priced offer and then clearly and conspicuously disclosing the complete terms of the offer elsewhere. Thus, the alternative language would not require that respondent disclose all the conditions "within close proximity to the free or other offer" as is now mandated.

While the Commission supports petitioner's proposed revisions to the order, the Commission has, without objection from petitioner, added a proviso to that portion of paragraph 1(b)(2) which would permit respondent to disclose the complete terms of the offer elsewhere in the advertisement. As revised herein, where respondent exercises this option and also includes in the advertisement a coupon, signature space or other means by which a consumer is intended to accept the offer, it is required to disclose the complete terms of the offer on or in close proximity to the coupon or other space provided.

The alternative language, as revised, should be sufficient to ensure that consumers are aware of their obligations in accepting the free or other offer. Not only would respondent be required by the modified order to disclose clearly and conspicuously and within close proximity to the offer that there are other conditions that a consumer assumes upon accepting the offer, but the respondent must clearly and conspicuously set forth on a coupon or other offer acceptance form included in the advertisement or, if no such form is provided, elsewhere in the advertisement the complete details, conditions, and obligations. Thus, assuming that the proper language is used, a consumer can be expected to be aware of the obligations attendant upon acceptance of the offer.

In its petition at page 8, respondent suggests that the modified order would be satisfied by placing, clearly, conspicuously, and within close proximity to the offer, such terms as "with membership", "with club membership", "when you join", "when you rejoin", "see details of plan in enrollment coupon", "see details of offer below", "see de-

tails inside", and other similar terms which clearly convey to the consumer a further obligation upon acceptance of the offer. Respondent should be advised that, in granting the petition, the Commission does not agree that all of the above terms would constitute satisfactory compliance with the modified order. In particular, in the Commission's view, the terms "see details inside" or "see details of offer below," even if placed "clearly, conspicuously and in close proximity" to the offer, are too imprecise to adequately inform consumers that there are further *obligations* attendant upon acceptance of the offer.

With the above noted order revision and compliance caveat, the Commission has decided to grant the petition. Moreover, having been informed by staff that the petitioner has no objection, the Commission also has made two other changes in the order. Because respondent Michael Posen has died, the Commission has deleted his name from the order, and it has changed the name of the corporate respondent, from Golden Fifty Pharmaceutical Co., Inc. to Golden Tabs Pharmaceutical Co., Inc.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued July 17, 1969, in Docket No. 8792 is hereby modified to read as follows:

ORDER

It is ordered, That respondent Golden Tabs Pharmaceutical Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated "Golden 50 Tabulets," or any food, drug, device or cosmetic do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing the dissemination of, by means of the United States mail or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which:

(a) Represents directly or by implication that respondent is a manufacturer of vitamin and/or mineral preparations or maintains laboratory facilities concerned with the formulation, testing or performance of vitamin and/or mineral preparations.

(b) Represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the "free" or other offer,

or, alternatively,

represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless (1) respondent discloses clearly, conspicuously, and within close proximity to the free or other offer that there is a further obligation upon the consumer upon acceptance of the offer, and (2) respondent also discloses clearly and conspicuously elsewhere in the advertisement the complete details, conditions, and obligations attendant upon acceptance of the offer, *provided further* that, if the advertisement includes a coupon, signature space, or other designated means by which the consumer is intended to accept the offer, respondent discloses clearly and conspicuously on or in close proximity to the coupon or other space provided for acceptance of the offer the complete details, conditions and obligations attendant upon acceptance of the offer, but such complete disclosure need not appear more than once in the advertisement, including the coupon.

(c) Represents directly or by implication that an offer is made without "further obligation," or with "no risk," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer when in fact there is an obligation incurred by the recipient.

(d) Represents directly or by implication that an offer is made to only a limited customer group or for only a limited period of time when no such limitations are imposed by respondents.

(e) Represents directly or by implication that such products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which said guarantor will perform thereunder are clearly and conspicuously disclosed therewith.

(f) Represents directly or indirectly that any product or combination of products identified, described or specified, directly or by implication, is being offered for sale, as a "gift" or otherwise, unless such offer does contain the items as specified, described or otherwise identified.

(g) Represents directly or indirectly that any product or combination of products which are offered for sale, "free," as a "gift," or otherwise is or are of regular commercial size when such product or product are of "trial," "sample," or otherwise less than regular commercial size.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or in-

directly, the purchase of respondent's products in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited by Paragraph 1 hereof.

It is further ordered, That respondent and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of "Golden 50 Tabulets" or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Shipping or sending any merchandise to any person without the prior authorization or prior consent of the person to whom such merchandise is sent and attempting, or causing to attempt, the collection of the price thereof.

2. Shipping or sending any merchandise to any person and attempting, or causing to attempt, the collection of the price thereof when a notification of refusal of such merchandise, or a notification of cancellation for any further shipments of merchandise, has been sent by such persons and received by respondent.

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 respondent shall, within sixty (60) days after service of this modified order upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

IN THE MATTER OF

MIB, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3108. Complaint, March 21, 1983—Decision, March 21, 1983

This consent order requires a Westwood, Mass. non-profit medical reporting agency, among other things, to cease reporting that a code in a consumer's file has been cancelled or deleted, except to report the cancellation or deletion to a person who was previously informed of the code's existence. The order prohibits respondent from conditioning the release of information to a consumer on his/her execution of a waiver of claims against the firm, and from representing to consumers that their statements concerning disputed items be limited to 100 words or less, unless at the same time, respondent offers to assist the consumer in preparing the statement. Additionally, the firm must timely reinvestigate disputed information; contact, where possible, the source(s) of disputed information or other persons identified by the consumer who may possess information relevant to the challenged data and modify its files accordingly.

Appearances

For the Commission: *William P. McDonough* and *Stephen P. Fauteux.*

For the respondent: *David B. Lytle, Hogan & Hartson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.,* and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.,* the Federal Trade Commission (Commission), having reason to believe that MIB, Inc., d/b/a Medical Information Bureau (MIB), has violated provisions of those Acts, and it appearing to the Commission that a proceeding by it in respect to those violations would be in the public interest, the Commission issues this complaint.

1. For the purposes of this complaint, the terms *consumer, consumer report, consumer reporting agency, file, person,* and *medical information* are defined as set forth in Section 603 of the Fair Credit Reporting Act (Act).

2. MIB is a nonprofit corporation, organized, existing, and doing business under the laws of Delaware, with its principal office and

place of business located at 160 University Avenue, Westwood, Massachusetts.

3. MIB's membership consists of approximately 700 life insurance companies (members) located throughout the United States and Canada.

4. Among its activities, MIB operates a confidential exchange of information among its members. To effectuate the information exchange, MIB's members are required to report to MIB information concerning insurance applicants received by the members from original medical and other sources, from official records, or from the applicant during the course of an insurance application.

5. All information reported to MIB by its members is reported in coded form pursuant to MIB's Manual, "Official List of Impairments" (Code Manual). The Code Manual contains a list of approximately 190 medical impairments and 7 supplementary nonmedical impairments, each of which is signified by a three-digit numerical code. The Code Manual also contains procedures for reporting these impairments, including requiring the use of a system of letters (as many as five in a sequence following the three-digit impairment code), which indicate among other things, when the impairment first appeared, whether it is present at the time of the application, or whether the condition is under treatment.

6. MIB files the coded information it receives from its members in its computer.

7. MIB uses this coded information to provide its "checking service" to its members. Under the "checking service," a member who has received an insurance application may request from MIB whatever coded information MIB has in its files on the applicant. In response to such a request, MIB transmits a report to the requesting member, either by wire or by mail.

8. These MIB reports bear on consumers' personal characteristics, and they are used in whole or in part for the purpose of serving as a factor in establishing consumers' eligibility for insurance to be used primarily for personal purposes. Therefore, these reports are consumer reports.

9. MIB is regularly engaged on a cooperative nonprofit basis in assembling information on consumers for the purpose of furnishing consumer reports to third parties through the means and facilities of interstate commerce. Therefore, it is a consumer reporting agency.

10. As of at least 1976, MIB maintained coded information on approximately 11 million persons, and in 1979 it received from its members 20,163,964 checking inquiries and 2,262,938 reports. In 1977 MIB received $9,739,597.00 in assessments and charges from its members.

11. The acts and practices alleged herein took place and are taking

place in the ordinary course and conduct of MIB's activities and have occurred on or after April 24, 1971, the effective date of the Act.

Count I

12. The allegations of paragraphs 1–11 above are incorporated by reference herein.

13. When MIB deletes from its files an adverse item of information because it has become obsolete within the meaning of Section 605(a) of the Act or because it was found inaccurate or unverifiable after a reinvestigation pursuant to Section 611(a) of the Act, in some cases it puts in its records the notation "cancelled" or "purged." In a substantial number of instances the notations have been included in subsequent consumer reports sent to members.

14. The notations described in paragraph 13 have been included in a substantial number of reports used in connection with the underwriting of life insurance involving a principal amount of less than $50,000 and the item of information was deleted because it was obsolete within the meaning of Section 605 of the Act. By this practice, MIB has failed to maintain procedures to avoid violations of Section 605 of the Act and, therefore, has violated Sections 605 and 607(a) of the Act.

15. The notations described in paragraph 13 have been included in a substantial number of reports in which the item of information was deleted because it was found inaccurate or unverifiable after a reinvestigation pursuant to Section 611(a) of the Act. By this practice, MIB has violated Section 611(a) of the Act.

Count II

16. The allegations of paragraph 1–11 above are incorporated by reference herein.

17. A substantial number of consumers have requested disclosure of the nature and substance of the non-medical information in their MIB files, and have given MIB proper identification. In all such instances MIB requires the consumer requesting disclosure to complete MIB Form D–2 as a prerequisite to obtaining such disclosure. (A copy of Form D–2 is attached as Appendix A). Completion of Form D–2 requires a consumer to, among other things, sign a release stating:

> Except as to false information furnished with malice or willful intent to injure and except as to liability for willful noncompliance or for negligent noncompliance as in the Federal Fair Credit Reporting Act (FCRA), I release the MIB and its members and any person who furnishes information to MIB or its members from any claims or suits based on any information disclosed as a result of this request.

18. Under Section 609(a) of the Act, upon request and the showing

of proper identification, a consumer is entitled to, among other things, disclosure of the nature and substance of all information (except medical information) maintained in his or her file by MIB.

19. The requirement of the Form D–2 release for disclosure of the nature and substance of such non-medical information constitutes more than "proper identification." Therefore, MIB has violated and is violating Section 609(a) of the Act.

Count III

20. The allegations of paragraphs 1–11 above are incorporated by reference herein.

21. When consumers inform MIB that they dispute the completeness or accuracy of an item of information in MIB's files, in a substantial number of instances MIB:

a. requires consumers to first complete the MIB Form D–2 which, in turn, requires the consumers to sign a release in MIB's favor, to identify a physician to whom disclosure will be made, and to obtain a non-related witness's signature. By not initiating reinvestigation until the consumer complies with these procedures, MIB, in some instances, fails to reinvestigate the disputed item of information within a reasonable period of time after receiving notice of the consumer's dispute;

b. fails to include as part of its reinvestigation contacting the original sources of the information or such other sources as the consumer identifies in disputing the information as being likely to have information on the subject of the dispute; and

c. fails to record, after reinvestigation, the current status of disputed information.

22. Under Section 611(a) of the Act, if the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer, and the dispute is directly conveyed to MIB, MIB must within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute is frivolous or irrelevant. Furthermore, under Section 611(a), if after the reinvestigation the information is found to be inaccurate or can no longer be verified, MIB must promptly delete the information.

23. By the acts described in paragraph 21, MIB has violated and is violating Section 611(a) of the Act.

Count IV

24. The allegations of paragraphs 1–11 above are incorporated by reference herein.

25. When MIB determines after reinvestigation not to modify or delete information that has been disputed by a consumer, in a substantial number of instances it notifies the consumers:

The federal Fair Credit Reporting Act of 1970 provides that you may file a brief statement of disputed accuracy. The statement should contain 100 words or less and it should set forth the nature of the dispute.

26. The two statements in the above notice, read together, suggest that it is the Act that requires the consumer to limit his statement to 100 words or less, when in fact, Section 611(b) of the Act allows MIB to impose such a limitation only if it provides assistance to the consumer in preparing such a statement. Therefore, MIB has violated and is violating Section 611(b) of the Act.

27. The acts and practices set forth in paragraphs 12–26 were and are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of the Act, such acts and practices constitute violations of Section 5(a) of the Federal Trade Commission Act.

Form #B

Request for Disclosure
Submitted to Medical Information Bureau (MIB)
P. O. Box 105, Essex Station, Boston MA 02112

IDENTIFICATION INFORMATION (Please print):

Name: _____ (Last name (surname)) _____ (First name (given name)) _____ (Middle name)

Date of Birth: _____ (month) _____ (day) _____ (year)

Birthplace: _____ (Give state (of U. S.), or Province (of Canada); if other, give country)

Present Address: _____ (street) _____ (town or city)

_____ (state and zip code) _____ (telephone number)

DISCLOSURE: I request disclosure of the meaning of my MIB record, if any. I understand MIB will require reporting member companies to disclose any medical information in my MIB record to my personal physician.

_____ (name of personal physician)

_____ (street) (city/state) (zip code)

As to non-medical information, I prefer disclosure by the one method checked below. (If method 2 or 3 is checked, insert a date which is about 15 days after you mail this form; also, select an hour between 10:00 AM and 4:00 PM on any weekday except holidays in Massachusetts).

☐ 1: By letter to my address as given above.

☐ 2: By reverse charge phone call at my phone number given above on

_____ (insert date and hour in Eastern Time Zone)

☐ 3: By appointment on _____ (insert date and hour) at the above MIB office.

Except as to false information furnished with malice or willful intent to injure and except as to liability for willful noncompliance or for negligent noncompliance as in the Federal Fair Credit Reporting Act (FCRA), I release the MIB and its members and any person who furnishes information to MIB or its members from any claims or suits based on any information disclosed as a result of this request.

_____ (insert month, day and year) _____ (Signature of Individual Requesting Disclosure)

I, (an adult person), witnessed the above signature and I represent that the person who made the above signature is known to me (but is not related to me), and is the person described above.

Present address of witness:

_____ (Signature of witness) Street _____

Town or city _____

_____ (Typed or printed name of witness) State and zip code _____

Attachment A

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 Boston 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 Fair Credit Reporting Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent MIB, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 160 University Avenue in the Town of Westwood, Commonwealth of Massachusetts.

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.

For purposes of this order, the following definitions shall apply:

A. *The Act* means the Fair Credit Reporting Act, Pub. Law No. 91–508, 15 U.S.C. 1681 *et seq.*

B. The terms *person, consumer, consumer report, file* and *medical information* are as defined in Section 603 (b), (c), (d), (g), and (i), respectively, of the Act.

C. The term *medical source* means a person from whom medical information may be obtained in accordance with Section 603(i) of the Act, namely a licensed physician or medical practioner, hospital, clinic or other medical or medically related facility which provided or provides the information with the consent of the individual to whom the information relates.

II.

It is ordered, That MIB, Inc. ("MIB"), its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection, preparation, assembly or furnishing of a consumer report shall cease and desist from:

A. Reporting, directly or indirectly, that a code in a consumer's MIB file has been cancelled or deleted, except to report the cancellation or deletion to a person who was previously informed of the existence of the code.

B. Requiring, as a condition for disclosure of information (except the nature and substance of medical information) pursuant to Section 609 of the Act, that the consumer seeking disclosure execute a waiver or release of claims against MIB based on the information disclosed.

C. Failing, if the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer and such dispute is directly conveyed to MIB by the consumer, to reinvestigate the disputed item within a reasonable period of time, unless MIB has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant, *provided* that where the consumer has failed to provide information sufficient to permit MIB to identify in its records the consumer and the item in dispute, MIB may require the consumer to provide such information before initiating a reinvestigation.

D. Failing, in connection with the reinvestigation of a disputed item of medical information pursuant to Section 611 of the Act:

1. to include as part of such reinvestigation a reasonable effort to contact (a) the medical source or sources who originally provided the information upon which the disputed item is based and (b) other medical sources identified by the consumer who may reasonably be expected to have additional information directly relevant to the disputed item;

2. to complete such reinvestigation within a reasonable period of time, *provided* that 30 days shall be presumptively deemed a reasonable period of time, in the absence of unusual circumstances;

3. if after such reinvestigation the disputed item is found to be inaccurate or unverifiable, promptly to delete the item from the consumer's MIB file; and

4. if after such reinvestigation the disputed item is found to be accurate and verifiable but incomplete, to make the item complete by adding to the consumer's MIB file any additional information learned through the reinvestigation and necessary for a proper understanding of the disputed item, including where applicable, the fact of recovery or improvement.

E. Representing, directly or indirectly, to consumers that their dispute statement under Section 611(b) of the Act is limited to 100 words or less, unless MIB at the same time informs the consumer that it will assist the consumer in writing such a statement.

III.

It is further ordered, That MIB mail a copy of this order to all of its members by certified mail, return receipt requested; that MIB deliver a copy of this order to all present and future MIB employees engaged in handling consumer requests for disclosure under Section 609 of the Act or disputes of accuracy or completeness under Section 611 of the Act; and that MIB secure a signed statement acknowledging receipt of a copy of this order from all such employees.

IV.

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

V.

It is further ordered, That MIB 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.