

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

DENTSPLY INTERNATIONAL, INC.

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

Docket C-3407. Complaint, Jan. 6, 1993--Decision, Jan. 6, 1993

This consent order requires, among other things, a Pennsylvania-based manufacturer of professional dental-care products to divest, within nine months of the order, all assets related to the manufacturing and marketing of its U.S. Valiant silver alloy product line to a Commission-approved purchaser. If the divestiture is not completed in the designated time-frame, the respondent is required to agree to a Commission-appointed trustee to divest its interest in the assets related to its Valiant Alloy products. In addition, the order requires a Hold Separate Agreement during any period in which the respondent possesses an ownership interest in the U.S. Valiant assets, and, for a 10-year period, requires the respondent to obtain Commission approval prior to acquiring any silver alloy manufacturer or distributor.

Appearances

For the Commission: *Casey Triggs* and *Steven A. Newborn*.

For the respondent: *J. Patrick Clark*, in-house counsel, York, PA. and *Judy Whalley*, *Howrey & Simon*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Dentsply International, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire certain Professional Dental Care assets of Johnson & Johnson, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commis-

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

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. *Dentsply International, Inc.* (“Dentsply”) means Dentsply International, Inc., a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary,” “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

2. *Johnson & Johnson* (“J&J”) means Johnson & Johnson, a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

3. “*Premium silver alloy business*” means the business of formulating, manufacturing, marketing and selling silver amalgam alloy products, perceived to be of high quality and consistency, used by dentists in the treatment of dental caries.

II. THE RESPONDENT

4. Respondent Dentsply is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 570 West College Avenue, York, Pennsylvania.

5. For purposes of this proceeding, Dentsply is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

6. J&J is a corporation organized and existing under the laws of the State of New Jersey, with its headquarters at One Johnson & Johnson Plaza, New Brunswick, New Jersey.

7. J&J is, and at all times relevant herein has been engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

8. On or about April 27, 1992, Dentsply and J&J agreed to enter into an agreement whereby Dentsply will acquire certain professional dental assets of the Professional Dental Care Products division of J&J for a price of approximately \$62 million (“Acquisition”).

V. THE RELEVANT MARKET

9. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the premium silver alloy business.

10. For purposes of this complaint, the relevant section of the country is the United States.

11. The relevant market set forth in paragraphs nine and ten is highly concentrated, whether measured by Herfindahl-Hirschmann Indices (“HHI”) or two-firm and four-firm concentration ratios.

12. Entry into the relevant market is difficult.

13. Dentsply and J&J are actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

14. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. Actual competition between Dentsply and J&J will be eliminated;

b. The likelihood of collusion in the relevant market would be increased.

15. All of the above increase the likelihood that firms in the relevant market will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

16. The acquisition agreement described in paragraph eight constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

17. The acquisition described in paragraph eight, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of Johnson & Johnson (“J&J”), and the respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 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 Acts, and that a 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 described 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 Dentsply International, Inc. (“Dentsply”) is a corporation organized and existing under the laws of Delaware with its offices and principal place of business at 570 West College Avenue, York, Pennsylvania.
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.

As used in this order, the following definitions shall apply:

A. "*Dentsply*" means Dentsply International, Inc., a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

B. "*J&J*" means Johnson & Johnson, a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnership and joint ventures.

C. "*Commission*" means the Federal Trade Commission.

D. "*Acquisition*" means the acquisition of certain assets of J&J's Professional Dental Care Products division by Dentsply.

E. "*Acquirer*" means the party or parties to whom Dentsply divests the assets herein ordered to be divested.

F. "*Silver alloy*" means a metal-based alloy product which, when combined with mercury, forms an amalgam that is used to fill dental caries.

G. "*Valiant Products*" means Dentsply's silver alloy products marketed in the United States under the names "Valiant," "Valiant Ph.D.," "Valiant Snap-Set," and "Valiant Extended Time."

H. “*Valiant Business*” means Dentsply's business of manufacturing, marketing, and selling Valiant Products in the United States.

I. “*Valiant Assets*” means all assets constituting or otherwise related to the Valiant Business, including but not limited to:

1. All books, records, manuals, reports, dockets, lists, advertising and promotional materials and other documents relating to the Valiant Products;

2. Valiant product line Profit and Loss Statements relating to each of the Valiant Products;

3. All United States trademarks together with all trademark registrations and applications therefor relating to Valiant Products;

4. All lists of stock keeping units (“SKUs”); *i.e.*, all forms, package sizes and other units in which Valiant Products are sold and which are used in records of sales and inventories;

5. All Bills of Materials for each of the Valiant Products, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including all lists of authorized sources for materials and components;

6. All artwork and mechanical drawings currently in use relating to each of the Valiant Products;

7. All fixed assets listed on Schedule I hereto;

8. All lists of all customers, including but not limited to, distributors, dentists, and dental schools, who have bought Valiant Products, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

9. All marketing information relating to Valiant Products, including but not limited to Dentsply's consumer and trade promotional, marketing and business programs;

10. All inventories of finished goods, packaging and unique raw materials relating to Valiant Products;

11. All names of manufacturers under contract with Dentsply to produce Valiant Products and all contracts with outside suppliers for formulations unique to the Valiant Products;

12. All product testing and laboratory research data relating to Valiant Products, including but not limited to toxicity research data, all regulatory registrations and correspondence;

13. All consumer correspondence and documents related to the Valiant Business;

14. All price lists for Valiant Products;

15. All information relating to costs of production for each of the Valiant Products, including but not limited to raw material costs, packaging costs, and advertising and promotional costs;

16. All sales data relating to Valiant Products;

17. A sublicense to make, use and sell certain technology in the U.S. related to the design for a sealed, mercury-tight dental mixing capsule under claims of certain patents owned by Ernest Muhlbauer K.G. and granted to Dentsply under a License Agreement dated November 26, 1979, as amended;

18. A sublicense to use and sell certain technology in the United States related to the formulation of the dental alloy used in the Valiant Products under claims of certain patents owned by Special Metals Corporation and granted to Dentsply under a License Agreement dated October 8, 1980, as amended; and

19. All patents and patent applications owned by Dentsply related to the Valiant Business and the formulas, processes, technology, know-how, trade secrets, manufacturing information, specifications, plans, drawings and data and other tangible embodiments of know-how used in the Valiant Business, including (without limitation) the technology and know-how required to manufacture commercially acceptable products.

J. "*Worldwide Valiant Products*" means Dentsply's silver alloy products marketed anywhere in the world under the names "Valiant," "Valiant Ph.D.," "Valiant Snap-Set," and "Valiant Extended Time."

K. "*Worldwide Valiant Business*" means Dentsply's business of manufacturing, marketing, and selling Worldwide Valiant Products.

L. “*Worldwide Valiant Assets*” means all assets constituting or otherwise related to the Worldwide Valiant Business, including but not limited to:

1. All books, records, manuals, reports, dockets, lists, advertising and promotional materials and other documents relating to the Worldwide Valiant Products;
2. Valiant product line Profit and Loss Statements relating to each of the Worldwide Valiant Products;
3. All trademarks together with all trademark registrations and applications therefor relating to Worldwide Valiant Products;
4. All lists of stock keeping units (“SKUs”); *i.e.*, all forms, package sizes and other units in which Worldwide Valiant Products are sold and which are used in records of sales and inventories;
5. All Bills of Materials for each of the Worldwide Valiant Products, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including all lists of authorized sources for materials and components;
6. All artwork and mechanical drawings currently in use relating to each of the Worldwide Valiant Products;
7. All fixed assets listed on Schedule I hereto;
8. All lists of all customers, including but not limited to, distributors, dentists, and dental schools, who have bought Worldwide Valiant Products, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
9. All marketing information relating to Worldwide Valiant Products, including but not limited to Dentsply’s consumer and trade promotional, marketing and business programs;
10. All inventories of finished goods, packaging and unique raw materials relating to Worldwide Valiant Products;
11. All names of manufacturers under contract with Dentsply to produce Worldwide Valiant Products and all contracts with outside suppliers for formulations unique to Worldwide Valiant Products;

12. All product testing and laboratory research data relating to Worldwide Valiant Products, including but not limited to toxicity research data, all regulatory registrations and correspondence;

13. All consumer correspondence and documents related to the Worldwide Valiant Business;

14. All price lists for Worldwide Valiant Products;

15. All information relating to costs of production for each of the Worldwide Valiant Products, including but not limited to raw material costs, packaging costs, and advertising and promotional costs;

16. All sales data relating to Worldwide Valiant Products;

17. A sublicense to make, use and sell certain technology in certain designated countries of the world related to the design for a sealed, mercury-tight dental mixing capsule under claims of certain patents owned by Ernest Muhlbauer K.G. and granted to Dentsply under a License Agreement dated November 26, 1979;

18. A sublicense to use and sell certain technology in the United States related to the formulation of the dental alloy used in the Worldwide Valiant Products under claims of certain patents owned by Special Metals Corporation and granted to Dentsply under a License Agreement dated October 8, 1980, as amended; and

19. All patents and patent applications owned by Dentsply related to the Worldwide Valiant Business and the formulas, processes, technology, know-how, trade secrets, manufacturing information, specifications, plans, drawings and data and other tangible embodiments of know-how used in the Worldwide Valiant Business, including (without limitation) the technology and know-how required to manufacture commercially acceptable products.

M. "*Dispersalloy Products*" means J&J's silver alloy products, marketed in the United States under the names "Dispersalloy" and "Unison."

N. "*Dispersalloy Business*" means the business of manufacturing, marketing, and selling Dispersalloy Products.

II.

It is ordered, That:

A. Dentsply shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, the Valiant Assets.

B. Dentsply shall divest the Valiant Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Valiant Assets is to ensure the continuation of such assets as an ongoing, viable enterprise and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Dentsply shall make available to the acquirer such Dentsply personnel, assistance and training as the acquirer might reasonably need to transfer technology and know-how and shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the technology and know-how. However, Dentsply shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the Valiant Assets are divested pursuant to this order.

D. Dentsply will provide reasonable cooperation and assistance to the acquirer in obtaining approvals for the transfer of all registrations relating to the Valiant Business or the Worldwide Valiant Business.

E. Dentsply shall comply with all terms of the Hold Separate Agreement, attached hereto and made a part hereof. Said agreement shall continue in effect until such time as Dentsply has divested the Valiant Assets or until such time as the Hold Separate Agreement provides.

F. Dentsply shall take such action as is necessary and reasonable to maintain the viability and marketability of the Worldwide Valiant

Assets and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any of the Worldwide Valiant Assets except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Worldwide Valiant Assets.

III.

It is further ordered, That:

A. If Dentsply has not divested, absolutely and in good faith and with the Commission's approval, the Valiant Assets within nine (9) months of the date this order becomes final, Dentsply shall consent to the appointment by the Commission of a trustee to divest the Valiant Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. *Provided, however,* that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. If the trustee has not divested the Valiant Assets within the subsequent nine (9) months, the trustee shall divest the Worldwide Valiant Assets within twelve (12) months thereafter. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Dentsply shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Dentsply to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, Dentsply shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Dentsply, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Valiant Assets, or, as the case may be, to divest the Worldwide Valiant Assets.

3. The trustee shall have nine (9) months to divest the Valiant Assets from the date of appointment, and if the Valiant Assets have not been divested, the trustee shall have twelve (12) months thereafter to accomplish the divestiture of the Worldwide Valiant Assets. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the twelve (12) month divestiture period for the Worldwide Valiant Assets may be extended by the Commission; *provided, however*, the Commission may only extend the twelve (12) month divestiture period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Valiant and Worldwide Valiant Assets, or any other relevant information, as the trustee may reasonably request. Dentsply shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Dentsply shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Dentsply shall extend the time for divestiture under paragraph III.B.3. in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to Dentsply's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II.B., the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each prospective acquirer for the divestiture of either the Valiant Assets or the Worldwide Valiant Assets. Either divestiture shall be made in the manner set out in paragraph II; *provided, however*, if the trustee receives *bona fide* offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer selected by Dentsply from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of Dentsply, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Dentsply, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Dentsply and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Valiant Assets or the Worldwide Valiant Assets.

7. Dentsply shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within thirty (30) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, Dentsply shall execute a trust agreement that transfers to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain either the Valiant Assets or the Worldwide Valiant Assets.

12. The trustee shall report in writing to Dentsply and to the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Dentsply has fully complied with the provisions of paragraphs II. and III. of this order, Dentsply shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Dentsply shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture, including the identity of all parties contacted. Dentsply also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That for a ten (10) year period commencing on the date this order becomes final, Dentsply shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any equity or other interest in, or the whole or any part of the stock or share capital of, any person or business that is engaged in any way in the manufacture, sale, shipment or distribution of silver alloy in the United States, or, except in the ordinary course of business, any assets used or previously used in (and still suitable for use in), the manufacture, sale, shipment or distribution of silver alloy. One year from the date this order becomes final and annually thereafter for nine years on the anniversary date of this order, Dentsply shall file with the Secretary of the Federal Trade Commission a verified written report of its compliance with this paragraph.

VI.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Dentsply, Dentsply shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Dentsply relating to any matters contained in this consent order; and

B. Upon five (5) days notice to Dentsply, and without restraint or interference from Dentsply, to interview officers or employees of Dentsply, who may have counsel present, regarding such matters.

VII.

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

SCHEDULE I

VALIANT MANUFACTURING/PACKAGING EQUIPMENT

Magnathermic Melter
Atomizer
Ovens (2)
Ohio grinder
America centrifuge
Ball mill
Sweco sieve
Vortex particle classifier
Pfaudler treating vessel Drum tumbler
ATM centrifuge
2 cu. ft. Paterson Kelly Blender
Box siever
Stokes tablet machine
Stacker/packager
Aidlin plugger
Synthron Capper
Fasson labler
DMG Sure Cap filling machine
Old design Sure Cap filling machine
Sure-Cap Mold

HOLD SEPARATE AGREEMENT

This Hold Separate Agreement (the "Agreement") is by and among Dentsply International, Inc. (Dentsply), a corporation organized, existing, and doing business under and by virtue of the

laws of Delaware, with its office and principal place of business at 510 West College Avenue, York, Pennsylvania; and the Federal Trade Commission (“the Commission”), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the “Parties”).

Premises

Whereas, on April 21, 1992, Dentsply entered into an agreement with Johnson & Johnson (“J&J”) to acquire certain assets of its Professional Dental Care division, (hereinafter “Acquisition”); and

Whereas, J&J, with its principal office and place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey, produces and markets, among other things, silver alloy products; and

Whereas, the Commission is now investigating the acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached agreement containing consent order (“consent order”), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of Dentsply’s Valiant Business during the period prior to the final acceptance of the consent order by the Commission’s (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of the Valiant Assets or the Worldwide Valiant Assets as described in paragraph I of the consent

order and the Commission's right to have the Valiant Business continued as a viable competitor; and

Whereas, the purpose of the agreement and the consent order is to:

1. Preserve the viability of the Valiant Business pending the divestiture of the Valiant Assets or the Worldwide Valiant Assets, as defined in paragraphs I.I. and I.L. of the consent order, as a viable and ongoing enterprise,
2. Remedy any anticompetitive effects of the acquisition, and
3. Preserve the Valiant Business as an ongoing, viable silver alloy business until divestiture is achieved; and

Whereas, Dentsply's entering into this agreement shall in no way be construed as an admission by Dentsply that the acquisition is illegal; and

Whereas, Dentsply understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws of the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Dentsply with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate Agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Valiant Assets or the Worldwide Valiant Assets pursuant to the consent order, as follows:

1. Dentsply agrees to execute and be bound by the attached consent order.

2. Dentsply agrees that from the date this agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.b, it will comply with the provisions of paragraph 3 of this agreement:

a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's rules;

b. The day after the divestiture required by the consent order has been completed.

3. Because complete isolation of the Valiant Business from Dentsply's marketing and sales operations could cause irreparable harm to that business and make it difficult or impossible to divest the Valiant Assets as an ongoing, viable alloy products business, Dentsply will manage and maintain the Valiant Assets, as they are presently constituted, on the following terms and conditions:

a. Dentsply will appoint two individuals, one each from among Dentsply's current employees working in the marketing and sales areas of the L.D. Caulk division of Dentsply to manage and maintain the Valiant Business. These individuals ("the management team") shall manage the Valiant Business independently of the management of Dentsply's other businesses, except that these individuals may provide information to and receive information from Dentsply's production and financial personnel, and Dentsply's marketing and sales forces to the extent necessary to effectively operate the Valiant Business and arrange for the Valiant Products to be marketed and sold. The management team shall not thereafter, until the Valiant Assets are divested pursuant to the consent order, be in any way involved in the marketing or selling of any Dispersalloy Product.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Dentsply with the consent of the Commission. The independent auditor/manager shall have exclusive control over the operations of the Valiant Business, with responsibility for the

management of the Valiant Business and for maintaining the independence of that business.

c. Dentsply shall not exercise direction or control over, or influence directly or indirectly the independent auditor/manager or the management team or any of its operations relating to the operations of the Valiant Business; *provided, however*, that Dentsply may exercise only such direction and control over the management team and the Valiant Assets as is necessary to assure compliance with this agreement and with the order.

d. Dentsply shall maintain the viability and marketability of the Valiant Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability. Dentsply shall ensure the uninterrupted supply of Valiant Products and shall not impede production nor allow inventories to fall below reasonable levels.

e. Except for the management team, Dentsply shall not permit any other Dentsply employee, officer, or director to be involved in the management of the Valiant Assets. Nothing in this paragraph shall preclude Dentsply's sales, marketing, manufacturing, financial, accounting, or distribution personnel from providing services to the management team in the ordinary course of business as set forth in subparagraph 3.a.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to divest assets, Dentsply shall not receive or have access to, or the use of, any material confidential information about the Valiant Business or the activities of the management team in managing that business not in the public domain, nor shall the management team receive or have access to, or the use of, any material confidential information about the Dispersalloy Business or the activities of Dentsply in managing the Dispersalloy Business not in the public domain. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not

written request with reasonable notice to Dentsply made to its principal office in the United States, Dentsply shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Dentsply and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Dentsply relating to compliance with this agreement;

b. Upon five (5) days notice to Dentsply, and without restraint or interference from it, to interview officers or employees of Dentsply, who may have counsel present, regarding any such matters.

c. Information obtained by the Commission pursuant to this provision shall be given confidential treatment pursuant to Sections 6(f) and 21(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f) and 56(f).

6. This agreement shall not be binding until approved by the Commission.

APPENDIX A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Dentsply International Inc. (“Dentsply”) has entered into a consent order and Hold Separate Agreement with the Federal Trade Commission relating to the divestiture of certain Dentsply silver alloy assets and products, including its Valiant, Valiant Ph.D, Valiant Snap-Set and Valiant Extended Time products. Until such assets and products are divested, they must be managed and maintained as a separate, ongoing business, independent of all other competing product lines of Dentsply. All competitive information relating to all Valiant product lines must be retained and maintained by the persons responsible for the management of these products on a confidential basis and such persons shall be prohibited from providing,

discussing, exchanging, circulating or otherwise furnishing any such information to or with any other person whose employment involves any Dentsply competing alloy product, including Dispersalloy, except to the extent such information is required in connection with the manufacture or sale of Valiant products. All such persons responsible for the management of Dentsply's competing silver alloy products shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing any competition information about those products to or with any person responsible for Valiant products.

Any violation of the consent order or the Hold Separate Agreement, incorporated by reference as part of the consent order, subjects the violator to civil penalties and other relief as provided by law.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,
CONCURRING IN PART AND DISSENTING IN PART

I concur in the decision to accept the consent order insofar as it provides a remedy for the anticompetitive effects of the acquisition in the alloy amalgam market. I dissent from the decision not to seek relief in the pit and fissure sealant market.

It is not possible to distinguish the merger's competitive effect in the sealant market from that in the amalgam market on the basis of market structure as both are highly concentrated markets, and both become much more concentrated as a result of the merger. In fact, concentration is higher in the sealant market, and Dentsply International's postmerger market share will be significantly higher in the sealant market than in the amalgam market. Conditions of entry are similar in both markets, and there are no countervailing efficiencies in either market. Overall, I cannot find a reason, either in principle or in the evidence, to seek relief in one market but not the other.

A compromise in which the Commission obtains relief in the amalgam market in exchange for which it forgoes relief in the smaller sealant market is not a bargain that the Commission should strike.

The compromise may benefit amalgam consumers only at the expense of sealant consumers. The acquisition may substantially lessen competition in two product markets, and the Commission should seek relief in both markets.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I have voted in favor of the consent agreement in this case because I have reason to believe that the effect of the proposed acquisition might be substantially to lessen competition in the market for premium silver alloy in the United States. Because I do not believe that the acquisition in the premium sealant market would have the same effect, I believe that the Commission has correctly decided not to challenge that part of the acquisition.

This case, in my judgment, presents the Commission with the difficult scenario of two markets in transition: one experiencing increasing impact from non-premium brands, and the second, growth due to increased demand. As a result, while concentration is high, it is particularly important for us to examine the potential adverse competitive effects of the merger to see whether stories of anticompetitive effects in both markets appear viable.

In the silver alloy market, after a review of the information available, I have concluded that anticompetitive effects may follow from the proposed merger because non-premium brands have not yet achieved sufficient competitive significance. This was, however, a close call, in my judgment. By contrast, the changing nature of the sealant market, in my view, makes the sustainability of anticompetitive activity by premium brands more unlikely, despite the high concentration in that market. Accordingly, I do not believe that Commission action is warranted, based on the information available.

This merger presented complex and difficult issues on which reasonable people could clearly disagree. However, on balance, I believe that the result achieved by the proposed consent is entirely appropriate.

IN THE MATTER OF

UNITED STATES GOLF ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND
THE FEDERAL TRADE COMMISSION ACT

Docket C-3408. Complaint, Jan. 6, 1993--Decision, Jan. 6, 1993

This consent order requires, among other things, a New Jersey-based non-profit corporation to clearly state in all future advertisements and product descriptions in mail order catalogs, and in all mail order promotional material, whether its clothing and other textile-fiber merchandise are manufactured or processed in the United States, or imported, or both. In addition, the respondent is required to use proper generic fiber names, consistent with the Textile Fiber Products Identification Act, and not to mention or imply fiber content of a fiber not present in the product.

Appearances

For the Commission: *Robert Easton and Ronald D. Lewis.*

For the respondent: *Simeon M. Kriesberg, Mayer, Brown & Clatt, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that United States Golf Association, a non-profit corporation, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act and of the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby alleges:

PARAGRAPH 1. Respondent United States Golf Association, is a non-profit 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 Liberty Corner Road, Far Hills, New Jersey.

PAR. 2. Respondent is now, and for some time past has been, engaged, directly or through licensees, by means of mail order catalogs, in the advertising, offering for sale, sale and distribution of a variety of products in or affecting commerce, including textile wearing apparel and other textile fiber products as "textile fiber product" and "commerce" are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) (hereafter referred to as the Textile Act). The allegations in this complaint relate to mail order catalogs published prior to June 1991.

PAR. 3. In September 1984 Congress amended the Textile Act to require that catalogs and other mail order promotional material disclose whether textile fiber products offered for sale are imported or domestically produced or both. The amendment states:

Misbranding and False Advertising of Textile Fiber Products

(i) For the purposes of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America; or imported, or both. (15 U.S.C. 70b(i))

PAR. 4. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated a rule effective April 17, 1985, relating to country of origin in mail order advertising. Rule 34 states:

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised. (16 CFR 303.34, as amended)

PAR. 5. Section 4(b) of the Textile Act requires that a label attached to an imported or domestic textile product disclose the identity of the constituent fibers by their generic names. Section 4(c) of the Textile Act states that if fiber content is mentioned or implied in a written advertisement, then the proper generic names as required under Section 4(b) of the Textile Act must be disclosed. Section 4(b) of the Textile Act reads, in part, as follows:

. . . a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefore authorized by Section 5, is not on (1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name . . .

Section 4(c) of the Textile Act reads:

(c) For the purpose of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under Section 4(b) (1) and (2) is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated. (15 U.S.C. 70b(c))

PAR. 6. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated Rules 40, 41 and 42 relating to fiber content disclosures in advertising. Rules 40, 41 and 42 read:

Rule 40 - Use of Terms in Written Advertisements
Which Imply Presence of a Fiber.

The use of terms in written advertisements which are descriptive of a method of manufacture, construction, or weave, and which by custom and usage are also indicative of a textile fiber or fibers, or the use of terms in such advertisements which constitute or connote the name or presence of a fiber or fibers, shall be deemed to be an implication of fiber content under Section 4(c) of the Act, except

that the provisions of this section shall not be applicable to non-deceptive shelf or display signs in retail stores indicating the location of textile fiber products and not intended as advertisements.

Rule 41 - Use of Fiber Trademarks and Generic
Names in Advertising.

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and Regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissive ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or lettering at least once in the advertisement.

Rule 42 - Arrangement of Information in Advertising
Textile Fiber Products.

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and Regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount five percentum or more of the total fiber weight of the product together with any fibers disclosed in accordance with Rule 3(b) shall appear in order of predominance by weight, to be followed by the designation other fiber or other fibers if a fiber or fibers required to be so designated be present. [16 CFR 303.42, as amended, effective December 13, 1965.]

PAR. 7. Pursuant to Section 3 of the Textile Act, 15 U.S.C. 70a, violation of that Act and the Federal Trade Commission rules issued thereunder is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act.

PAR. 8. Respondent advertised or offered for sale textile fiber products in mail order catalogs or mail order promotional material

without a clear and conspicuous statement that the products were processed or manufactured in the United States of America, or imported, or both.

PAR. 9. Respondent advertised or offered for sale textile fiber products in mail order catalogs or mail order promotional materials in which fiber content was mentioned or implied in written advertisements, but the generic names were not disclosed.

PAR. 10. Respondent advertised or offered for sale textile fiber products in mail order catalogs or mail order promotional materials in which the manufacturer's trademark "Cashmerlon" was used to describe fiber content when there was no cashmere present.

PAR. 11. Respondent's sale, offering for sale and advertising of textile fiber products in or affecting commerce were in violation of the Textile Act and the Federal Trade Commission rules and regulations promulgated thereunder, and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation 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 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 Textile Fiber Products Identification Act; and

The respondent, its attorneys, and the 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 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 Acts, and that complaint should issue stating its charges that 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 United States Golf Association is a non-profit 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 presently located at Liberty Corner Road, Far Hills, New Jersey.

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

ORDER

I.

It is ordered, That respondent United States Golf Association, a non-profit corporation, its successors and assigns, trading under its own name or under any other name or names, and its officers, agents, licensees, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, selling or advertising of any textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, in commerce, as the terms "textile fiber product" and "commerce" are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) ("Textile Act"), do forthwith cease and desist from:

1. Failing to state in the description of such textile fiber product in a clear and conspicuous manner that such textile fiber-product is processed or manufactured in the United States of America, or imported, or both;

2. Mentioning or implying fiber content without using the generic fiber names in a manner consistent with the Textile Act and the rules and regulations thereunder; and

3. Mentioning or implying fiber content for a fiber which is not present in such textile fiber product.

II.

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

III.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its agents, licensees and representatives acting in connection with the offering for sale, selling or advertising of any textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, in commerce, as the terms “textile fiber product” and “commerce” are defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) (“Textile Act”).

IV.

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

MEDICAL MARKETING SERVICES, INC., ET AL.

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

Docket C-3409. Complaint, Jan. 12, 1993--Decision, Jan. 12, 1993

This consent order prohibits, among other things, a Florida firm and its founder from misrepresenting in advertising or promotional materials -- with respect to any chemical face peel procedure or any health care service -- the degree of risk, level of pain, recovery period, or results associated with the procedure; any entity's approval or endorsement of the procedure; or any training the respondents provide for the procedure and services.

Appearances

For the Commission: *Richard F. Kelly* and *Renate Kinscheck*.

For the respondents: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Medical Marketing Services, Inc., a corporation, and Michael Walerstein, individually and as an officer of Medical Marketing Services, Inc., (hereinafter "respondents"), have violated the provisions 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, alleges:

PARAGRAPH 1. (a) Respondent Medical Marketing Services, Inc. (hereinafter "MMS") is a Florida corporation. Its office and principal place of business was located at 860, Southwest 89th Terrace, Plantation, Florida.

(b) Respondent Michael Walerstein (hereinafter "Walerstein") is the founder, president and sole stockholder of MMS. He directs, controls, and formulates the acts and practices of the corporate

respondent, including the acts and practices alleged in this complaint. Respondent's address is 3101 Port Royale Blvd., Apt. 217, Fort Lauderdale, Florida.

PAR. 2. Since at least early 1986, and continuing thereafter, respondents have promoted and sold training and marketing services relating to a chemical face peel procedure respondents refer to as "Endodermology." Respondents have promoted and sold their services to licensed physicians (hereinafter "clients") throughout the United States through correspondence and other written materials. Respondents have provided clients with a promotional kit consisting of advertising materials, brochures, a video tape, sample sales scripts, press releases, direct mail letters, fact sheets and other promotional materials (hereinafter "promotional materials") that contain information about the aforementioned chemical face peel (hereinafter "peel procedure"), for the clients' use in marketing the peel procedure to the public. These promotional materials include, but are not necessarily limited to, the attached Exhibits A through F.

PAR. 3. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents' promotional materials contain statements concerning the safety, efficacy and nature of the peel procedure, including the following:

- (a) "Non-surgical, safe, effective procedure performed only by trained physicians." [Exhibit A]
- (b) "... it is a completely safe ... method." [Exhibit B]
- (c) "Everyone has a different tolerance for pain. A little itch was the only discomfort I had. . . Some felt a little sunburn or a little itch." [Video text]
- (d) "... this safe and painless way of reversing the aging process." [Exhibit C]
- (e) "Yes. You CAN look younger in just 8 days. Imagine the benefits of NON-SURGICAL FACIAL REJUVENATION." [Exhibit D]
- (f) "Effective in . . . removing wrinkles, lines, spots and folds in the face." [Exhibit E]
- (g) "As opposed to a chemical peel, Endodermology is designed to evenly reach certain layers of the epidermis that have been affected by aging or the environment" [Exhibit F]

(h) "RECOGNIZED PROCEDURE . . . accepted by the American Medical Association (AMA)" [Exhibit E]

PAR. 5. By and through the statements in the preceding paragraph and others not specifically set forth herein of similar import and meaning, respondents have, directly or by implication, represented the following:

(a) The peel procedure is free of the risk of serious adverse medical complications. In fact, the peel procedure is not free of the risk of serious adverse medical complications.

(b) The peel procedure involves little or no pain or discomfort. In fact, for many people, the peel procedure involves significant pain or discomfort.

(c) The peel procedure involves a recovery period of eight days. In fact, the peel procedure typically involves a recovery period of more than eight days.

(d) The peel procedure eliminates facial folds of skin. In fact, the peel procedure does not eliminate facial folds of skin.

(e) The peel procedure is not a chemical face peel. In fact, the peel procedure is a chemical face peel.

(f) The peel procedure is accepted or recognized by the American Medical Association. In fact, the peel procedure is not accepted or recognized by the American Medical Association.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 6. By and through the statements set forth in paragraph four referring to the safety of the peel procedure, and others not specifically set forth herein of similar import and meaning, respondents have represented, directly or by implication, that the peel procedure is unqualifiedly safe. Respondents have failed to disclose that the peel procedure entails a risk of serious adverse complications. In light of respondents' representation that this procedure is unqualifiedly safe, such failure to disclose is a deceptive omission of material fact.

PAR. 7. Respondents' promotional materials feature a "before" and "after" photograph of a woman and, in juxtaposition therewith, a caption "IMAGINE LOOKING YOUNGER In just 8 days." By and through these promotional materials, respondents have represented, directly or by implication, that the "after" photograph accurately depicts the likely condition of the typical patient's skin within eight days of when the peel procedure is administered.

PAR. 8. In fact, the "after" photograph referred to in the preceding paragraph does not accurately depict the likely condition of the typical patient's skin within eight days of when the peel procedure is administered. As opposed to the representation in the "after" photograph, the typical patient's skin is likely to be quite red and swollen at the end of eight days. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. By and through the aforesaid acts and practices, respondents engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

EXHIBIT A

**LOOK YOUNGER IN 1988
THAN YOU DID
IN 1978**



BEFORE AFTER

A YOUNGER LOOKING YOU

Non-surgical, safe, effective procedure performed only by trained physicians.
A new appearance can be yours in days.



© 1987 Medical Marketing Services, Inc. All Rights Reserved

EXHIBIT B

**RECEPTIONIST AND TELEPHONE
INFORMATION REQUESTS**

- Receptionist: "Good Morning/Afternoon"
- Patient: "I saw your advertisement and would like to find out more about it."
- Receptionist: "Terrific, I'll set up an appointment for you with our Consultant. This is a free, no obligation consultation. Do you prefer mornings or afternoons?"
Check Appointment Book and tell caller when you have an opening.
- Patient: "How much does it cost?"
- Receptionist: "Unfortunately, it is virtually impossible to give you costs without our Consultant seeing you, as each person has individual problems and must be seen in order to evaluate his/her particular problem area."
- Patient: "You must be able to give me some idea of the cost..."
- Receptionist: "It ranges from ____ to ____ depending on your needs."
(Doctor to supply price range prior to consultation.)
- Patient: "I can't come in, I'm working, etc."
- Receptionist: "We are open on _____ evenings or Saturdays. Is that convenient for you?"
- Patient: "I'd like to know something more about it before I come in."
- Receptionist: "It is a non-surgical procedure performed by our Doctor in the office. It removes wrinkles, blemishes, age spots, so in just 8 days you can look 10-15 years younger and it is a completely safe, reliable and effective method that has been in existence for over 60 years. I would like for you to come in and meet with our consultant who has had the procedure done and talk to her. She can answer any questions that you might have. Of course, this is a free, no obligation appointment. Would you prefer to come in during the day or in the evening?"

If patient still hesitates to make an appointment, say:

"I can send you a brochure if you like, explaining our process."

Get name, address and telephone number. Mail brochure with an Enclosure Letter. Record information on the daily Information Calls form and give these to the Consultant at the end of each week.

EXHIBIT C

Sample Announcement of Seminars for General Public

(place on company letterhead)

(date)

Contact: (name, telephone number)

Cosmetic Facial Rejuvenation Seminar in (City)

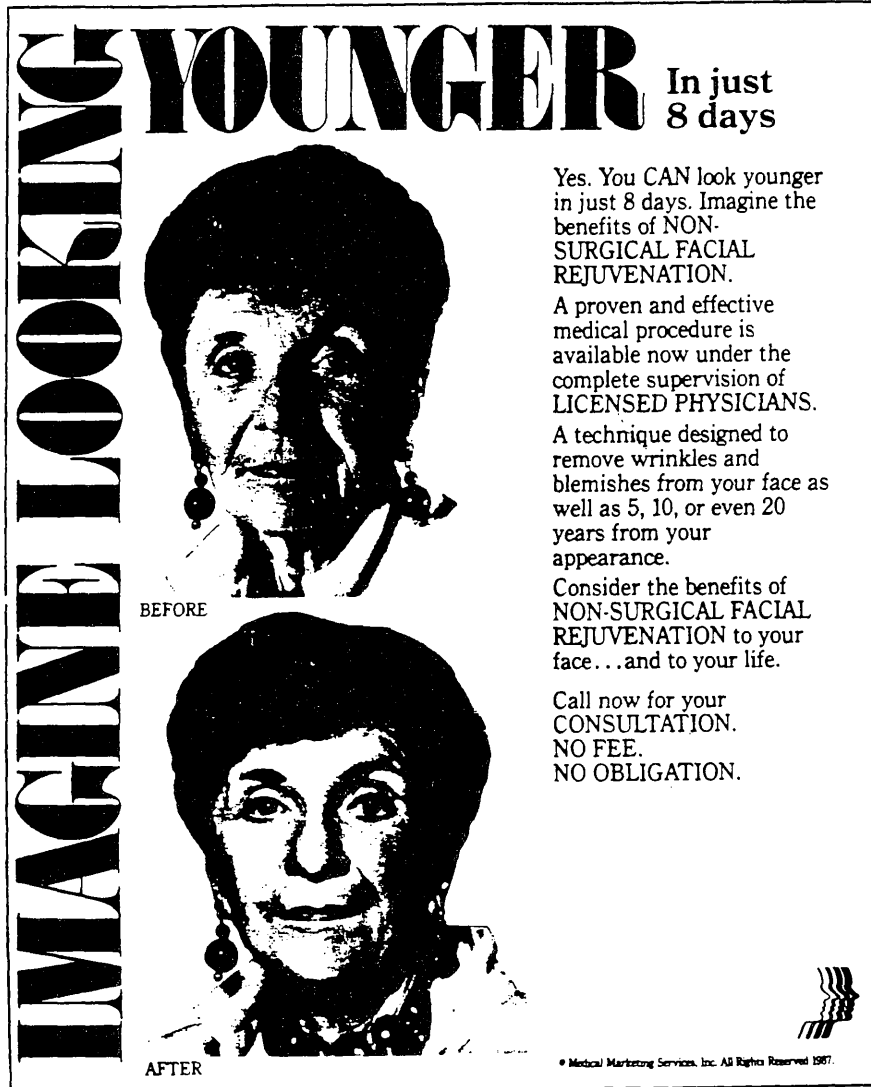
(City, State) -- (Company Name) is sponsoring a free seminar on Endodermology -- a medical, non-surgical cosmetic facial rejuvenation process that can remove up to 15 years from one's appearance. The seminar will be held (date) from (hours) at the (place), (address) in (city).

The seminar will focus on our society's desire for a youthful appearance and how it can be accomplished through this safe and painless way of reversing the aging process. Persons who have undergone the treatment will be available with Dr. (Name) of the (company name) to answer your questions. A reception will follow. For reservations call (phone) in (city).

###

EXHIBIT D

IMAGINE LOOKING YOUNGER In just 8 days



Yes. You CAN look younger in just 8 days. Imagine the benefits of **NON-SURGICAL FACIAL REJUVENATION**.

A proven and effective medical procedure is available now under the complete supervision of **LICENSED PHYSICIANS**.

A technique designed to remove wrinkles and blemishes from your face as well as 5, 10, or even 20 years from your appearance.

Consider the benefits of **NON-SURGICAL FACIAL REJUVENATION** to your face...and to your life.

Call now for your **CONSULTATION**.
NO FEE.
NO OBLIGATION.

© Medical Marketing Services, Inc. All Rights Reserved 1987.

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Complaint

EXHIBIT E

Endodermology™ Fact Sheet
(May Accompany Your Press Release)

(Place on Company Letterhead)

EXPLANATION: Medically approved non-surgical, cosmetic facial rejuvenation procedure

PROCESS:

1. solution applied to face
2. area sealed with surgical paper tape mask
3. mask removed and replaced by powdered mask
4. powdered mask removed eight days later

BENEFITS: Effective in:

- restoring sun-damaged skin
- removing wrinkles, lines, spots, and folds in the face
- stimulates deeply embedded dormant skin cells

RESULTS:

- glowing fresh, smooth, soft and firm textured skin
- can remove 5, 10 to 15 years from face
- enduring effects of treatment continue as age process resumes

LOCATION OF TREATMENT AND RECOVERY:

Eight - Day procedure

- treatment is performed in physician's office
- recovery period in aftercare facility

RECOGNIZED PROCEDURE:

- accepted by the American Medical Association (AMA)
- chemicals used approved by Food and Drug Administration

Complaint

116 F.T.C.

EXHIBIT E

FOUNDED:

The basic procedure had its beginnings in Europe and was brought to America in the early part of the century by German dermatologists. Over the years, the procedure has been modified and improved to its present state of effectiveness.

- (company name)
(address)
(telephone)
- (physician's name)
(physician's credentials)
- (consultant's name)

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Complaint

EXHIBIT F

SAMPLE GENERAL ENDODERMOLOGY™ RELEASE

(place on company letterhead)

(Date)

CONTACT: (name, phone)

THE MIRACLE OF ENDODERMOLOGY™

(City, State)--

Nature deals us a harsh blow, as age and the effects of the sun creep into the body -- particularly the face.

In this day and age, people are now feeling younger and working hard at looking as young as they feel. You can shape up a body but it's virtually impossible to hide a sun or age-ravaged face.

Thanks to a process called Endodermology,™ the clock of nature can be turned back by 10-20 years in both men and women who are experiencing the manifestation of wrinkles, spots or roughness of the skin's epidermis. A safe, non-surgical face rejuvenation procedure, Endodermology,™ works on the outer layers of skin. As opposed to a chemical peel, Endodermology™ is designed to evenly reach certain layers of the epidermis that have been affected by aging or the environment (sun, wind or pollution).

The most remarkable aspect of Endodermology™ is the enduring effects of the process. Soft, smooth, glowing skin replaces the old skin for years following treatment. As the aging process resumes, the patient will always look 10-20 years younger.

Endodermology,™ performed by a select group of medical doctors throughout the country, is becoming one of the most popular forms of age rejuvenation procedures in the United States.

Dr. (name, M.D. or D.O.) (name of Company), based in (City, State) offers the Endodermology™ process in the (city) area. Dr. (name) is located at (address).

For further information on Endodermology™ contact Dr. (name) at the (company name, phone).

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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 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 a 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 Medical Marketing Services, Inc. ("MMS") is a Florida corporation. Its office and principal place of business was located at 860 Southwest 89th Terrace, Plantation, Florida.

2. Respondent Michael Walerstein is the founder, president and sole stockholder of MMS. He directs, controls and formulates the acts and practices of MMS, including the acts and practices alleged in the complaint herein. Respondent's address is 3101 Port Royale Blvd., Apt. 217, Fort Lauderdale, Florida.

3. 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

DEFINITIONS

For purposes of this order, the term “*chemical face peel procedure*” (hereafter “peel procedure”) shall mean the application of a chemical solution containing phenol, or other solution having a similar effect, to the skin to destroy the top layers of the skin.

I.

It is ordered, That respondents, Medical Marketing Services, Inc., a corporation, its successors and assigns, and its officers, and Michael Walerstein, individually and as an officer of said corporation, and respondents’ agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any peel procedure or any other health care service; in connection with the advertising, promotion, offering for sale or sale of any training in performing any peel procedure or any other health care service; or in connection with the advertising, promotion, offering for sale or sale of any service in marketing any peel procedure or any other health care service, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, that:

1. Any peel procedure is free or virtually free of the risk of serious adverse medical complications.

2. Any peel procedure involves little or no pain or discomfort.
3. Any peel procedure involves a recovery period consisting of only a few days.
4. Any peel procedure eliminates facial folds of skin.
5. Any peel procedure is not a chemical face peel.
6. Any peel procedure is accepted or recognized by the American Medical Association.

B. Making any representation, directly or by implication, about the safety of any peel procedure, or any other health care service which entails serious adverse risks, unless respondents clearly and prominently disclose in close proximity to any such representation that such procedure or service entails adverse risks.

C. Misrepresenting, in any manner, directly or by implication:

1. The degree of risk associated with any peel procedure or any other health care service;
2. The level of pain or discomfort associated with any peel procedure or any other health care service;
3. The recovery period required for any peel procedure or any other health care service;
4. The results that can be achieved with any peel procedure or any other health care service;
5. Approval or endorsement of any peel procedure or any other health care service by any entity.

D. Misrepresenting, in any manner, directly or by implication, the likely condition of the typical patient's skin within any specified period following any peel procedure.

E. Making any representation, directly or by implication, relating to the risks or benefits of any peel procedure unless respondents clearly and prominently disclose in close proximity to such representation that the peel procedure is a chemical face peel.

F. Misrepresenting, in any manner, directly or by implication, any material fact relating to any peel procedure or any other health care service, or the results thereof.

G. Disseminating to any provider of health care services any material containing any representation prohibited by any of the above provisions I.A.-F. of this order.

II.

It is further ordered, That for the purpose of determining and securing compliance with this order, respondents MMS, or its successors and assigns, and Walerstein shall:

A. Within thirty (30) days following the date of entry of this order, distribute a copy of this order to all of respondents' present officers, agents, representatives, independent contractors and employees having responsibilities with respect to the subject matter of this order; and for a period of five (5) years from the date of entry of this order, distribute a copy of same to all of respondents' future officers, agents, representatives, independent contractors and employees having said responsibilities.

B. For a period of five (5) years from the date of entry of this order, maintain and, within ten (10) days of a written request, make available to duly authorized representatives of the Commission for inspection and copying, complete records relative to the manner and form of respondents' compliance with the above terms and provisions of this order, including copies of each different material in which any representation subject to part I of this order is made.

C. For a period of ten (10) years from the date of entry of this order, notify the Commission in writing at least thirty (30) days prior to any discontinuance of respondent Walerstein's affiliation with the corporate respondent and inform the Commission in writing within 30 days of any affiliation of respondent Walerstein with a new business or employment which involves the advertising, promotion, offering for sale or sale of any peel procedure or any other health care service, the advertising, promotion, offering for sale or sale of training in performing any peel procedure or any other health care service or the advertising, promotion, offering for sale or sale of any service in marketing any peel procedure or any other health care

service, each such notice to include the respondent Walerstein's new business address and a statement of the nature of the business or employment with which the respondent is newly affiliated, as well as a description of the respondent's duties and responsibilities in connection with the business or employment.

D. Within ten (10) days after issuance of this order, designate an agent authorized to accept correspondence and service of process from the Federal Trade Commission on behalf of respondent Walerstein, notify the Commission of the name and address of such agent, and cause said agent to notify the Commission in writing within ten (10) days of his or her acceptance of such designation, and, for a period of ten (10) years from the date of issuance of this order, at all times maintain such a designated agent, notify the Federal Trade Commission of any change in the name or address of such designated agent within 10 days of such change, and cause each such designated agent to notify the Commission in writing within ten days of his or her acceptance of such designation.

E. 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, the filing of a bankruptcy petition, or any other change in the corporate respondent that may affect compliance obligations arising out of this order.

F. Within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which respondents have complied with this order.

IN THE MATTER OF

SOUTHEAST COLORADO PHARMACAL ASSOCIATION

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

Docket C-3410. Complaint, Jan. 15, 1993--Decision, Jan. 15, 1993

This consent order prohibits, among other things, a Colorado-based association of pharmacies, that dispense prescriptions which are paid for by third-party payers according to predetermined formulas, from entering into or threatening to enter into any agreement with pharmacies to withdraw or to refuse to participate in these kinds of reimbursement programs in the future.

Appearances

For the Commission: *Claude W. Wild, III and Jeffery Dahnke.*
For the respondent: *John Geddes, President, La Junta, CO.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that the Southeast Colorado Pharmacal Association, hereinafter sometimes referred to as respondent, has violated the provisions of the 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 as follows:

RESPONDENT

PARAGRAPH 1. Respondent Southeast Colorado Pharmacal Association ("SCPhA") is an unincorporated association of pharmacies doing business in the State of Colorado, with its office and principal place of business located at 15 W. 22nd Avenue, La Junta, Colorado.

PAR. 2. SCPhA's members are generally engaged in the business of the retail sale of prescription drugs. At all times relevant to this complaint, SCPhA members included the following pharmacies located in southeastern Colorado: Ordway Pharmacy, Harris Pharmacy, Sunnyside Pharmacy, Gibson's Pharmacy (La Junta), Jeffers Pharmacy, Loma Vista Pharmacy, Opera House Pharmacy, City Pharmacy, Val-U-Med Healthmart, Coles Prescription Pharmacy, Corner Pharmacy, Geddes Drug, Gibson's Pharmacy (Lamar), Jim's Pharmacy, L-M Healthmart, Gale Drug, Ray's Pharmacy, Walsh Drug, and Kiowa Drug. Except to the extent that competition has been restrained as alleged herein, SCPhA's members have been and now are in competition among themselves and with other pharmacy firms in southeastern Colorado.

JURISDICTION

PAR. 3. SCPhA is and has been at all times relevant to this complaint organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses and through the policies, acts, and practices described below, SCPhA and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

COMPETITION

PAR. 5. In their course of business, pharmacy firms fill prescriptions for customers which are often paid for by health insurance plans which provide coverage for prescription drugs. Through the Public Employees' Retirement Association of Colorado ("PERA"), the State of Colorado offers a Health Care Program to retired employees ("beneficiaries") which includes a prescription drug plan ("the Plan"). Since January 1, 1987, Pharmaceutical Card Services, Inc. ("PCS"), a nationwide administrator, has administered the Plan on behalf of PERA.

PAR. 6. In order to administer prescription drug plans sponsored by third-party payers such as PERA, PCS enters into participation agreements with pharmacies under which pharmacies accept as payment in full (1) a reimbursement of the ingredient cost of the drug, and (2) a dispensing fee, for those prescriptions filled for individuals covered by a prescription drug plan. Under the Plan offered by PERA, part of the payment in full accepted by pharmacies is paid by the beneficiary as a co-payment. Payment by third-party payers under PCS administered prescription drug plans is usually made to the participating pharmacy.

PAR. 7. Absent collusion between or among pharmacies, each pharmacy firm would decide independently whether to enter into a participation agreement with PCS. Such independent action would insure that PERA and the beneficiaries of the Plan would enjoy the benefits of competition among pharmacies.

PAR. 8. Effective July 1, 1988, PERA and PCS lowered the reimbursement level for the ingredient cost of prescriptions filled under PERA's prescription drug plan in order to contain escalating costs for the prescription drugs used by the Plan's beneficiaries.

ANTICOMPETITIVE ACTS AND PRACTICES

PAR. 9. During July 1988, in response to the change in reimbursement level, respondent SCPhA, acting through its president, John W. Geddes, communicated with other SCPhA members regarding participation in the Plan and scheduled a meeting of SCPhA members. In his communications with SCPhA members, Mr. Geddes also advised them of his own intention not to participate in the Plan.

PAR. 10. SCPhA conducted the above referenced meeting in July 1988, and SCPhA members there agreed not to participate in the Plan. SCPhA members also agreed to send a letter to PERA, drafted by Mr. Geddes and signed by all members, to urge PERA to reconsider and change the new reimbursement formula. In connection with this letter, SCPhA members agreed to give PERA until September 30, 1988, to resolve their concerns. Finally, SCPhA

members agreed to place notices in local newspapers announcing to the public their refusal to participate in the Plan if PERA did not change the reimbursement formula by the September 30, 1988, deadline.

PAR. 11. Pursuant to the agreements arrived at during the above referenced meeting, John W. Geddes sent a letter to PERA on or about August 1, 1988, signed by most SCPhA members, urging PERA to increase its reimbursement level. The letter stated that the pharmacies expected PERA to resolve their concerns no later than September 30, 1988. Mr. Geddes also wrote to PERA on or about October 1, 1988, on behalf of SCPhA, to inform PERA that SCPhA members would not participate in the plan and that notices would be placed in local newspapers announcing to the public that SCPhA members would not participate in the Plan. On or about October 1, 1988, Mr. Geddes placed such notices in at least two local newspapers.

PAR. 12. The refusal of SCPhA's members to participate in the Plan has required individuals covered by the Plan to pay for prescriptions directly and seek reimbursement from PERA through PCS. Individual consumers have incurred additional expenses since the difference in the amount of money paid to the pharmacy and the amount reimbursed by PCS is greater than the co-payment under the Plan.

ANTICOMPETITIVE EFFECTS

PAR. 13. Respondent SCPhA has restrained competition among pharmacies by conspiring with at least some of its members to engage in a concerted refusal to deal with PERA, in order to increase the price paid for prescriptions filled for individuals covered by the Plan and to deny PERA and these individuals the benefits of competition.

PAR. 14. The combination or conspiracy and the acts and practices described above have unreasonably restrained competition among pharmacy firms in southeastern Colorado, and have injured consumers by increasing prices paid to pharmacies for prescription drugs with respect to third-party prescription benefit plans.

PAR. 15. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are continuing, will continue, or are likely to recur in the absence of the relief herein requested.

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 complaint which the Denver Regional Office 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, by its duly authorized officer, 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 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 Southeast Colorado Pharmacal Association is an unincorporated association of pharmacies, existing and doing busi-

ness under the laws of the State of Colorado, with its office and principal place of business located at 15 W. 22nd Avenue, in the City of La Junta, State of Colorado.

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. “*SCPhA*” means the Southeast Colorado Pharmacal Association and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. “*Third-party payer*” means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage (“Covered Persons”), and includes, but is not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; prescription service administrative organizations; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs;

C. “*Participation agreement*” means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. “*Pharmacy firm*” means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions

and joint ventures that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That SCPhA, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into any proposed or existing participation agreement;

B. For a period of five (5) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms after (1) any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and SCPhA fails to eject such person from the meeting, or (2) two persons make such statements;

C. For a period of five (5) years after the date this order becomes final, providing advice to any pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. *Provided, however*, that nothing in this paragraph II.C. shall prohibit SCPhA from communicating purely

factual information describing the terms and conditions of any participation agreement or operations of any third-party payer;

D. For a period of five (5) years after the date this order becomes final, communicating in any way to any pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

E. For a period of five (5) years after the date this order becomes final, soliciting from any pharmacy firm any information concerning that firm's or any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

Provided, however, that nothing in this order shall be construed to prevent SCPPhA from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That SCPPhA:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of SCPPhA's members within thirty (30) days after the date this order becomes final;

B. For a period of five (5) years after the date this order becomes final, provide each new SCPPhA member with a copy of this order at the time the member is accepted into membership;

C. File a verified written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five years on the anniversary of the date this order

becomes final, and at such other times as the Commission may require, by written notice to SCPhA, setting forth in detail the manner and form in which it has complied and is complying with this order;

D. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by paragraphs II. and III. of this order, including but not limited to, all documents generated by SCPhA or that come into SCPhA's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

E. Notify the Commission at least thirty (30) days prior to any proposed change in SCPhA such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Complaint

116 F.T.C.

IN THE MATTER OF

SITE FOR SORE EYES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3411. Complaint, Jan. 15, 1993--Decision, Jan. 15, 1993*

This consent order requires, among other things, a California chain of retail stores that sell eye-care products and services to have competent and reliable scientific evidence to substantiate any future claim that any lens, shade, coating or other material sold in connection with eyeglasses protects eyes from radiation from any source. In addition, the respondent is required to maintain materials relied upon to substantiate claims covered by the order and to distribute copies of the order to specified individuals and entities.

Appearances

For the Commission: *Linda K. Badger* and *Matthew D. Gold*.

For the respondent: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Site for Sore Eyes, Inc., a corporation, ("respondent"), has violated the provisions 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, alleges:

PARAGRAPH 1. Site for Sore Eyes, Inc., is a California corporation, with its principal office or place of business at 3512 Breakwater Court, Hayward, California.

PAR. 2. Respondent operates a chain of retail stores offering a variety of eye care products and services. In the course and conduct of its business, respondent has engaged in the promotion, offering for sale, sale, and distribution to the public of a coating for eyeglasses to

protect the user from ultraviolet radiation (hereinafter referred to as "UV protective coating for eyeglasses").

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated, or has caused to be disseminated, advertisements for UV protective coating for eyeglasses, including, but not necessarily limited to, a place mat displayed on eyeglass fitting tables that contains promotional information. These advertisements contain the following statements:

PROTECTION FROM UV RAYS

Treatment: UV400

UV protective coating will protect your eyes from the harmful rays of the sun as well as from computer screens. UV radiation can cause redness and irritation to the eyes -- and can also cause irreversible damage to the retina and cornea. This clear, non-toxic formula protects your eyes by absorbing 99% of all harmful UV rays.

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement described in paragraph four, respondent has represented, directly or by implication, that computer screens emit UV radiation that is harmful to the eyes, and that UV protective coating will protect the eyes from such harmful radiation.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement described in paragraph four, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) 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 San Francisco Regional Office 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 attorneys, 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 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 Site For Sore Eyes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 3512 Breakwater Court, Hayward, California.

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

ORDER

I.

It is ordered, That respondent Site for Sore Eyes, 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 manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any eyeglass or eyeglass related device or product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product protects eyes from radiation from any source, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

For purposes of this order, “*competent and reliable scientific evidence*” shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. For purposes of this order, “*eyeglass related device or product*” shall mean any lens, shade, coating, or other material sold in connection with eyeglasses.

II.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon

request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements, promotional materials, documents, or other materials relating to the offer for sale or sale of any product covered by this order that make any representation covered by this order;

B. All materials relied upon by respondent to substantiate any representation covered by this order;

C. All test reports, studies, experiments, analyses, research, surveys, demonstrations, or other materials in the possession or control of respondent that contradict, qualify, or call into question any representation covered by this order or the basis on which respondent relied for such representation, including complaints from consumers.

III.

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

IV.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon them, distribute a copy of this order to any individual or entity who or which is involved in the preparation and placement of advertisements or promotional materials, or communicates with customers or prospective customers regarding the use of any product covered by this order, and shall obtain from each such individual or entity a signed and dated statement acknowledging receipt of this order.

V.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Complaint

116 F.T.C.

IN THE MATTER OF

AMERICAN FAMILY PUBLISHERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9240. Complaint, Apr. 16, 1990--Decision, Jan. 21, 1993*

This consent order prohibits, among other things, a New Jersey-based seller of magazine subscriptions from misrepresenting that an attorney is actively and substantially involved in the collection of any debt, and that legal action with respect to any alleged debt is about to be, or will be, initiated. Respondent also is prohibited from failing to instruct any debt collector it retains, engages or employs to comply fully with all the provisions of the Fair Debt Collection Practices Act.

Appearances

For the Commission: *David Medine, Roger J. Fitzpatrick and Christopher Keller.*

For the respondent: *Charles J. Miller and David H. Carlin, Loeb & Loeb, New York, N.Y.*

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 American Family Publishers, a joint venture partnership of The Time Incorporated Magazine Company and AFP Associates, hereinafter referred to as respondent, has violated the provisions 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, alleges:

PARAGRAPH 1. American Family Publishers is a joint venture partnership of The Time Incorporated Magazine Company and AFP

Associates, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Four Gateway Center, Suite 1000, Newark, New Jersey.

PAR. 2. Respondent has been and is now engaged in the advertising, offering for sale, and sale of magazine subscriptions directly by mail.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, in the course and conduct of its business, has engaged and now engages various debt collection agencies for the purpose of collecting debts allegedly owed to respondent.

PAR. 5. In the course and conduct of its business, respondent had knowledge of, and approved, the collection letters that the aforementioned debt collection agencies mailed to consumers allegedly owing debts to respondent.

PAR. 6. Typical contents of the letters referred to in paragraph five, but not necessarily all inclusive thereof, are the following:

Letter A:

Attorney's Name
Attorney's Address

Your creditor has requested that legal action be commenced in order to satisfy your lawful debt to him. . .

You are accordingly advised that unless payment is received by this office within five (5) days from the date of this letter I will instruct my client, your creditor, to retain an attorney to commence a law suit against you without further notice.

Such action would presumably result in a judgment being entered against you by the creditor, which may include court costs, interest and other disbursements, in addition to the amount presently due. In addition, if the judgment is entered, a property and/or income execution may be issued by the Sheriff's office in your County in order to effect collection of the judgment.

Attorney's Signature

Complaint

116 F.T.C.

Letter B :

Attorney's Name

I am the attorney hired by American Family Publishers to protect their interests in the United States. I have filed suits and obtained judgments on small balance accounts just like yours. My authority to collect these accounts includes the enforcement of judgments when received and docketed or, I can forward your account to a collection agency.

PAR. 7. By mailing to consumers the letter referred to in paragraph six, and others not specifically set forth herein, respondent's debt collection agencies represented, directly or by implication, that:

A. An attorney is actively and substantially involved in the collection of the debt to which the letters refer;

B. Legal action with respect to the alleged debt is about to, or will, be initiated if the debt is not paid.

PAR. 8. In truth and in fact:

A. An attorney is not actively and substantially involved in the collection of the debt to which the letters refer;

B. Legal action with respect to the alleged debt is neither about to, nor will, be initiated if the debt is not paid.

Therefore, the representations set forth in paragraph seven were and are false and misleading.

PAR. 9. Because respondent has knowingly approved the representations made by its debt collection agencies as set forth in paragraph seven, or has acted in concert with or knowingly assisted its debt collection agencies in making such representations, respondent has engaged in unfair and deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, 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 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 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent is a joint venture partnership organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at Four Gateway Center, Newark, New Jersey.

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

ORDER

I.

It is ordered, That respondent American Family Publishers, a joint venture partnership of The Time Incorporated Magazine Company and AFP Associates, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, agent, independent contractor, or other device, in connection with the collection or attempted collection of any debt in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication, that:

- (1) An attorney is actively and substantially involved in the collection of any debt;
- (2) Legal action with respect to any alleged debt is about to, or will, be initiated.

B. Failing to instruct any debt collector it retains, engages, or employs to comply fully with all provisions of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*, as amended or as it may hereafter be amended.

II.

It is further ordered, That respondent shall distribute a copy of this order to each of its present and future officers, agents, representatives, and employees having responsibility with respect to the collection of debts and to each of the present and future debt collectors that respondent retains, engages or employs and shall

secure from each such person or entity a signed statement acknowledging receipt of said order.

III.

It is further ordered, That:

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

(1) “*Consumer Accounts*” shall mean a debt owed to respondent by a direct mail purchaser of magazines or other goods or products;

(2) “*Debt Collector*” shall mean an independent third party engaged in the collection of debts on behalf of itself or others.

B. Respondent is enjoined from:

(1) Encouraging, inducing, advising or coercing any debt collector to which it sells, transfers, or assigns title to consumer accounts to engage in acts or practices that are prohibited by Section I(A) of this order with respect to such consumer accounts, provided that mere negotiation of the price of sale without referring to or suggesting practices prohibited by Section I(A) of this order shall not be deemed to be encouraging, inducing, advising or coercing;

(2) Failing to take reasonable steps sufficient to determine whether any debt collector to which it sells, transfers, or assigns title to consumer accounts engages in collection activities prohibited by Section I(A) of this order with respect to such consumer accounts. Respondent shall have satisfied its duty to determine which practices are employed by a debt collector if it instructs and contractually requires such debt collector to provide regularly to respondent collection letters used by such debt collector, and investigates all consumer complaints received by respondent (including those

received from third parties such as government agencies and better business bureaus) that state or imply a violation of Section I(A) of this order by debt collectors.

(3) Selling, transferring or assigning title, or continuing to sell, transfer or assign title to consumer accounts to any debt collector when it has actual knowledge or knowledge fairly implied that such debt collector is engaged in acts or practices prohibited by Section I(A) of this order, unless respondent has a *bona fide* belief that such debt collector is immediately ceasing to engage in such prohibited acts or practices.

(4) Failing to notify the Associate Director of Enforcement that it has terminated the sale, transfer or assignment of title to consumer accounts to a debt collector pursuant to the requirements of subsection (3) above.

(5) Failing to maintain, for a period of five (5) years from the date of entry of this order, records sufficient to demonstrate compliance with the order.

IV.

It is further ordered, That notwithstanding anything herein to the contrary:

A. Respondent shall have a complete defense to any charge that it has violated Section I(A) of this order if title to the subject consumer accounts had been, at the time the alleged violations occurred, assigned or transferred to a debt collector in a *bona fide*, arm's-length irrevocable sale; and

B. A debt collector shall not be deemed retained, engaged or employed for purposes of determining compliance with Section I(B) of this order if title to the subject consumer accounts had been, at the time the alleged violations occurred, assigned or transferred to such debt collector in a *bona fide*, arm's length irrevocable sale.

V.

It is further ordered, That for a period of five (5) years from the entry of this order, respondent shall promptly notify the Federal Trade Commission at least thirty (30) days prior to any proposed change, such as relocation, dissolution, assignment, or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

VI.

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

IN THE MATTER OF

THE ISALY KLONDIKE COMPANY

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

Docket C-3412. Complaint, Jan. 28, 1993--Decision, Jan. 28, 1993

This consent order prohibits, among other things, a Florida-based, frozen dessert bar corporation from misrepresenting the amount of fat, any other nutrient or ingredient, or calories in any of its frozen food products in the future. In addition, the order prohibits the respondent from misrepresenting the effect of any frozen food product on serum cholesterol levels or the risk of heart disease through the use of terms such as "low in cholesterol" or in any other manner.

Appearances

For the Commission: *Robert C. Cheek and Joel Winston.*

For the respondent: *Martin L. Holton, III, Womble, Carlyle, Sandridge & Rice, Winston-Salem, N.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Isaly Klondike Company, a corporation formerly known as Klondike (Southeast) Corporation, ("respondent"), has violated the provisions 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, alleges:

PARAGRAPH 1. Respondent The Isaly Klondike Company, a corporation formerly known as Klondike (Southeast) Corporation, is a Delaware Corporation. On January 1, 1992, The Hanover Klondike Company, Inc., a Delaware corporation, and Klondike (Pacific)

Corporation, a California corporation, merged with respondent. Previously all three corporations had done business as The Isaly Klondike Company. Respondent has its office and principal place of business located at 5400 118th Avenue North, Clearwater, Florida.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed the Klondike Lite bar, a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as “commerce” is defined in the Federal Trade Commission Act.

PAR. 4. Respondent disseminated or caused to be disseminated advertisements for Klondike Lite bars, including but not necessarily limited to, the attached Exhibits A through D. Specifically, the aforesaid advertisements contained the following statements:

a. If you don't believe that something lite can taste delicious, then try new Klondike Lite. It's 93% fat-free. Low in cholesterol. And made with 100% Nutra Sweet, so it's sugar-free. (Exhibit A);

b. Klondike Lite Sugar Free 93% Fat Free Frozen Desert with chocolate-flavored coating (Exhibits A and B);

c. ANNCR: We're here with another letter about new Klondike Lite Frozen Dessert bars. They're so delicious, it's hard to believe they're lite. As Miss Betsy Hudson of Baltimore, Maryland found out.

ANNCR: Dear Sir or Madam, she writes, I just tried a new Klondike Lite Bar, and it's really delicious. But it cannot be lite as everything lite I've ever eaten tastes like I didn't just eat anything, if you know what I mean. Well, Klondike Lite Bars taste like something. Something delicious, in fact. So they can't be light. Signed, I've got my fingers crossed that Klondike Lite Bars are really lite because if they are lite I can eat them without feeling guilty and I'll be a Klondike Lite fan forever if they really are lite, please, please, please tell me I'm wrong, Betsy.

ANNCR: Well, Betsy, you're right, you're wrong. Klondike Lite Bars are indeed lite. They're 93% fat-free, they're made with 100% Nutra Sweet, so they're sugar-free, and they're low in cholesterol.... (Exhibit C);

d. ANNCR: When people try new Klondike Lite Frozen Dessert Bars, they're so delicious they find it hard to believe they actually are lite. Among them, a Mr. John Parlato. He writes:

ANNCR: Hey! Who are you trying to kid, here. Do you really think that I believe these Klondike Lite Bars are lite? Lite means bland. Lite means less. Lite means dull, boring, innocuous. Since Klondike Lite Bars are delicious, they can't be lite. If they're light, everything delicious could be light. We'd have lite cheeseburgers, lite pizza, lite devils food cake, everything you ever wanted to eat would be lite. Since that's not the case, ipso facto, Klondike Lite Bars can't be lite. Signed, I wasn't born yesterday, John.

ANNCR: Well John, I'm not trying to kid you. Klondike Lite Bars are lite. They're 93% fat-free. They're made with 100% Nutra Sweet, so they're sugar-free. They're low in cholesterol. And since they're sugar-free, 93% fat-free, and low in cholesterol, ipso facto, they are lite. So try new Klondike Lite Bars... (Exhibit D).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent represented, directly or by implication, that Klondike Lite bars are 93% fat free.

PAR. 6. In truth and in fact, Klondike Lite bars are not now nor have been 93% fat free because the entire bar, including the coating, contains at least 14% fat by weight. Therefore, the representation as set forth in paragraph five was and is false and misleading.

PAR. 7. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent represented, directly or by implication, that Klondike Lite bars are low in fat.

PAR. 8. In truth and in fact, Klondike Lite bars are not now nor have been low in fat. Each bar contained 10 grams of fat at the time of the advertisements referred to in paragraph four. Therefore, the representation as set forth in paragraph seven was and is false and misleading.

PAR. 9. Through the use of statements contained in advertisements referred to in paragraph four, including but not limited to the advertisements attached as Exhibits A through D, respondent represented, directly or by implication, that Klondike Lite bars have significantly less fat and/or provide significantly fewer calories than regular Klondike bars on an equivalent weight basis.

PAR. 10. In truth and in fact, at the time of the advertisements referred to in paragraph four, Klondike Lite bars did not have significantly less fat and/or provide significantly fewer calories than regular Klondike bars on an equivalent weight basis. Therefore, the representation as set forth in paragraph nine was and is false and misleading.

PAR. 11. Respondent disseminated or caused to be disseminated advertisements for Klondike Lite bars, including but not necessarily limited to, the attached Exhibits A, C, and D. Specifically, the aforesaid advertisements contained the following statements:

- a. Klondike Lite...low in cholesterol...(Exhibit A);
- b. Klondike Lite Bars...they're low in cholesterol...(Exhibit C);
- c. Klondike Lite Bars...they're low in cholesterol...they're...low in cholesterol...(Exhibit D).


PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisements attached as Exhibits A, C, and D, respondent represented, directly or by implication, that consuming Klondike Lite bars will cause little or no increase in serum cholesterol levels.

PAR. 13. In truth and in fact, since Klondike Lite bars contained a substantial amount of saturated fat, consuming Klondike Lite bars would in many cases cause a substantial increase in serum cholesterol levels. Therefore, the representation as set forth in paragraph twelve was and is false and misleading.

PAR. 14. The dissemination by respondent of aforesaid false and misleading representations as alleged in the complaint constitutes unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

**Introducing Klondike Lite.
Proof That Less Can Taste Like More.**



SAVE 30¢
on new
Klondike
Lite

NEW AT YOUR STORES

VOID

If you don't believe that something lite can taste delicious then try new Klondike Lite. It's 93% fat-free, low in cholesterol, and made with 100% Nutrasweet® so it's sugar-free. Become a believer. Just rip out the coupon and find out why it took Klondike to make Lite delicious.

EXHIBIT B



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Complaint

EXHIBIT C

ANNCR: We're here with another letter about new Klondike Lite Frozen Dessert Bars. They're so delicious, it's's hard to believe they're lite. As Miss Betsy Hudson of Baltimore, Maryland, found out.

SFX: PAPER RUSTLING

ANNCR: Dear Sir or Madam, she writes, I just tried a Klondike Lite Bar, and it's really delicious. (CROSSFADE TO WOMAN'S VOICE) But it cannot be lite, as everything lite I've ever eaten tastes like I didn't just eat anything, if you know what I mean. Well, Klondike Lite Bars taste like something. Something delicious, in fact. So they can't be light. Signed, I've got my fingers crossed that Klondike Lite Bars are really lite because if they are lite I can eat them without feeling guilty and I'll be a Klondike Lite fan forever. If they really are lite, please (CROSS FADE BACK TO ANNOUNCER) please, please tell me I'm wrong, Betsy.

ANNCR: Well, Betsy, you're right, you're wrong. Klondike Lite Bars are indeed lite. They're 93% fat-free, they're made with 100% Nutrasweet, so they're sugar-free, and they're low in cholesterol. So you can go ahead and uncross your fingers and, uh, by the way, next time you write it would be a lot easier to read writing if you got the chocolate off your fingers before you started your letter. Try new Klondike Lite Bars and find out for yourself why it took Klondike to make lite taste delicious.

EXHIBIT D

ANNCR: When people try new Klondike Lite Frozen Dessert Bars, they're so delicious they find it hard to believe they are actually lite. Among them, a Mr. John Parlato. He writes:

SFX: PAPER RUSTLING

ANNCR: Hey! Who are you trying to kid, here. Do you really think that I believe these Klondike Lite Bars are lite? (CROSS FADE TO MAN'S VOICE) Lite means bland. Lite means less. Lite means dull, boring, innocuous. Since Klondike Lite Bars are delicious, they can't be lite. If they're light, everything delicious could be light. We'd have lite cheeseburgers, lite pizza, lite devils food cake, everything you ever wanted to eat would be lite. Since that's not the case, ipso facto, (CROSS FADE BACK TO ANNCRS. VOICE) Klondike Lite Bars can't be lite. Signed, I wasn't born yesterday, John.

ANNCR: Well John, I'm not trying to kid you. Klondike Lite Bars are lite. They're 93% fat-free. They're made with 100% Nutrasweet, so they're sugar-free. They're low in cholesterol. And since they're sugar-free, 93% fat-free, and low in cholesterol, ipso facto, they are lite. So try new Klondike Lite Bars. And find out for yourself why it took Klondike to make lite delicious.

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 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 attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by respondent 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 respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in the attached draft complaint, other than the jurisdictional facts, are true, and waives and other provisions as required by the Commission's Rules.

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 The Isaly Klondike Company 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 5400 118th Avenue, North, Clearwater, Florida.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent The Isaly Klondike Company, 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, labeling, offering for sale, sale or distribution of any food in or affecting commerce, as “food” and “commerce” are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat or any other nutrient or ingredient in any frozen food product, or the amount of calories provided by any frozen food product.

II.

It is ordered, That respondent The Isaly Klondike Company, 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, labeling, offering for sale or distribution of any food in or affecting commerce, as “food” and “commerce” are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through the use of terms such as “low in cholesterol” or in any other manner, the effect of any frozen food product on serum cholesterol levels or the risk of heart disease.

III.

Nothing in this order shall prevent respondent from making any representation that is specifically permitted in labeling for any food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

It is further ordered, That for three (3) years after the last date of dissemination of the representation, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondent in disseminating any representation covered by this order; and
2. All test reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question any representation that is covered by this order.

V.

It is further ordered, That respondent, or its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representations to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying all advertisements containing any representation covered by parts I and II of this order.

VI.

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

VII.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees who perform discretionary

functions and are engaged in the preparation or placement of advertisements or other materials covered by this order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, 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

CITICORP CREDIT SERVICES, INC.

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

Docket C-3413. Complaint, Jan. 29, 1993--Decision, Jan. 29, 1993

This consent order prohibits, among other things, a New York-based processor of credit card transactions to determine each month whether the chargeback rate for each of its merchants exceeds a certain percentage of all credit card transactions for two of the preceding three months. The respondent is required to stop processing the credit card sales of merchants with excessive chargeback rates or determine whether each merchant's chargebacks are the result of fraudulent, deceptive or unfair activity relating to the sale, advertising, promotion, or distribution of goods or services to consumers, and if so, to stop processing credit card transactions for the merchant at that point.

Appearances

For the Commission: *David Medine and Stephen Cohen.*

For the respondent: *Christopher Lipsett, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Citicorp Credit Services, Inc., a corporation hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act ("FTC 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, and alleges as follows:

PARAGRAPH 1. Respondent, Citicorp Credit Services, 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 1 Court Square, Long Island City, New York.

PAR. 2. Respondent has been engaged in the business of contracting with merchants to process credit card transactions and chargebacks and provide settlement services by funding those transactions processed.

PAR. 3. The acts and practices of respondent alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

PAR. 4. Respondent, in the course and conduct of its business, entered into an agreement with Credit Card Travel Services, Inc., d/b/a BankCard Travel Club ("BankCard") to provide settlement services, including the processing of credit card transactions.

PAR. 5. During the course of its business as a travel club, BankCard was engaged in unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), by, *inter alia*, billing consumers after they cancelled their memberships and failing to issue refunds.

PAR. 6. Respondent, in the course and conduct of its business, continued to process credit card transactions for BankCard when it knew or should have known that such transactions resulted from unfair and deceptive acts or practices.

PAR. 7. By providing the services described in paragraphs four and six above, respondent substantially assisted and aided and abetted BankCard in its unfair and deceptive acts or practices.

PAR. 8. Respondent's aforesaid practices violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Citicorp Credit Services, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 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 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 Citicorp Credit Services, 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 1 Court Square, Long Island City, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

DEFINITIONS

1. "*Credit Card*" means all credit cards and charge cards for which respondent, pursuant to contract with the merchant, processes transactions and Chargebacks and provides the merchant with settlement services (funding for transactions processed);
2. "*Merchant*" means a business (in whatever legal form) for which respondent processes Credit Card transactions;

3. “*Chargeback*” means a sales draft or transaction record, whether in print or electronic form, returned after presentment by a credit card issuer to a merchant’s credit card processor;

4. “*Consumer Dispute Chargeback*” means a chargeback that arises under any of the Visa or Master Card Chargeback codes, or chargeback codes for other credit card companies, that are equivalent to the categories described in the Fair Credit Billing Act, Sections 226.13(a) (1), (2), (3), and (6) of Regulation Z, 16 CFR 226.13(a) (1), (2), (3), and (6). A chargeback that is initiated by a person other than the cardholder before the transaction is placed on the cardholder’s account is not a consumer dispute chargeback;

5. “*Excessive Chargebacks*” means chargebacks that exceed six percent (6%) of all credit card transactions for any single credit card company for two (2) out of three (3) consecutive months. In determining the chargeback rate, respondent may exclude any month in which there are fewer than fifty (50) credit card transactions or fifteen (15) chargebacks. Respondent may assume that the merchant’s chargeback rate is the same for all credit card companies, unless respondent knows or should know that the merchant’s chargeback rate is higher for one credit card company than for the others;

6. “*Excessive Consumer Dispute Chargebacks*” means consumer dispute chargebacks that exceed three percent (3%) of all credit card transactions for any single credit card company for two (2) out of three (3) consecutive months. In computing this consumer dispute chargeback rate, respondent may exclude any month in which there are fewer than fifty (50) credit card transactions or fifteen (15) consumer dispute chargebacks. Respondent may assume that the merchant’s consumer dispute chargeback rate is the same for all credit card companies, unless respondent knows or should know that the merchant’s consumer dispute chargeback rate is higher for one credit card company than for the others;

7. “*Chargeback Reduction Plan*” means a plan that reduces the merchant’s rate of consumer dispute chargebacks below three percent (3%) for transactions occurring during the plan by the fourth month, as reported in the fifth month, after the plan begins, and maintains the

consumer dispute chargeback rate below three percent (3%) for the three (3) consecutive months thereafter. In computing the consumer dispute chargeback rate, respondent may exclude any month in which there are fewer than fifty (50) credit card transactions or fifteen (15) consumer dispute chargebacks;

8. “*Terminate*” means to cease processing credit card transactions for a merchant. Termination does not require that respondent cease processing chargebacks or consumer disputes with respect to prior transactions, or cease other business relationships with a merchant. Termination does not require that respondent cease processing credit card transactions for a merchant that has lines of business that are not subject to an investigation and are separate and distinct from the line of business currently under investigation;

9. “*Investigation*” means a good faith attempt to obtain and review, within thirty (30) days, the following information, as relevant, to determine whether a significant cause of the merchant's chargebacks is that the merchant is engaged in fraudulent, deceptive, or unfair activity relating to the sale, advertising, promotion, or distribution of goods or services to consumers:

a. The merchant's advertisements, sales scripts, promotional materials, and operating manuals;

b. The type of service or product offered by the merchant; the terms and conditions of the sale or offer of such service or product; the truthfulness and accuracy of representations made to consumers; and the adequacy of disclosures;

c. Complaints made or referred to respondent from any third party concerning the services or products of the merchant or its principals, excluding chargeback documentation;

d. Whether the merchant or its principals have been terminated by any other credit card processor and, if so, why the termination occurred; and

e. Whether the merchant or its principals have been investigated by any applicable federal law enforcement agency or state law enforcement agency for those states in which the merchant has its principal place of business, and up to five (5) additional states in

which the merchant transacts a significant amount of business, and if such information is available, the reason the law enforcement agency initiated the investigation and the outcome of the investigation.

If the merchant refuses to provide reasonably available information in its possession, custody, or control that the respondent has requested pursuant to the investigation, respondent shall presume the information would have tended to show that the merchant engaged in fraudulent, deceptive, or unfair activity.

ORDER

I.

It is ordered, That Citicorp Credit Services, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the processing of any credit card transaction, do forthwith cease and desist from:

A. Failing to determine, within fifteen (15) days of the later of (1) the end of each month or (2) receipt of the data upon which the monthly calculation is based, whether a merchant has excessive chargebacks;

B. Failing, for any merchant with excessive chargebacks, either to terminate the merchant immediately or to commence an investigation immediately;

C. Failing, by the close of an investigation, to conclude as to whether a significant cause for the merchant's excessive chargebacks is that the merchant is engaged in fraudulent deceptive, or unfair activity relating to the sale, advertising, promotion, or distribution of goods or services to consumers and, if respondent so concludes, to terminate the merchant promptly.

D. Failing to determine, within the later of (1) twenty-five (25) days from the end of each month or (2) fifteen (15) days from the receipt of the data upon which the monthly calculation is based, whether a merchant has excessive consumer dispute chargebacks;

E. Failing, for any merchant with excessive consumer dispute chargebacks, either to terminate the merchant immediately or to require the merchant within twenty-one (21) days of the determination under paragraph D to commence and follow a charge-back reduction plan;

F. Failing to terminate any merchant immediately whose consumer dispute chargebacks have not been reduced to or maintained at the levels required by the chargeback reduction plan, provided that respondent may, while a chargeback reduction plan is in effect, conduct an investigation, and if respondent concludes that there is not significant evidence that the merchant's excessive consumer dispute chargebacks are the result of fraudulent, deceptive, or unfair activity by the merchant relating to the sale, advertising promotion, or distribution of goods or services to consumers, then respondent need not terminate the merchant;

G. Providing processing for any merchant respondent has terminated within the last year because of excessive chargebacks or excessive consumer dispute chargebacks unless respondent has conducted an investigation and has concluded on the basis of the investigation that the merchant is not engaged in fraudulent deceptive, or unfair activity relating to the sale, advertising, promotion, or distribution of goods or services to consumers;

H. Nothing in paragraphs A through G of this part shall be construed to prohibit or restrict respondent from terminating the account of a merchant at an earlier time than required by this order and on such terms and conditions as respondent deems warranted.

II.

It is further ordered, That respondent shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order including, but not limited to, records relating to chargeback

volume, investigations, the terminations of any merchants, or any provision of part I of this order.

III.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, or any other change in the corporation that may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of the date of service 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

GENERAL ELECTRIC COMPANY

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

Docket C-3414. Complaint, Jan. 29, 1993--Decision, Jan. 29, 1993

This consent order prohibits, among other things, a New York-based manufacturer of lighting products from misrepresenting the relative light output or wattage of the bulbs, and from representing without certain qualifications relative energy cost savings or any environmental benefit for its bulbs.

Appearances

For the Commission: *Joel Winston, Sara Greenberg, and Phoebe Morse.*

For the respondent: *Michael Sohn and Deborah Feinstein, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that, General Electric Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions 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, alleges:

PARAGRAPH 1. Respondent General Electric Company is a New York corporation, with its offices and principal place of business located at One River Road, Schenectady, NY.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed throughout the United States incandescent light bulbs under the trade name "ENERGY CHOICE™."

PAR. 3. The acts or practices of respondent alleged in this complaint constitute the maintenance of a substantial course of trade

in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated package labels for its ENERGY CHOICE incandescent light bulbs, including but not necessarily limited to the attached Exhibits A through D. These package labels emphasize the environmental and economic benefits of respondent's light bulbs by way of statements such as “Conserve Natural Resources,” charts describing the energy and cost savings from using ENERGY CHOICE light bulbs instead of ordinary light bulbs, and other means.

PAR. 5. Respondent has also disseminated or caused to be disseminated advertisements and promotional materials for its ENERGY CHOICE incandescent light bulbs, including but not necessarily limited to the attached Exhibit E. The advertisement refers to the fact that respondent “just had an idea” that can save resources and reduce electric bills. This advertisement contains the following statements and depictions:

“At GE, we just had an idea that could help eliminate pollution from the atmosphere -- an idea that could save power plants 3 million tons of coal a year and 1 million barrels of oil. Introducing GE's Energy Choice Lights. If we all change to these lights, we'd save our resources and you'd save enough on your electric bill to all but pay for the bulbs. New GE Energy Choice.” [Depiction in two different scenes of Energy Choice light bulb packaging featuring large numeral “60.”]

PAR. 6. The ENERGY CHOICE packaging and advertisements suggest that consumers replace light bulbs of a particular wattage with a corresponding ENERGY CHOICE replacement light bulb. The corresponding ENERGY CHOICE light bulbs have less wattage than the bulbs they are designed to replace. Respondent has offered, for example, a 90 watt ENERGY CHOICE bulb to replace ordinary 100 watt bulbs, a 67 watt ENERGY CHOICE bulb to replace ordinary 75 watt bulbs, a 52 watt ENERGY CHOICE bulb to replace ordinary 60 watt bulbs, and a 45-95-140 watt three-way bulb to replace ordinary 50-100-150 watt light bulbs.

PAR. 7. The ENERGY CHOICE packages and package depicted in the “Brilliant Idea” television advertisement, rather than promi-

nently displaying the wattage of the light bulbs contained inside the package, display the wattage of the light bulb being replaced in large prominent white numerals in the middle of the front panel (*e.g.*, “100”). Below, in substantially smaller yellow print, is a phrase such as “[100] watt replacement for only [90] watts.” There is a further small yellow print statement of the lumens of the light bulb inside (*e.g.*, “Avg. lumens 1540”), but no adequate disclosure of the number of lumens of the ordinary light bulb being replaced or whether the ordinary bulb produces more light than the ENERGY CHOICE bulb.

PAR. 8. Through the use of the statements and depictions in the advertisements and package labels referred to in paragraphs five, six, and seven above, including but not necessarily limited to the advertisement and package labels attached as Exhibits A through D, respondent has represented, directly or by implication, that, the ENERGY CHOICE 90, 67, 52, and 45-95-140 watt incandescent light bulbs will provide the same amount of light as the ordinary 100, 75, 60 and 50-100-150 watt light bulbs that they are designed to replace.

PAR. 9. In truth and in fact, the ENERGY CHOICE 90, 67, 52, and 45-95-140 watt incandescent light bulbs will not provide the same amount of light as the ordinary 100, 75, 60, and 50-100-150 watt light bulbs that they are designed to replace. The ENERGY CHOICE incandescent light bulbs use fewer watts and provide fewer lumens (a standard measurement of light output) than the light bulbs they are designed to replace.

Therefore, the representations set forth in paragraph eight were, and are, false and misleading.

PAR. 10. In its advertising and sale of ENERGY CHOICE incandescent light bulbs, respondent has represented, directly or by implication, that use of ENERGY CHOICE light bulbs will help eliminate pollution, save energy and lower consumers' electricity costs as compared to the ordinary light bulbs that they are designed to replace, but has failed to disclose adequately that the ENERGY CHOICE bulbs provide less light than the light bulbs they are designed to replace. This fact would be material to consumers in their purchase or use decisions regarding the product. The failure to

disclose adequately this fact, in light of the representations made, was, and is, a deceptive practice.

PAR. 11. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek recused.

13 443
Kmart
\$ 3.97

ENERGY CHOICE
Light Bulbs

Conserve Natural Resources

100
Watt Replacement
For Only 90 Watts

Avg. lumens 1540
Avg. life 750 hours

Save 2.40
in Energy Costs

4 Bulbs

See Back for Details

ENERGY CHOICE
Light Bulbs

100
Watt Replacement
For Only 90 Watts

Avg. lumens 1540 - Avg. life 750 hours

4 Bulbs

GE

ENERGY CHOICE
Light Bulbs

Conserve Natural Resources

75
Watt Replacement
For Only 67 Watts

Avg. lumens 1080
Avg. life 750 hours

Save \$1.90
In Energy Costs

GE

ENERGY CHOICE
Light Bulbs

75
Watt Replacement
For Only 67 Watts

Avg. lumens 1080 - Avg. life 750 hours

See Back for Details



EXHIBIT B

Light Bulbs
Avg. Lumens 1080
Avg. Life 750 Hours

Light Bulbs
Watt Replacement
For Qty. of Watts

75 ENERGY CHOICE


75 WATT EQUIVALENT

ENERGY CHOICE
Conserve Natural Resources Light Bulbs

Use ENERGY CHOICE™ bulbs to REDUCE natural resource consumption and carbon dioxide emissions*			
NATURAL RESOURCE USED FOR POWER GENERATION			
REDUCE:	COAL	OR OIL	OR NATURAL GAS
NATURAL RESOURCE CONSUMPTION	23 POUNDS	1.7 GALLONS	250 CUBIC FEET
CARBON DIOXIDE EMISSIONS	52 POUNDS	43 POUNDS	28 POUNDS

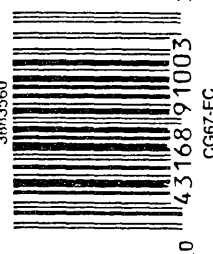
*Based on using four 75 watt ENERGY CHOICE™ Bulbs compared to four ordinary 75 watt bulbs (avg. life 750 hours, avg. lumens 1170). Energy cost savings based on national kilowatt hour rate of 8¢.

 Package Made of Recycled Paper

For information on GE energy efficient lighting products call toll free GE Answer Center: 800.526.2000

GE Lighting
General Electric Company
Nela Park, Cleveland, OH 44112

DESCRIPTION: 67A/EC
PRODUCT ORDER CODE: 20635



3893360
0 43168 91003 3
CG67-EC

GE

ENERGY CHOICE
Light Bulbs

Conserves Valuable Resources

60
Watt Replacement
For Only 52 Watts

Avg. lumens 780
Avg. life 1000 hours

Save 2.50
in Energy Costs

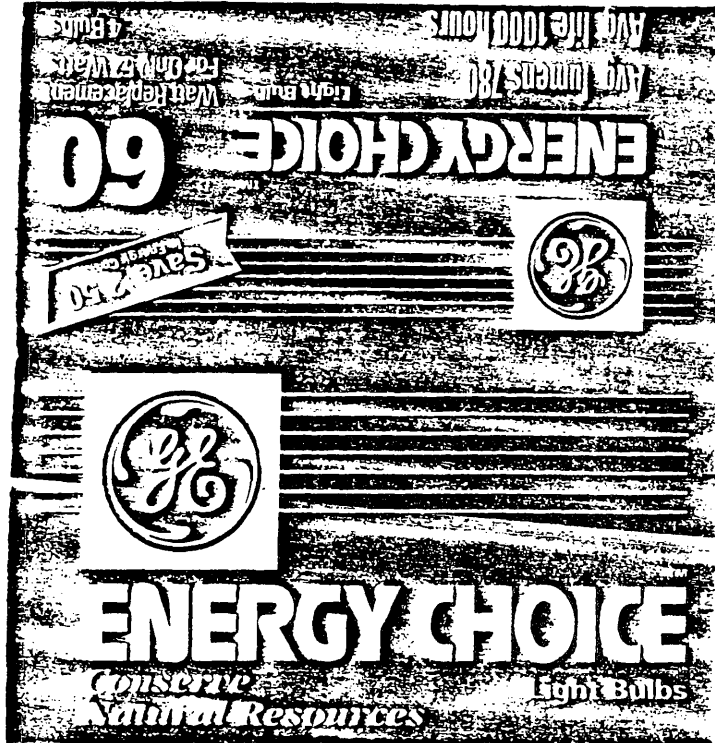
GE

ENERGY CHOICE
Light Bulbs

60
Watt Replacement
For Only 52 Watts

Avg. lumens 780 - Avg. life 1000 hours


EXHIBIT C



Use ENERGY CHOICE™ bulbs to **REDUCE** natural resource consumption and carbon dioxide emissions*

REDUCE:	NATURAL RESOURCE USED FOR POWER GENERATION		
	COAL	OR OIL	OR NATURAL GAS
NATURAL RESOURCE CONSUMPTION	31 POUNDS	2.2 GALLONS	330 CUBIC FEET
CARBON DIOXIDE EMISSIONS	70 POUNDS	57 POUNDS	38 POUNDS

*Based on using four 52 watt ENERGY CHOICE™ Bulbs compared to four ordinary 60 watt bulbs (avg. life 1,000 hours, avg. lumens 855). Energy cost savings based on national kilowatt hour rate of 8c.

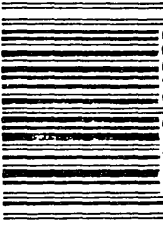
 Package Made of Recycled Paper

For information on GE energy efficient lighting products, call toll-free GE Answer Center: 800.526.2000

GE Lighting
General Electric Company
Nela Park, Cleveland, OH 44112

DESCRIPTION: 5-WATT
UNIVERSAL: 20634

300352



0 43168 91002 6

CG52-EC

EXHIBIT D

50-100-150 Watt Replacement for Only 45-95-140 Watts

50-100-150 Watt Replacement for Only 45-95-140 Watts

Watts 45 95 140
Avg. lumens 550 1500 2050
Avg. life 1200 hours

Watts 45 95 140
Avg. lumens 550 1500 2050
Avg. life 1200 hours

ENERGY CHOICE™
3 WAY Bulb
SAVE \$63
Conserve Natural Resources

ENERGY CHOICE™
3 WAY Bulb
SAVE \$63
Conserve Natural Resources

See Side Panel for Details

See Side Panel for Details

EXHIBIT D

50-100-150
Watt Replacement
for Only 85-95-140 Watts

ENERGY CHOICE™
WAVE Bulb

Use **ENERGY CHOICE™** bulbs to help **REDUCE** natural resource consumption and carbon dioxide emissions*

REDUCE:	NATURAL RESOURCE USED FOR POWER GENERATION		
	OR COAL	OR OIL	OR NATURAL GAS
NATURAL RESOURCE CONSUMPTION	7 POUNDS	.6 GALLONS	83 CUBIC FT.
CARBON DIOXIDE EMISSIONS	17 POUNDS	14 POUNDS	9 POUNDS

See Side Panel for Details

RES. 388596Z
0 43168 90517 6
CG211-EC

GE Lighting Division
General Electric Company
Nela Park, Cleveland, OH 44117

Based on average watts per hour difference between ENERGY CHOICE™ WAVE bulb and one ordinary 100 watt incandescent bulb. ENERGY CHOICE™ WAVE bulb consumes 85-95-140 watts per hour, while ordinary 100 watt incandescent bulb consumes 100 watts per hour. Difference is 15-15-10 watts per hour. Difference is 15-15-10% of the energy consumed by the ordinary 100 watt incandescent bulb.

95

Complaint

EXHIBIT E

General Electric Energy Choice Light Bulbs
"Brilliant Idea"

910702

:30

(L)

VIDEO

OPENS ON OVERHEAD LS OF MOUNTAINS.

FADES TO CU OF CHUNKS OF COAL AS THE CAMERA PANS BACK FOR LS OF A COAL MINE.

FADES TO LS OF AN OIL FACTORY.

FADES TO LS OF THE PRODUCT PACKAGE.

FADES TO LS OF SEVERAL SKYSCRAPERS AT NIGHT AS SEVERAL LIGHTS COME ON.

FADES TO MS OF A WOMAN SITTING ON A COUCH READING TO HER DAUGHTER. THE WOMAN REACHES UP TO TURN ON A LAMP.

SUPER: COST SAVINGS BASED ON USING FOUR 52 KILOWATT ENERGY CHOICE BULBS VS. FOUR ORDINARY 60 WATT BULBS AT AVERAGE 8c KILOWATT.

FADES TO CU OF THE PRODUCT PACKAGE AS A WOMAN SETS IT DOWN IN FRONT OF THE CAMERA. THE CAMERA PANS BACK FOR PRODUCT LINE SHOT. A PRODUCT BULB APPEARS AND LIGHTS UP.

SUPER: PRODUCT LOGO. WE BRING GOOD THINGS TO LIFE.

AUDIO

SFX: MUSIC THROUGHOUT.

ANNC: AT G.E., WE JUST HAD AN IDEA THAT COULD HELP ELIMINATE POLLUTION FROM THE ATMOSPHERE.

AN IDEA THAT COULD SAVE POWER PLANTS THREE MILLION TONS OF COAL A YEAR.

AND ONE MILLION BARRELS OF OIL.

INTRODUCING

G.E.'S ENERGY CHOICE LIGHTS.

IF WE ALL CHANGE TO THESE LIGHTS, WE'D SAVE ON RESOURCES AND

YOU'D SAVE ENOUGH ON YOUR ELECTRIC BILL TO ALL BUT PAY FOR THE BULBS.

NEW G.E. ENERGY CHOICE. NO WONDER THE LIGHT BULB IS THE SYMBOL FOR A BRILLIANT IDEA.

Complaint

116 F.T.C.

EXHIBIT E

**RADIO
REPORTS**

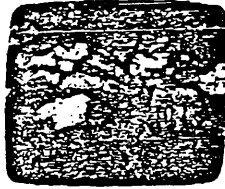
1 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT: GE ENERGY CHOICE LIGHTS
TITLE: "POWER PLANTS"
PROGRAM: SUNDAY MORNING
STATION: CBS

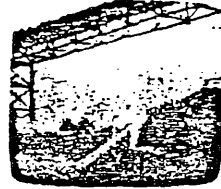
91-04676
05/05/91 :30
(NEW YORK) 10:18 AM



(MUSIC) ANNCR: At GE, we just had an idea that could help reduce air pollution from the atmosphere.



an idea that could save power plants.



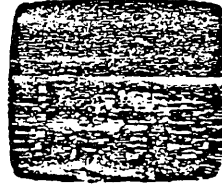
3 million tons of coal a year



and 1 million barrels of oil.



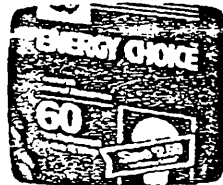
Introducing GE's Energy Choice Lights.



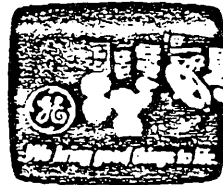
If we all change to these lights, we'd save our resources.



and you'd save enough on your electric bill to all but pay for the bulbs.



New GE Energy Choice.



No wonder the lightbulb is the symbol for a brilliant idea. (MUSIC OUT)

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 respondent 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 respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent of facts, other than jurisdictional facts, or of violations of law as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules.

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. General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the state of New York, with its offices and principal place of business located at One River Road, Schenectady, NY.
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

DEFINITION

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

“*Light bulb*” means any incandescent, halogen, or fluorescent lamp marketed to consumers, excluding lamps designed and promoted primarily for decorative applications, appliances, traffic signals, showcases, projectors, airport equipment, trains, and lamps such as color, flood, reflector, rough service, and vibration service.

I.

It is ordered, That respondent General Electric Company, 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, labeling, offering for sale, sale, or distribution of any light bulb in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

- A. That any such light bulb will provide the same amount of light as the light bulb to which it is compared;
- B. The wattage of any such light bulb.

II.

It is further ordered, That respondent General Electric Company, 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, labeling, offering for sale, sale, or distribution of any light bulb in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing,

directly or by implication, that any such bulb will save energy, will reduce pollution, will lower consumers' energy costs, or has some other benefit or advantage regarding its impact on the environment relative to any other bulb(s), when that benefit or advantage is attributable, in whole or in part, to the fact that such bulb provides fewer lumens than the bulb(s) to which it is compared, unless respondent discloses, clearly and prominently and in close proximity to the representation that such bulb provides less light than the light bulb(s) to which it is compared.

III.

It is further ordered, That with respect to claims covered by 16 CFR 409.1(d), compliance with said provision shall constitute compliance with this order.

IV.

It is further ordered, That, if the Commission makes any changes in its Trade Regulation Rule relating to incandescent lamps, 16 CFR 409.1 *et seq.*, or issues any new regulation with respect to the labeling or marketing of light bulbs (as defined herein) that is in actual conflict with any requirement imposed by paragraphs I and II of this order, compliance by respondent with such regulation will not constitute a violation of any provision of this order. As used herein, "*actual conflict*" shall mean that it is impossible for respondent to comply with both the regulation(s) and all or any part of paragraphs I or II of this order. This paragraph shall not be deemed to limit respondent's right to petition for modification pursuant to any applicable statute or regulation.

V.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent to distributors or retailers prior

to one hundred twenty (120) days after the date of service of this order.

VI.

It is further ordered, That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon them to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling or the preparation or placement of advertisements or other such sales or promotional materials covered by this order.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

VIII.

It is further ordered, That respondent shall, within one hundred eighty (180) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek recused.