IN THE MATTER OF

SAN-MAR LABORATORIES, INC., ET AL.

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

Docket C-3003. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, two Elmsford, N.Y. firms and their corporate president, engaged in the manufacture and marketing of "Acne Lotion 22," the "Acne Masque," and the "Home Acne Kit," to cease disseminating advertisements which represent that their products can cure acne or eliminate bacteria-caused skin blemishes; or which misrepresent or make unsubstantiated claims regarding the superiority, efficacy, and performance of their products; the extent to which their products have been tested; and the results of the tests. Respondents are required to inform purchasers of their right to request and receive refunds; and honor refund requests in a timely manner. Additionally, respondents are required to maintain specified records for a period of three years.

Appearances

For the Commission: *Mark A. Heller.*

For the respondents: *Burt Bauman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that San-Mar Laboratories, Inc. (hereinafter "San-Mar") and Maison Drug Company, Inc. (hereinafter "Maison Drug"), corporations, and Marvin Berkrot, (hereinafter "Berkrot") as an individual and corporate officer, hereinafter at times referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "San-Mar" and "Maison Drug" are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal places of business located at 399 Executive Boulevard, Elmsford, New York. "San-Mar" and "Maison Drug" manufacture, market and advertise health-related products. "Maison Drug" is a wholly-owned subsidiary of "San-Mar."

PAR. 2. "Berkrot" is an individual and corporate president of "San-Mar" and "Maison Drug." He formulates, directs and controls the acts and practices of "San-Mar" and "Maison Drug," including the acts and practices described herein. "Berkrot's" business address is 399 Executive Boulevard, Elmsford, New York.

PAR. 3. Respondents have been and now are engaged in the business of marketing and advertising health-related products, including but not limited to products known as Acne Lotion 22 or Special Lotion 22 (hereafter "Acne Lotion 22"); and Special Acne Protein Menthol Therapy Masque or Protein Therapy Masque (hereafter "Acne Masque"). The aforesaid products were and are offered alone and as part of a program for the treatment of acne known as the Special Home Acne Treatment Kit (hereafter "the Home Acne Kit"). In connection with the manufacture and marketing of said products respondents "Berkrot" and "San-Mar," through "San-Mar's" subsidiary, respondent "Maison Drug," have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations, and advertisements in the form of a booklet, entitled "Acne Its Control and Treatment" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the products "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit," and have disseminated and caused the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly the purchase of said products in commerce.

PAR. 5. Typical of the statements and representations in said advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:

AT LAST — NEW HOPE FOR ACNE SUFFERERS!

If You Have ACNE – Now A Doctor's Special Treatment For Lasting Help!

This new treatment is the result of years of experience by Dr. Harvey Glass, M.D., dermatologist and Medical Director of Phase IV Acne Clinics

"Let me first explain what acne is. It's a condition involving the skin's pores and the Sebaceous (oil) Glands in which the pores of the skin are blocked by unsightly blackheads, whiteheads, pimples and blemishes and the growth of C-Acne bacteria in the Sebaceous Glands causes irritation and ugly inflammation. It is a skin disease that's most prevalent in teenagers and young adults but can also strike at any age.

Discovered After Years of Treating Acne Patients

"What I discovered in my Acne Clinics is that you had to treat Acne below as well as on the skin surface. The pore openings must be cleansed, cleared and opened and the C-Acne Bacteria beneath the skin surface must be removed.

After years of treating acne, I developed a special regimen for a home treatment. It includes a very special compress solution, Acne Lotion 22, containing among its ingredients, a mild surfactant that breaks the skin surface tension, softens and unclogs the pores and allows for deep action by the ingredients. Included also is a Therapeutic Drawing Mask with sublimed sulfur that dries and quiets the Acne while its ingredients work to finish the job. With pores open and much of the C-Acne bacteria flushed away, the body's own defenses can then fight off the remaining bacteria. Pimples that are no longer swollen with pus and debris start to heal and redness and irritation is reduced and eliminated. Scar producing picking is avoided, along with the spreading of bacteria to other areas of the skin.

Why This Special Offer Through The Mail?

"Because all the Acne sufferers in the U.S.A. can't possibly come to my clinics, I have developed this simple yet effective acne control regimen that can reach them. I believe it is the finest program available for treatment in the home and will effectively provide lasting help for almost all cases."

DR. HARVEY GLASS, M.D.

Dr. Glass is a Diplomat American Board of Dermatology and the Medical Director of the Phase IV Acne Clinics

ACNE LOTION 22

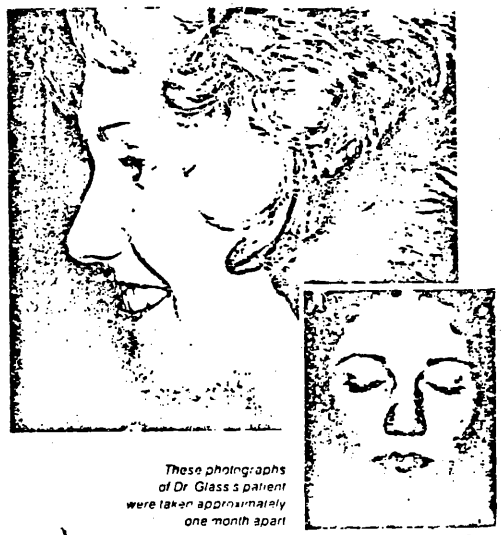
ACNE THERAPY MASK

A Full 30 Day Supply In Each Kit

THE 2 SIMPLE STEPS OF THE DOCTOR'S ACNE TREATMENT

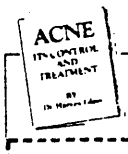
1. Apply Lotion 22 to affected areas. Ingredients soften blackheads, whiteheads, opens comedone clogged pores. Surfactant penetrates into pores and sebaceous glands to flush out C-Acne Bacteria. In a few minutes blackheads, loosened grime, impurities and bacteria are wiped away with compress.

2. Apply Special Acne Protein Menthol Therapy Masque with sublimed sulfur for 15 minutes. Healing drying and soothing agents work to reduce swelling and redness of inflamed areas. Continue treatment twice daily until complexion is clear. After that only a maintenance treatment 1-3 times a week.



These photographs of Dr. Glass's patient were taken approximately one month apart

AT START OF TREATMENT



WHEN YOU ORDER RIGHT NOW, YOU WILL RECEIVE ABSOLUTELY FREE THIS VALUABLE $3.00 BOOKLET, "ACNE, ITS CONTROL AND TREATMENT"

Mail Your Order Today To:
VANOWEN PRODUCTS, Dept. 192, 10635 Vanowen St., Burbank, CA 91505

☐ Please rush me _____ 30 Day Supplies of Special Home Acne Treatment Kit consisting of Special Lotion 22, Protein Therapy Masque with Sulfur and FREE Acne Booklet. I can lose $9.50 plus 50¢ post. & hand. for each 30 day supply ordered. Enclosed is a check or M.O. for $_____

MONEYBACK GUARANTEE if help you get does not completely satisfy you.

Name _____

Address _____

City _____

State _____ Zip _____

Calif. Residents Add Applicable Sales Tax

PAR. 6. Through the use of said advertisements and other advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent, directly or by implication that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will cure acne regardless of the severity of the condition.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads, and other acne blemishes.

c. Several minutes after use of "Acne Lotion 22" the bacteria responsible for acne are flushed out of the pores of the skin and can be easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of "the Home Acne Kit," have been medically and scientifically proven effective in the treatment of acne by clinical testing.

PAR. 7. In truth and in fact:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will not cure acne.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. The bacteria contributively responsible for acne cannot be flushed out of the pores of the skin and easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of "the Home Acne Kit," are not medically or scientifically proven effective in the treatment of acne by clinical testing.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraph Six, were and are false, misleading or deceptive.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondents represented, and now represent that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," will result in skin free of pimples,

blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne.

c. "The Home Acne Kit" is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than Dr. Harvey Glass, whose endorsement of "the Home Acne Kit" appears in said advertisements.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them, in that respondents lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents San-Mar Laboratories, Inc. and Maison Drug Company, Inc. are corporations organized, existing, and doing business under and by virtue of the laws of the State of New York, with their principal offices and places of business at 399 Executive Boulevard, Elmsford, New York.

2. Respondent Marvin Berkrot is an individual and corporate officer of San-Mar Laboratories, Inc., and Maison Drug Company, Inc., and maintains an office at 399 Executive Boulevard, Elmsford, New York.

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

I

It is ordered, That respondents San-Mar Laboratories, Inc. and Maison Drug Company, Inc., corporations, and Marvin Berkrot, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondents' officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," or any other acne product or regimen will cure acne.

2. Represents that "Acne Lotion 22" and/or "Acne Masque," or any chemically similar formulations, either alone or as part of "the Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria contributively responsible for acne, pimples, blackheads, whiteheads, and other acne blemishes.

3. Represents that the bacteria contributively responsible for acne can be flushed out of the pores of the skin and/or easily eliminated from the skin surface.

4. Misrepresents, the efficacy, use or the mode of performance of any drug where the use or reasonably foreseeable misuse of the drug may affect the health or safety of the user.

5. Misrepresents the extent to which any product has been tested or the results of any such tests.

B. Disseminating or causing the dissemination of any advertisements by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease;

2. Represents that "Acne Lotion 22" and/or "Acne Masque," either alone or as part of "the Home Acne Kit," or any other acne product or regimen, are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne;

3. Represents that "the Home Acne Kit," or any other acne product or regimen, is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than Dr. Harvey Glass;

4. Represents that "the Home Acne Kit," or any other acne product or regimen, is efficacious in any manner in the treatment of acne,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be

defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

II

It is further ordered, That respondents shall:

A. Within thirty (30) days after entry of this order notify each purchaser of one or more orders of the Special Home Acne Kit, who has not received nor is in the process of receiving a full refund on their purchase prior to that time, of the purchaser's right to a refund in the amount of the full purchase price excluding the cost of mailing. Said notice shall be in the form of a letter identical in form, language and content to that annexed hereto as Attachment A (hereinafter "the notice"). The notice shall be sent to said purchasers by first class mail, and shall not include any other written matter which would obscure its clear meaning, nor any solicitation for respondents' products.

B. Refund the full purchase price of the Special Home Acne Kit, excluding the cost of mailing, by check, to any purchaser who responds to the notice within ten (10) weeks of its mailing. Such refunds shall be mailed to purchasers who request refunds no later than fourteen (14) weeks after the notice is sent to said purchasers.

C. Proof of compliance with this section shall be sent to the Commission by registered mail upon completion of the processing of all refund requests made pursuant to the notice. Said proof shall include all refund requests by purchasers made pursuant to the notice, and such records as will show full payment to these purchasers.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and one (1) year thereafter, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

ATTACHMENT A

(Maison Drug Company Letterhead)

Dear Customer:

According to our records, you have purchased our Special Home Acne Treatment Kit, consisting of Special Lotion 22, Protein Therapy Masque, and a booklet on acne.

The Federal Trade Commission has recently brought to our attention certain questions about advertising claims we made for the Special Home Acne Treatment Kit.

We have agreed with the Commission to make sure that all our customers who purchased the Special Home Acne Kit are satisfied that it performed as they expected it would, and to refund the full purchase price to cusomters who may have not been satisfied.

If you choose to request a refund because of dissatisfaction with the product, submit proof of purchase (check or money order will do) and we will remit payment. You must complete the form below and return it no later than . Please allow fourteen (14) weeks from receipt for processing of your refund request.

Sincerely,

MARVIN BERKROT, President
MAISON DRUG COMPANY

.....

(cut along dotted line)

Dear Mr. Berkrot:

I was not satisfied that the Special Home Acne Kit performed as I expected it would.

I purchased _____ (insert number of Kits you bought) Kits. I enclose herewith proof of purchase.

My full name and address is:

NAME: _____

ADDRESS: _____
Street Apt. No.

_____
City State Zip

SIGNATURE: _____

AFTER YOU HAVE COMPLETED THIS FORM, SEND IT TO:

Marvin Berkrot, President
Maison Drug Company
399 Executive Boulevard
Elmsford, New York 10523

IN THE MATTER OF

HARVEY GLASS, M.D.

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

Docket C-3004. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a Cherry Hill, N.J. dermatologist to cease, in connection with the endorsing, advertising or sale of products, representing that the use of "Acne Lotion 22," "Acne Masque," or any other acne product or regimen will cure acne; eliminate bacteria-caused skin blemishes and result in a blemish-free skin. The respondent is also prohibited from disseminating advertisements and/or permitting his endorsement to appear in advertisements which misrepresent or make unsubstantiated claims regarding a product's efficacy, use or performance; the extent to which a product has been tested and the results of such tests.

Appearances

For the Commission: *Mark A. Heller.*

For the respondent: *Barry Greenberger*, Bricktown, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Harvey Glass, M.D., an individual (hereafter "Glass"), at times referred to as respondent, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "Glass" is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. "Glass's" business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, New Jersey.

PAR. 2. "Glass," in conjunction with San-Mar Laboratories, Inc., Maison Drug Company, Inc., and Marvin Berkrot, chief executive officer of both corporations, has been and now is engaged in the business of marketing and advertising health-related products, including but not limited to products known as Acne Lotion 22, or Special Lotion 22 (hereafter "Acne Lotion 22"); and Special Acne Protein Menthol Therapy Masque, or Protein Therapy Masque (hereafter "Acne Masque"). The aforesaid products were and are offered alone

and as part of a program for the treatment of acne known as the Special Home Acne Treatment Kit (hereafter "the Home Acne Kit"). In connection with the manufacture and marketing of said products, San-Mar Laboratories, Maison Drug Company, and Marvin Berkrot have disseminated, published, and distributed, and now disseminate, publish and distribute, advertisements and promotional material, which contain the respondent's endorsement, for the purpose of promoting the sale of said products for human use. These products, as advertised, are "drugs" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. "Glass" for his part aided in the promotion of the aforementioned products by providing an endorsement as a medical expert which directly related to the efficacy and medical evaluation of the products. This endorsement appeared in every disseminated advertisement for "Acne Lotion 22," "Acne Masque" and "the Home Acne Kit." Respondent caused his endorsement to appear in advertisements concerning said products for the purpose of inducing, and which was and is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Advertisements containing respondent's aforementioned endorsement have been and are disseminated through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the insertion of advertisements for "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in magazines and newspapers with national circulations, and advertisements in the form of a booklet authored by respondent and entitled "Acne: Its Control and Treatment," which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the products "Acne Lotion 22," "Acne Masque," and "the Home Acne Kit" in commerce.

PAR. 5. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive, are the following:

AT LAST—NEW HOPE FOR ACNE SUFFERERS!

If You Have ACNE—Now A Doctor's Special Treatment For Lasting Help!

This new treatment is the result of years of experience by Dr. Harvey Glass, M.D., dermatologist and Medical Director of Phase IV Acne Clinics

"Let me first explain what acne is. It's a condition involving the skin's pores and the Sebaceous (oil) Glands, in which the pores of the skin are blocked by unsightly blackheads, whiteheads, pimples and blemishes and the growth of C-Acne bacteria in the Sebaceous Glands causes irritation and ugly inflammation. It is a skin disease that is most prevalent in teenagers and young adults but can also strike at any age.

Discovered After Years of Treating Acne Patients

"What I discovered in my Acne Clinics is that you had to treat Acne below, as well as on, the skin surface. The pore openings must be cleansed, cleared and opened and the C-Acne Bacteria beneath the skin surface must be removed.

After years of treating acne, I developed a special regimen for a home treatment. It includes a very special compress solution, Acne Lotion 22, containing among its ingredients, a mild surfactant that breaks the skin surface tension, softens and unclogs the pores and allows for deep action by the ingredients. Included also is a Therapeutic Drawing Mask with sublimed sulfur that dries and quiets the Acne while its ingredients work to finish the job. With pores open and much of the C-Acne bacteria flushed away, the body's own defenses can then fight off the remaining bacteria. Pimples that are no longer swollen with pus and debris start to heal, and redness and irritation is reduced and eliminated. Scar producing picking is avoided, along with the spreading of bacteria to other areas of the skin.

Why This Special Offer Through The Mail?

"Because all the Acne sufferers in the U.S.A. can't possibly come to my clinics, I have developed this simple yet effective acne control regimen that can reach them. I believe it is the finest program available for treatment in the home, and will effectively provide lasting help for almost all cases."

DR. HARVEY GLASS, M.D.

Dr. Glass is a Diplomat American Board of Dermatology and the Medical Director of the Phase IV Acne Clinics

ACNE LOTION 22

ACNE THERAPY MASK

A Full 30 Day Supply In Each Kit

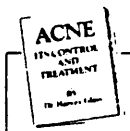
THE 2 SIMPLE STEPS OF THE DOCTOR'S ACNE TREATMENT

1. Apply Lotion 22 to affected areas. Ingredients soften blackheads, whiteheads, opens comedone clogged pores. Surfactant penetrates into pores and sebaceous glands to flush out C. Acne Bacteria. In a few minutes blackheads, loosened grime, impurities and bacteria are wiped away with compress.

2. Apply Special Acne Protein Menthol Therapy Masque with sublimed sulfur for 15 minutes. Healing, drying and soothing agents work to reduce swelling and redness of inflamed areas. Continue treatment twice daily until complexion is clear. After that only a maintenance treatment 1-3 times a week.

These photographs of Dr. Glass's patient were taken approximately one month apart

AT START OF TREATMENT



WHEN YOU ORDER RIGHT NOW, YOU WILL RECEIVE ABSOLUTELY FREE THIS VALUABLE $3.00 BOOKLET, "ACNE, ITS CONTROL AND TREATMENT"

Mail Your Order Today To:
VANOWEN PRODUCTS, Dept. 192, 10635 Vanowen St., Burbank, CA 91505

☐ Please rush me_____ 30 Day Supplies of Special Home Acne Treatment Kit consisting of Special Lotion 22, Protein Therapy Masque with Sulfur and FREE Acne Booklet. I enclose $9.50 plus 50¢ post. & hand. for each 30 day supply ordered. Enclosed is a check or M.O. for $_____

MONEYBACK GUARANTEE if help you get does not completely satisfy you.

Name _____
Address _____
City _____
State _____ Zip _____
Calif. Residents Add Applicable Sales Tax

PAR. 6. Through his endorsement as contained in said advertisements and other advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents, directly or by implication that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will cure acne regardless of the severity of the condition.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads, and other acne blemishes.

c. Several minutes after use of "Acne Lotion 22" the bacteria responsible for acne are flushed out of the pores of the skin and can be easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," have been medically and scientifically proven effective in the treatment of acne by clinical testing.

PAR. 7. In truth and in fact:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will not cure acne.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. The bacteria contributively responsible for acne cannot be flushed out of the pores of the skin and easily eliminated from the skin surface.

d. "Acne Lotion 22" and "Acne Masque," either alone or as part of the "Home Acne Kit," are not medically or scientifically proven effective in the treatment of acne by clinical testing.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements, and respondent knew or should have known that the statements and representations set forth in Paragraph Six were and are false, misleading or deceptive.

PAR. 8. Furthermore, through his endorsement contained in the advertisements referred to in Paragraphs Four and Five, respondent represented, and now represents that:

a. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease.

b. "Acne Lotion 22" and/or "Acne Masque," either alone or as part

of the "Home Acne Kit," are superior to all prescription and/or over-the-counter preparations in the treatment of acne.

c. "The Home Acne Kit" is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent.

PAR. 9. In truth and in fact, there existed at the time of the first dissemination of the representations in Paragraphs Six and Eight no reasonable basis for making them in that respondent lacked competent and reliable scientific evidence to support each such representation. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 10. In the course and conduct of his aforesaid business, and at all times mentioned herein, the respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

In addition to the above, respondent is in substantial competition with other corporations, firms and individuals in the business of providing endorsements for consumer products or services.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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 Harvey Glass, M.D. is a medical doctor, licensed to practice by the State of New Jersey, with a specialty in dermatology. His business address is Old Orchard Professional Building, 1999 East Marlton Pike (Route 70), Cherry Hill, 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 Harvey Glass, M.D., individually and through any corporate entity over which he now or hereafter exercises control, and his corporate successors and assigns, in connection with the endorsing, advertising, offering for sale, sale, or distribution of all products, forthwith cease and desist from:

A. Representing, directly or indirectly, through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will cure acne or any skin condition associated with acne;

2. "Acne Lotion 22" and/or "Acne Masque," or any chemically similar formulations, either alone or as part of the "Home Acne Kit," can penetrate the pores of the skin to eliminate the bacteria

contributively responsible for acne, pimples, blackheads, whiteheads, and other acne blemishes;

3. The bacteria contributively responsible for acne can be flushed out of the pores of the skin and/or easily eliminated from the skin surface.

B. Representing directly or indirectly through advertisements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

1. Use of "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen, will result in skin free of pimples, blackheads, whiteheads, other blemishes associated with acne and scarring, regardless of the severity of the disease;

2. "Acne Lotion 22" and/or "Acne Masque," either alone or as part of the "Home Acne Kit," or any other acne product or regimen are superior to all prescription and/or over-the-counter acne preparations in the treatment of acne;

3. The "Home Acne Kit" or any other acne product or regimen is superior in the treatment of acne to any other treatment, including but not limited to treatments offered by dermatologists other than the respondent;

4. "The Home Acne Kit" or any other acne product or regimen is efficacious in any manner in the treatment of acne,

Unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). "Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or otherwise causing his endorsement to appear in any such advertisement which directly or indirectly:

1. Misrepresents the efficacy, use or the mode of performance of any "drug," "cosmetic," "device," or "food," (as these terms are defined by Section 15 of the Federal Trade Commission Act, 15 U.S.C.

55) where the use or reasonably foreseeable misuse of the product may adversely affect the health or safety of the user.

2. Misrepresents the extent to which any product has been tested or the results of any such tests.

Provided, however, that respondent shall have an affirmative defense to a compliance suit for violation of this order paragraph where respondent acted only as an endorser and neither knew nor should have known that the advertisement(s) violated the order paragraph.

D. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and/or permitting or causing his endorsement to appear in any such advertisement, which directly or indirectly makes representations referring or relating to the performance or efficacy of any health-related product or refers or relates to any characteristic, property or result of the use of any such product, unless, at the time of each dissemination of such representation(s) respondent possesses and relies upon a reasonable basis for such representation(s).

II

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in his business status, such as incorporation, or any other change which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of his compliance with this order.

It is furthered ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and ID of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

IN THE MATTER OF

BAYER AG, ET AL.

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

Docket C-3007. Complaint, Jan. 15, 1980—Decision, Jan. 15, 1980

This consent order requires, among other things, a diversified chemical company, located in Leverkusen, Germany, and its two American subsidiaries to divest, within one year to a Commission-approved buyer, all United States assets gained through their acquisition of Miles Laboratories, Inc., primarily utilized in the manufacture, distribution or sale in the United States of allergenic extracts. Additionally, for specified time periods, the firms would be barred from acquiring, without prior Commission approval, any concern engaged in the manufacture, distribution or sale in the United States of allergenic extracts or chemically treated diagnostic reagent strips used for *in vitro* quantitative urinalysis.

Appearances

For the Commission: *Geoffrey Walker, Richard Collier* and *Michelle Crown.*

For the respondents: *John Henry Davis, Cravath, Swaine & Moore,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have acquired Miles Laboratories, Inc., a corporation, 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, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For purposes of this complaint, the following definition shall apply:

"Allergenic extracts" are biological products that are administered to man for the diagnosis or treatment of allergies.

II. Respondents

2. Bayer AG (Bayer) is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany with its principal office and place of business located in Leverkusen, Federal Republic of Germany.

3. In 1976, Bayer, including its German and non-German subsidiaries (Bayer World), had consolidated revenues of approximately $9 billion and consolidated assets of approximately $8.6 billion.

4. Bayer is a diversified chemical company whose principal business, conducted directly and through subsidiaries and affiliates throughout the world, consists of the manufacture and sale of dyestuffs, organic and inorganic chemicals, plastics and surface coatings, agricultural chemicals, pharmaceuticals, polyurethanes, rubber and man-made fibers. In 1976, pharmaceuticals accounted for 13% of Bayer's worldwide sales.

5. Bayer has been engaged in the manufacture and sale of pharmaceuticals and chemicals in the United States since 1895 through a combination of de novo operations, joint ventures and acquisitions. Since 1973, Bayer has acquired, directly or indirectly, the following assets or companies in the United States: Cutter Laboratories, Inc. (1974); the remaining 50% of Helena Chemical Co. from Vertac, Inc. (1977); the Harman Colors business of Allied Chemical Corporation (1977); and Miles Laboratories, Inc. (1978). Total consolidated sales of Bayer in the United States in 1976 amounted to $1.1 billion.

6. Rhinechem Corporation (Rhinechem) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 Park Ave., New York, New York. Rhinechem is a wholly–owned subsidiary of Bayer International Finance N.V. which in turn is a wholly–owned subsidiary of respondent Bayer.

7. Through Rhinechem, Bayer conducts its principal operations in the United States through two subsidiaries, Mobay Chemical Corporation and Cutter Laboratories, Inc. Mobay Chemical Corporation is a manufacturer of chemical products with sales in 1976 of $544 million. Cutter Laboratories, Inc. is a manufacturer of biological products, hospital and pharmaceutical supplies with sales in 1976 of $175 million. In 1976, Bayer, through Cutter Laboratories, Inc. was the second largest manufacturer of biological products in the United States with sales of $65 million.

8. Cutter Laboratories, Inc. (Cutter), through its Hollister-Stier Laboratories division, is the largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately $7 million.

9. Since 1960, Cutter has grown in the allergenic extracts market through internal expansion and acquisitions, including the acquisitions of Hollister-Stier Co.; Arlington, Inc.; assets of Abbott Laboratories, Inc.; assets of the Lederle Laboratories division of American Cyanamid Co.; and assets of Endo Laboratories, Inc., a subsidiary of E.I. duPont de Nemours & Co.

10. Miles Laboratories, Inc. (Miles Labs) is a corporation existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana. Miles Labs was organized originally under the name of Rhinechem Laboratories, Inc. for the purpose of acquiring Miles Laboratories, Inc. On February 8, 1979, the acquired company, Miles Laboratories, Inc., merged into its nominal acquirer Rhinechem Laboratories, Inc., and the successor corporation has been named Miles Laboratories, Inc. Miles Labs is a wholly owned subsidiary corporation of respondent Rhinechem.

11. At all times relevant herein, respondents have been and are engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. Acquisition

12. As of January 5, 1978, respondents acquired over 90% of the outstanding common shares of Miles Laboratories, Inc. for consideration of approximately $250 million.

IV. Acquired Corporation

13. Miles Laboratories, Inc. (Miles) was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 1127 Myrtle St., Elkhart, Indiana.

14. At the time of the aforesaid acquisition, Miles was engaged principally in the manufacture and sale of pharmaceutical preparations, biological products, diagnostic chemical reagent and microbiological test systems, surgical and medical instruments, abrasive products, chemical products and specialty foods.

15. In 1976, Miles had consolidated worldwide revenues of approximately $450 million and assets of approximately $382 million.

16. Miles is the third largest manufacturer of allergenic extracts in the United States, with 1976 sales in the United States of approximately $2.6 million.

17. At all times relevant herein, Miles has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. Trade and Commerce

18. For purposes of this complaint, the relevant product market is the manufacture and sale of allergenic extracts and the relevant geographic market is the United States.

19. Allergenic extracts are used primarily in the diagnosis and immuno-therapeutic treatment of allergies.

20. Sales of allergenic extracts in the United States are substantial. Sales are estimated to be $18 million in 1976.

21. Prior to the aforesaid acquisition, Miles and respondents were substantial and actual competitors in the manufacture and sale of allergenic extracts.

22. At the time of the aforesaid acquisition, respondents through Cutter, and Miles ranked approximately first and third respectively in total sales of all allergenic extracts manufacturers. Of total sales in the allergenic extracts industry at the time of the acquisition, respondents accounted for an estimated 35–40 percent and Miles accounted for an estimated 12 percent.

23. The allergenic extracts market is concentrated. It is estimated that in 1976, the four top ranking firms accounted for more than 70 percent of domestic sales.

24. In 1976, there were seventeen companies licensed by the Bureau of Biologics, Food and Drug Administration, that were engaged in the manufacture and sale of allergenic extracts. Of those, three companies sold allergenic extracts nationwide, including respondents and Miles. The remaining companies were either local or regional sellers.

25. Concentration is high in the allergenic extracts industry, notwithstanding a growing market and the existence of small companies.

26. Entry into the manufacture and sale of allergenic extracts is difficult, requiring significant financial resources, sophisticated technological skills, quality control and effective marketing, distribution and servicing.

VI. Effects of Acquisition; Violations Charged

27. The effects of the acquisition of Miles by respondents may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of allergenic extracts in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Actual and potential competition between respondents and Miles in the manufacture and sale of allergenic extracts has been or may be eliminated;

b. Miles as a substantial, independent competitive factor in the manufacture and sale of allergenic extracts has been eliminated;

c. The leading position of respondents in the manufacture and sale of allergenic extracts may be further entrenched;

d. Concentration in the manufacture and sale of allergenic extracts will be maintained or increased, and the possibility of deconcentration may be diminished;

e. Existing barriers to new entry may be increased substantially;

f. Additional acquisitions and mergers in the industry may be encouraged;

g. Independent manufacturers and sellers of allergenic extracts may be deprived of a fair opportunity to compete with the combined resources and market position of respondents and Miles;

h. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture and sale of allergenic extracts.

Decision and Order

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

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

1. Respondent Bayer AG is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located in the City of Leverkusen, Federal Republic of Germany.

Respondent Rhinechem Corporation 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 425 Park Ave., in the City of New York, State of New York.

Respondent Miles Laboratories, Inc. (formerly Rhinechem Laboratories, 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 1127 Myrtle St., in the City of Elkhart, State of Indiana.

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

ORDER

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

"Allergenic Extracts" are biological products that are administered to man primarily for the diagnosis or treatment of allergies.

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondents, through their officers, directors, employees, subsidiaries, affiliates, divisions, successors and assigns, whether direct or indirect, shall within one (1) year from the date on which this order becomes final divest absolutely and in good faith all United States

assets (other than items which cannot be moved without substantial injury to the premises), of whatever description acquired by respondents as a result of their acquisition of Miles Laboratories, Inc. (Miles), as well as subsequent additions and improvements thereto, and primarily utilized by Miles in the manufacture, distribution or sale in the United States of Allergenic Extracts. Such assets shall include equipment, machinery, raw material reserves, inventory, a list of customers, product trade names, product trademarks, patents, assignable licenses (non-assignable licenses shall be relinquished), manufacturing specifications and procedures, market research materials, sales training materials, research and development projects (including licenses, license applications and Notices of Claimed Investigational Exemption for a New Drug (IND's)), and such other property of whatever description relating primarily to Miles Allergenic Extracts. Such divestiture shall be made to a third party which represents that it intends to use such assets in the manufacture, distribution or sale of Allergenic Extracts in the United States.

II

It is further ordered, That, upon the written request of the acquirer of the divested property, respondents shall, for no longer than three (3) years from the date of the agreement with a third party to transfer the assets referred to in Paragraph I, furnish such technical, market and quality control information of Miles and make available such personnel and technical assistance as may be necessary to enable such acquirer to manufacture and market those Allergenic Extracts manufactured in the United States by Miles at the time of its acquisition by respondents.

III

It is further ordered, That, pending the divestiture required by this order, respondents shall not cause, and shall use their best efforts to prevent, any diminution of the value of the Miles Allergenic Extracts products or assets.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the Miles Allergenic Extracts assets shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee or agent of, or under the control, direction or influence of, respondents or any of respondents'

subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of any respondent.

V

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of Allergenic Extracts; *provided, however,* that the foregoing provision shall not prohibit, with respect to Allergenic Extracts, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VI

It is further ordered, That, for a period of five (5) years from the date this order becomes final, no respondent, its subsidiaries, affiliates, divisions, successors or assigns, shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital or equity interest in any concern, corporate or noncorporate, engaged in, or the assets of such concern relating to, the manufacture, distribution or sale in the United States of chemically treated diagnostic reagent strips used for in vitro quantitative urinalysis; *provided, however,* that the foregoing provision shall not prohibit, with respect to such strips, (1) the taking by respondents from such concerns of non-exclusive licenses that contain no restrictions with respect to limiting other market entrants, and (2) purchases in the ordinary course of business which do not result in the elimination of a competitor.

VII

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondents have fully complied with the divestiture provision of this order, and annually thereafter, on the anniversary date of service of this order, for the duration of this order, submit in

writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which each or every respondent intends to comply, is complying or has complied with this order. Until divestiture is accomplished, all compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and any respondent.

VIII

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

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Jan. 17, 1980

ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION FOR ADDITION OF PORTION OF APPENDICES TO BRIEF ON APPEAL

By motion dated January 7, 1980, respondent Bristol-Myers Company ("Bristol-Myers") requests that the Commission accept 18 pages of appendices as part of its appeal brief in this proceeding. The 18 pages concerned here represent the amount by which Bristol-Myers' 77 page main appeal brief and 31 page booklet of appendices exceed the 90 page limit on appeal briefs set by the Commission in its Order Granting Leave to File Briefs in Excess of Sixty Pages, dated November 9, 1979.

Bristol-Myers has already asked the Commission to reconsider its 90 page limit and to permit lengthier briefs. The Commission denied that request by order dated November 29, 1979. Thus, Bristol-Myers has long been on notice that the 90 page limit is firm. However, in its latest motion, Bristol-Myers provides no reason for exceeding that limit other than the difficulty of paring down its discussion of the case to the required length. Bristol-Myers' motion is therefore denied.

The Commission is nevertheless willing to grant Bristol-Myers an additional period within which to edit its appendices or main appeal brief, or both, in such a manner that the combined filing does not exceed ninety pages. If Bristol-Myers fails to submit a revised brief or revised appendices within that period, the Commission shall accept the first 13 pages of Appendix A to Bristol-Myers' appeal brief and shall reject the remainder of Appendix A and the entirety of Appendix B.

To assure complaint counsel adequate opportunity to respond to any such revisions as Bristol-Myers may make, the remainder of the briefing schedule must be readjusted. Accordingly,

It is ordered, That:

(1) Bristol-Myers' motion to have the final 18 pages of Appendices A and B accepted as part of its appeal brief is denied;

(2) Bristol-Myers is granted leave until and including January 28, 1980, in order to withdraw its main appeal brief and appendices and to revise them such that they total no more than 90 pages;

(3) If no such revisions are submitted before January 28, 1980, the Secretary shall remove pages A–14 through B–11 of Appendices A and B to Bristol-Myers' main appeal brief before placing such appendices on the public record and transmitting them to the Commission; and

(4) The briefing schedule shall be revised as follows: all answer

briefs shall be filed on or before March 17, 1980; and all reply briefs shall be filed on or before March 31, 1980.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MONTGOMERY WARD & COMPANY, INCORPORATED

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

Docket C-3006. Complaint, Jan. 24, 1980—Decision, Jan. 24, 1980

This consent order requires, among other things, a Chicago, Ill. firm, engaged in the operation of a chain of department and catalog stores, to cease making unsubstantiated safety-related claims regarding the installation, operation or maintenance of woodburning heaters and Franklin fireplaces; or any representation that contradicts the requirements of prevailing model building or fire protection codes. Respondent is required to include in its catalogs a conspicuous notice providing minimum distances from adjacent walls at which heating devices can be safely and properly installed; and advising consumers that such information has been previously misstated; that improperly installed heating devices are fire hazards and should be immediately relocated; and that respondent, at its own expense, will reinstall improperly installed heaters and provide shields for previously purchased Franklin fireplaces. Additionally, the company is required, within six months, to revise and reprint promotional and instructional material so as to comply with the terms of the order, and provide its sales personnel with corrected installation information.

Appearances

For the Commission: *William C. Holmes.*

For the respondent: *William J. Thompson,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. Respondent

PARAGRAPH 1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

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PAR. 2. Respondent, one of the world's largest merchandising organizations, sells a broad range of merchandise lines through its nationwide mail-order catalog business and through retail stores located throughout the United States.

II. Products

PAR. 3. Among the products sold and offered for sale by respondent through its mail-order catalogs and retail stores are "woodburning heaters" and "Franklin fireplaces." These devices burn wood or other solid fuel as a means of heating the rooms in which the devices are placed. Examples of such devices include the "pot belly stove," the "parlor heater," the "comfort heater," the "circulating wood heater" and the "Franklin-style fireplace."

III. Jurisdiction

PAR. 4. In the course and conduct of its aforesaid business, respondent has caused such woodburning heaters and Franklin fireplaces to be advertised, sold, transported and shipped across state lines. Respondent has thereby, at all times relevant to this complaint, maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

IV. Violations

A. Count I

PAR. 5. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

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

1. Respondent has represented to consumers, in written advertisements and in written materials packaged with the products, directly or by implication, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the backs of the devices without installing a special protective heat shield between the devices and the combustible walls. However, product safety tests applicable to these devices performed before such representations by respondent

were made determined that minimum safe clearances for these fireplaces from adjacent combustible walls are 18 inches at the backs of the devices with a special protective heat shield installed between the devices and the combustible walls. Moreover, respondent was aware or should have been aware of the results of these tests before the aforementioned representations were made.

2. Respondent has represented to consumers, in written advertisements and in written materials packaged with the product, directly or by implication, that one of its woodburning heaters (model 7366) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the back of the device. However, this heater is of a type which, in the opinion of experts, and according to building and fire protection codes in effect in numerous states, counties and municipalities throughout the United States, should not be installed closer than 36 inches from adjacent combustible walls.

3. Respondent has represented to consumers, in written advertisements and in oral sales presentations by its sales personnel, directly or by implication, that two more of its woodburning heaters (models 7377 and 7387) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests conducted by respondent's own Merchandise Testing Laboratories before these representations were made determined that minimum safe clearances from combustible walls for these two devices are 30 inches at the backs of the devices and 36 inches at the sides.

4. Respondent has represented to consumers in written advertisements, directly or by implication, that still another of its woodburning heaters (model 5722) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests performed by the manufacturer of this model and by Underwriters Laboratories, Inc. determined that minimum safe clearances from combustible walls for model 5722 are 36 inches at the back of the device and 30 inches at the sides. Moreover, respondent was aware of the results of these tests before the aforementioned representations were made.

5. Respondent has represented to consumers in a free promotional booklet mailed to prospective purchasers that its Franklin fireplaces can be safely and properly installed as close as 12 inches at the sides of the devices from adjacent combustible walls. However, product safety tests on at least two of respondent's Franklin fireplaces (models 21015 and 21017) have determined that safe and proper clearance requirements at the sides of these devices are 36 inches—not 12 inches.

PAR. 6. The false representations by respondent referred to in Paragraph Five above have the tendency and capacity to:

1. Cause consumers to install woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.

2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials and presentations used by respondent to induce sales of such devices.

PAR. 7. The false representations by respondent referred to in Paragraph Five above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

B. Count II

PAR. 8. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made contradictory representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

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

1. Respondent has made contradictory representations to consumers in written materials packaged by respondent with three of its woodburning heaters (models 7366, 7386 and 7396) concerning the safe and proper installation of these devices. Diagrams contained in these written materials show proper clearances from adjacent combustible walls for these three devices as being 24 inches at the backs of the devices and 30 inches at the sides. However, printed instructions that appear immediately below the diagrams state that these devices should be installed with clearances from combustible walls of 18 inches at the backs of the devices and 36 inches at the sides.

2. Respondent has represented to consumers in written advertisements, directly or by implication, that four more of its woodburning heaters (models 7326, 7336, 7377 and 7387) may be safely and properly installed as close as 24 inches from adjacent combustible walls. However, in the written materials packaged by respondent with these four devices, respondent has informed consumers that these devices should be installed with clearances from combustible walls of at least 30 inches at the backs of the devices and 36 inches at the sides.

PAR. 9. The contradictory representations by respondent referred to in Paragraph Eight above have the tendency and capacity to:

1. Confuse consumers into installing woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.

2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials used by respondent to induce sales of such devices.

PAR. 10. The contradictory representations by respondent referred to in Paragraph Eight above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

C. Count III

PAR. 11. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made unsubstantiated representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed, where such representations have lacked a prior reasonable, scientific basis.

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

1. The false representations referred to in Paragraph Five above involving models 21015, 21017, 21335, 21336, 21337, 7377, 7387 and 5722 not only lacked prior scientific substantiation but were even contradicted by actual scientific tests conducted before the representations were made.

2. The false representations referred to in Paragraph Five above involving model 7366, and the contradictory representations referred to in Paragraph Eight above involving models 7366, 7386, 7396, 7326 and 7336, were made without prior scientific substantiation, since respondent was and is aware of no scientific tests conducted on these models to substantiate such representations.

3. Respondent has represented to consumers in written advertisements, directly or by implication, that another of its woodburning heaters (model 5718), can be installed as close as 24 inches from adjacent combustible walls. However, not only were these representations made without prior scientific substantiation; these representations contradicted the results of prior scientific tests on a comparable model, and of which respondent was aware, in which it was found that minimum safe clearances from combustible walls for the comparable

model were 36 inches at the back of the device and 30 inches at the sides.

PAR. 12. The scientifically unsubstantiated representations referred to in Paragraph Eleven above:

1. Involve specific claims concerning the safe usage of potentially hazardous consumer products.

2. Involve potential personal injury and property damage in the event that the representations are false.

3. Are of a type that consumers cannot themselves verify, since they lack the necessary equipment and expertise.

PAR. 13. The scientifically unsubstantiated representations referred to in Paragraph Eleven above contradict and offend model building, mechanical and fire protection codes recommended by the International Conference of Building Officials, the American Insurance Association, the Southern Building Code Congress, and the National Fire Protection Association. These model codes, which have been adopted by numerous states, counties and municipalities throughout the nation, require either that devices such as respondent's woodburning heaters and Franklin fireplaces, models 7326, 7336, 7366, 7377, 7387, 21015, 21017, 21335, 21336 and 21337, be specifically and scientifically tested to establish minimum safe clearances for the devices from adjacent combustible walls, or, in the absence of such tests, that such devices be installed with clearances of at least 36 inches from adjacent combustible walls.

PAR. 14. Certain insurance companies look to the aforementioned model codes when determining the insurability of private dwellings. If a home owner fails to comply with the requirements of such model codes, such insurance companies may, as applicable, either refuse to grant a home owner's policy to the home owner or cancel the home owner's existing policy.

PAR. 15. In light of factors such as those referred to in Paragraphs Twelve through Fourteen above, the representations by respondent referred to in Paragraph Eleven above were unfair and deceptive, since they were made without a prior reasonable basis and, in particular, without prior adequate scientific substantiation.

PAR. 16. The representations by respondent referred to in Paragraph Eleven above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

D. Count IV

PAR. 17. In connection with the sale and offering for sale of certain

of its woodburning heaters and Franklin fireplaces, respondent has, as described in Counts I, II and III above, made representations to consumers concerning the safe and proper usage of potentially dangerous consumer products, where such representations have been false, contradictory and/or scientifically unsubstantiated. A continuing and lingering effect of such representations is the danger that, where such representations were in fact false and unsafe, consumers who have already installed such devices in accordance with such representations will, unless notified otherwise, continue to be exposed to unreasonable risks of personal injury and property damage.

PAR. 18. It is an unfair or deceptive act or practice for respondent to continue to fail to:

1. Notify past purchasers of the dangers created by reliance upon those representations already shown to be false by actual scientific tests and expert opinion (see Count I above).

2. Conduct adequate scientific tests to assess the safety of those representations respecting which scientific tests have not yet been conducted (see Count III above), and notify past purchasers of any safety hazards disclosed by such tests and involving respondent's representations.

PAR. 19. Respondent's continuing failure to give the notices to past purchasers referred to in Paragraph Eighteen above constitutes an unfair act or practice in or affecting commerce, in violation of . ection 5 of the Federal Trade Commission Act.

E. COUNT V

PAR. 20. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false or deceptive representations to consumers concerning the applicability and results of third party product tests, listing and approvals.

Among and typical, but not all inclusive, of such false or deceptive representations are the following:

1. Respondent has represented to consumers, in written materials and in oral sales presentations by its sales personnel, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) have been "listed" and approved under International Conference of Building Officials ("ICBO") research reports for installation as close to adjacent combustible walls as: 12 inches at the backs of the devices if a special protective heat shield is used; or 18 inches if the heat shield is not used. In actuality, however, the ICBO research reports applicable to these devices require that they be installed with the heat shield

(never without the heat shield) and be installed at least 18 inches (not 12 inches) from combustible walls.

2. Respondent has represented to consumers in written advertisements that one of its woodburning heaters (model 5722) has been "listed" and approved by Underwriters Laboratories, Inc. ("UL") for installation as close as 24 inches from combustible walls. In actuality, however, the UL listing for model 5722 requires that for the device to be listed, minimum safe clearances "must" be maintained from adjacent combustible walls of "not less than . . . 36 inches at back of cabinet, 30 inches at sides."

PAR. 21. Consumers rely upon UL and ICBO listings and other third party products tests, listings and approvals when choosing consumer products.

PAR. 22. State, county and municipal building officials rely upon UL and ICBO listings when determining whether devices such as respondent's woodburning heaters and Franklin fireplaces satisfy the requirements of local building and fire protection codes.

PAR. 23. The representations referred to in Paragraph Twenty above have the tendency and capacity to mislead and deceive consumers and state, county and municipal building officials as to the applicability and results of third party product tests, listings and approvals, and have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34, 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 Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

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 Montgomery Ward & Co., Incorporated (hereinafter "respondent"), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any woodburning heaters or Franklin fireplaces, forthwith cease and desist from, directly or indirectly:

A. Making any representation to consumers regarding the safe or proper installation clearances for any woodburning heater or Franklin fireplace from adjacent combustible walls, where such representation contradicts the general clearance requirements from combustible walls contained in prevailing model building, mechanical and fire protection codes, unless prior to the time such representation is first made, respondent possesses and relies upon a competent scientific test which substantiates such representation. *Provided,* that for purposes of this order, a "competent scientific test" shall mean:

A test in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, or (b) with the exception of the specific tests required by Paragraph III.A below, by persons

employed by respondent, if they are qualified by professional training, education and experience and can conduct and evaluate the test in an objective manner.

B. Making any safety-related representation to consumers regarding the installation (other than clearances from adjacent combustible walls), operation or maintenance of any woodburning heater or Franklin fireplace, unless prior to the time such representation is first made, respondent possesses and relies upon competent and reliable evidence which substantiates such representation, including but not limited to competent scientific tests or competent and reliable opinions of scientific, engineering or other experts, including employees of respondent, who are qualified by professional training or experience to render competent judgments in such matters.

C. Making any representation to consumers regarding any woodburning heater or Franklin fireplace, which misstates or misrepresents the results or applicability of any test, listing or approval by any third party.

II.

It is further ordered, That respondent shall include as a full page located in the center of its October 1979 catalog house clearance books, and as a full page located immediately preceding the first page of the Index in its Spring & Summer 1980 semi-annual general catalog, the following notice, conspicuously displayed:

IMPORTANT SAFETY NOTICE TO OWNERS OF WARDS WOODBURNING HEATERS AND FRANKLIN FIREPLACES

Some recent Wards catalogs, fireplace booklets, descriptive manuals, owner's guides, or sales person statements understated some of the minimum recommended clearances between some Wards woodburning heaters and Franklin fireplaces and adjacent combustible walls (see the list of model numbers below). If you purchased one of these heaters or fireplaces and installed it closer to combustible walls than the distances shown in the chart below, it should be relocated IMMEDIATELY. Failure to relocate the heater or fireplace to these distances, or (if needed) to install a protective heat shield between it and combustible walls, COULD CAUSE A FIRE.

CLEARANCES FOR MODELS 5722, 7377, 7387, 21015 AND 21017:

STOVE MODEL	DISTANCE FROM REAR	DISTANCE FROM SIDES
5722 (Circulating wood heater)	36 inches from back of stove	30 inches from sides of stove
7377 (Comfort heater)	30 inches from back of stove	36 inches from sides of stove

7387 (Parlor heater)	30 inches from back of stove	36 inches from sides of stove
21015 (Franklin fireplace)	18 inches from back of fireplace, with heat shield installed on the inside back wall of fireplace	36 inches from sides of firebox opening
21017 (Franklin fireplace)	18 inches from back of fireplace, with heat shield installed on the inside back wall of fireplace	36 inches from sides of firebox opening

If you have installed one of the above heaters or fireplaces at less than the distances from combustible walls shown above, or without a heat shield where a heat shield is needed, Wards will help you by either relocating the heater or fireplace to the correct distance or by providing or installing the heat shield, at Wards' expense.

CLEARANCES FOR MODELS 21335, 21336 AND 21337:

STOVE MODEL	DISTANCE FROM REAR	DISTANCE FROM SIDES
"Little Ben" Franklin fireplace (Wards model 21335; Hearth Craft model 220)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth
"Big Ben" Franklin fireplace (Wards model 21336; Hearth Craft model 260)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth
"Giant Ben" Franlkin fireplace (Wards model 21337; Hearth Craft model 300)	18 inches from back of fireplace, with heat shield installed on back of fireplace	12 inches from sides of cast iron hearth

If you have purchased one of the above three Franklin fireplaces from Wards and installed it without a heat shield, Wards will provide or install a heat shield at Wards' expense.
FOR FURTHER INFORMATION, write:

Mr. Donald C. Gutmann,
Customer Relations Manager, 4–N
Montgomery Ward & Co., Incorporated
Montgomery Ward Plaza
Chicago, Illinois 60671

To enable us to assist you promptly, please try to include the following information in your letter, if known: your name, address and telephone number, the unit you own, the distance from the back and sides of your unit to adjacent combustible walls, whether your unit is installed with a heat shield, and the address where your unit is located."

III.

It is further ordered, That:

A. Respondent shall promptly submit the following of its models of woodburning heaters to one or more independent product testing laboratories approved for this purpose by the Federal Trade Commission or its delegees, for determination by competent scientific tests, as defined in Paragraph I.A above, of the minimum recommended installation clearances for such models from adjacent combustible walls: models 5718, 7326 and 7336, as offered in respondent's Spring & Summer 1978 catalog, and models 7366, 7386 and 7396, as offered in respondent's Fall & Winter 1977 catalog.

B. If the results of the tests required by Paragraph III.A above on respondent's models 5718, 7326, 7336, 7366, 7386 and 7396, show that respondent has understated the minimum recommended clearances for any such model from adjacent combustible walls, in any of its current or past catalogs, fireplace booklets, descriptive manuals or owner's guides, respondent shall include in the notice required by Paragraph II above notification of the clearances determined by such test and an offer to relocate the model to such clearances at respondent's expense.

IV.

It is further ordered, That respondent shall take all such steps as are necessary to carry out its obligations described in the notice required by Paragraphs II and III.B above to relocate certain woodburning heaters and Franklin fireplaces, or provide or install protective heat shields where needed, at respondent's expense. *Provided,* that:

A. Respondent may, at its election, have the necessary work performed by persons selected by it, including its own employees, who are competent to perform such work.

B. Respondent shall, if relocation of a particular heater or fireplace, or installation of the necessary heat shield on its Franklin fireplace models 21335, 21336 and 21337, is not acceptable to the consumer, offer instead to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

C. Respondent may, at its election, if it concludes that relocating a particular heater or fireplace, or installing the necessary heat shield on its Franklin fireplace models 21015, 21017, 21335, 21336 or 21337, would not be feasible, instead offer to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping

and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

D. Respondent may, as regards its Franklin fireplace models 21335, 21336 and 21337, require the consumer to submit proof of purchase satisfactory to respondent showing that the consumer purchased his or her unit from respondent, before respondent must approve any remedy under this order for said consumer, which approval by respondent shall not be unreasonably withheld.

V.

It is further ordered, That:

A. Respondent shall send to each of its retail sales departments involved in the sale of any woodburning heater or Franklin fireplace, prior to or contemporaneously with the selling of such item in that department, descriptive manual pages or other written information for the department's sales personnel setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of that item.

B. For a period of six (6) months from the effective date of this order (plus such additional time as may be necessary to conduct competent scientific tests and to print the materials), respondent shall send to all company retail and catalog stores, as available based upon competent scientific tests, written point of sale material for distribution to consumers inquiring about any of the woodburning heaters or Franklin fireplaces which are covered by the notice requirements of Paragraphs II and III.B of this order, and which respondent is then offering for sale to consumers, setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of such items.

VI.

It is further ordered, That respondent shall have a period of six (6) months from the effective date of this order to revise and reprint all printed materials as required to comply with this order, including but not limited to owner's guides, advertising copy, catalog copy and descriptive materials, and shall not be in violation of this order because of the existence of owner's guides packaged with products prior to the effective date of this order. *Provided,* that during such period, respondent shall use its best efforts to advise customers and consumers of the installation information contained in the notice required by Paragraphs II and III.B above of this order, and to include with the woodburning heaters and Franklin fireplaces covered by such notice

corrected installation information concerning recommended clearances from adjacent combustible walls.

VII.

It is further ordered, That respondent shall:

A. Sixty (60) and two hundred forty (240) days after the effective date of this order, file with the Commission reports in writing setting forth in detail the manner and form in which it has complied with this order.

B. Maintain files of all persons making written requests to respondent to have woodburning heaters or Franklin fireplaces covered by the notice required by Paragraphs II and III.B of this order relocated, or installed or provided with heat shields, where respondent has refused such requests, which files shall contain the names and addresses of such persons and the information on which each such refusal was based, including all correspondence from the consumer concerning the consumer's request. Such files shall be made available for inspection and copying, upon reasonable notice, by a duly authorized agent of the Commission during respondent's regular business hours.

C. Forthwith distribute a copy of this order to each of its operating divisions which is involved in the sale or offering for sale of, or the selection, evaluation or preparation of materials regarding, woodburning heaters or Franklin fireplaces.

D. 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.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Jan. 29, 1980

ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION THAT THE COMMISSION TAKE OFFICIAL NOTICE OR THAT IT REOPEN THE RECORD

On November 26, 1979, respondent, Bristol-Myers Company, ("Bristol-Myers") filed a motion requesting the Commission to take official notice of selected newspaper reports about the initial decision in this case, or reopen the record so those reports could be introduced into evidence. Bristol-Myers contends that these reports have misstated the findings made by the administrative law judge, demonstrating that the press has misunderstood not only the tenor of the initial decision, but also the affirmative disclosures which Bristol-Myers has been ordered to include in its comparative advertising. The respondent argues that the reports consequently provide direct evidence of the likelihood that consumers will also misconstrue the affirmative advertising disclosures. Complaint counsel answered Bristol-Myers' motion on December 3, 1979, opposing it on grounds that the newspaper reports are neither reliable nor probative evidence of consumers' understanding of the affirmative disclosures.

At this point in the proceedings at least, we are not persuaded of a need either to notice the proferred clippings officially or to reopen the record for the introduction into evidence. The newspaper reports seem, in fact, to be only dimly relevant to the issue of consumer perceptions. The respondent's motion does not state that newspapers have generally mischaracterized the affirmative disclosures which would be given to consumers; rather the motion asserts only that the press has misconstrued the findings on which the order of the administrative law judge is based. On the other hand, we also note from the motion that one of the respondent's witnesses has already testified directly about the probable impact on consumers of affirmative disclosures that are similar or identical to those set forth in the initial decision. Therefore, it is not apparent that the selected newspaper reports constitute evidence necessary or helpful to a proper resolution of this case.[1] Accordingly,

It is ordered, That Bristol-Myers' motion be and hereby is denied.

Commissioner Pitofsky did not participate.

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[1] The Commission may at any time take official notice of appropriate material on its own motion. Pursuant to Rule 3.43(d), however, parties are entitled to disprove an officially noticed fact if the Commission's decision is based on it, in whole or in part, and it is a material fact that does not appear in evidence of record.

IN THE MATTER OF

THE HARTZ MOUNTAIN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(A) OF THE CLAYTON ACT

Docket C-3008. Complaint, Jan. 31, 1980—Decision, Jan. 31, 1980

This consent order requires, among other things, a Harrison, N.J. manufacturer of pet supplies to cease entering into any agreement or arrangement having the tendency to fix resale prices for pet products, or restrict interbrand and intrabrand competition in the pet supply industry. The firm is specifically prohibited from entering into any exclusive or preferential dealing arrangements; and using price incentives, refusals to deal, and threats of termination to induce and maintain such arrangements. Respondent is further prohibited from engaging in price discrimination; restricting sales territories and allocating customers; disparaging financial status of competitors or disfavored distributors; suggesting resale prices for pet supplies; and refusing to deal with recalcitrant distributors. Respondent is additionally required to publish the terms of the order in the *Supermarket News*, and maintain specified records for a designated period.

Appearances

For the Commission: *Thomas D. Massie, Peggy H. Summers, William C. Holmes* and *Jerome S. Lamet.*

For the respondent: *Joshua F. Greenberg, Kaye, Scholer Fierman, Hays & Handler,* New York City.

COMPLAINT

The Federal Trade Commission having reason to believe that The Hartz Mountain Corporation has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges as follows:

Definitions

1. As used in this complaint:

(a) "Pet supply" means a product that is utilized in the everyday maintenance, care and enjoyment of common household pets and includes, but is not limited to, such items as pesticidal collars,

shampoos, medicinals, rawhide and rubber chewing toys, leashes, feeding dishes, books, bird and small animal cages, cat litter, aquariums, aquarium pumps, heaters, filters and ornaments, dog and cat treats and biscuits, small animal treats, pet and wild bird seed, fish foods and aquarium remedies.

(b) "Manufacturer" means any person engaged in production, assembly or packaging of pet supplies or which causes production, assembly or packaging of pet supplies to be done for it. The term manufacturer shall not include any person engaged primarily as a retailer which uses its own trademark in connection with pet supplies.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal business entity.

Respondent

2. The Hartz Mountain Corporation (hereinafter referred to as Hartz Mountain or respondent) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 700 South Fourth St., Harrison, New Jersey.

Nature of Respondent's Business

3. Hartz Mountain is primarily engaged in the business of manufacturing, distributing and selling approximately 1200 pet supply items under the Hartz, Hartz Mountain, Delta and Longlife brand names. It is the largest manufacturer and distributor of pet supplies in the United States. It is also engaged in the business of distributing and selling live pets such as tropical fish, goldfish, birds, small mammals and reptiles. It has major pet supply manufacturing, warehousing and distribution facilities in Harrison, Bloomfield and Jersey City, New Jersey.

4. Hartz Mountain's total sales, including live pets, were approximately $180,000,000 in 1975. Its sales of pet supplies accounted for approximately $163,800,000 during that period.

5. Hartz Mountain distributes its brands of pet supplies to over 50,000 retail outlets primarily through a distribution system of independent service distributors, who are sometimes referred to as rack jobbers, and wholesale distributors, both of whom purchase and warehouse pet supplies for resale to retailers. In addition, service distributors usually provide services ancillary to the sale of pet supplies, such as setting up displays and fixtures, preticketing individual products with prices designated by a retailer, delivering to individual retail outlets, stocking the displays or fixtures with less than

case lots, setting up promotions and floor displays, cleaning and otherwise maintaining the displays or fixtures, and removing damaged, shopworn and slow moving pet supplies. In a number of instances, Hartz Mountain sells directly to retailers, either by shipping merchandise directly to the retailer from its New Jersey facilities or through one of its branches located in various parts of the United States; its principal method of distribution, however, is through service distributors.

6. Hartz Mountain maintains a sales force whose personnel are located throughout the United States. These sales personnel call on distributors and retailers carrying Hartz Mountain's brands of pet supplies, regardless of whether such customers purchase directly from respondent or from one of its distributors, for the purpose of introducing new pet supply products, offering suggestions and advice on merchandising respondent's products, advising such distributors and retailers of promotions that are or will be available, and resolving problems and maintaining relations with such customers. In addition, respondent's sales personnel actively solicit new accounts.

Commerce

7. The pet supplies manufactured and distributed by respondent have been and are being sold by Hartz Mountain to purchasers thereof located throughout the several States of the United States and in the District of Columbia. Respondent has caused and is causing such pet supplies to be transported and shipped from the various places of manufacture and warehousing to purchasers thereof who are located in states other than the state where such pet supplies have been and are being manufactured and warehoused. At all times relevant herein, Hartz Mountain was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 44), and was engaged in commerce as "commerce" is defined in the Clayton Act, as amended (15 U.S.C. 12).

8. Except to the extent that competition has been hindered, frustrated and restrained as set forth hereafter, Hartz Mountain has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, distribution and sale of pet supplies in and affecting "commerce" as that term is defined in the Federal Trade Commission Act and in "commerce" as that term is defined in the Clayton Act, as amended.

COUNT I

9. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count I as if fully written herein.

Nature of the Violation

10. In the course and conduct of its business in and affecting commerce Hartz Mountain has:

(a) Engaged in a course of conduct to hinder, frustrate and restrain the distribution of competitive brands of pet supplies by certain distributors and retailers. In furtherance of such course of conduct it has:

(1) Entered into and enforced agreements, understandings or arrangements with certain distributors and retailers whereunder such distributors and retailers would refrain from the purchase of pet supply products of manufacturers other than Hartz Mountain;

(2) Granted special rebates, discounts, guaranteed or subsidized profits, and other monetary incentives and modifications in price to certain retailers as an inducement for such retailers to refrain from the purchase of pet supply products from competitors of Hartz Mountain; and

(b) Knowingly made or caused to be made false reports and statements concerning the financial status of certain distributors and competitors, including statements indicating that such distributors or competitors were about to go out of the pet supply business.

Effects

11. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of:

(a) Hindering, frustrating and restraining the ability of competitors to gain distribution of their brands of pet supplies; and

(b) Impairing the credibility and business reputation of certain competitors, thereby impairing their ability to compete with respondent.

Violation Alleged

12. The acts and practices of the respondent as set forth in Paragraph 10 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

13. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count II as if fully written herein.

Nature of the Violation

14. In the course and conduct of its business in and affecting commerce Hartz Mountain has engaged in a course of conduct to limit the freedom of certain of its distributors to resell its products. In furtherance of such course of conduct Hartz Mountain has:

(a) Entered into and enforced contracts, agreements, understandings or arrangements with certain of its distributors requiring that they resell respondent's products only on a service basis. Such distributors are required to provide, replenish, clean and remove respondent's products at the point of display, over and above the actual sale of such products. Such distributors are precluded from selling respondent's products to retailers who wish to purchase such products without receiving such ancillary services.

(b) Entered into and enforced agreements, understandings or arrangements with certain distributors forbidding such distributors from soliciting or selling to retailers who purchase respondent's products from another distributor.

Effects

15. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of:

(a) Depriving certain distributors of their freedom to solicit customers and to tailor their sales to the desires and needs of such customers; and

(b) Allocating customers among certain distributors and eliminating intrabrand competition in the resale of respondent's products by distributors thereof, and depriving retailers and consumers of the benefits of competition between such distributors.

Violation Alleged

16. The acts and practices of the respondent as set forth in Paragraph 14 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

17. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count III as if fully written herein.

Nature of the Violation

18. In the course and conduct of its business in and affecting commerce Hartz Mountain has engaged in a course of conduct, the purpose or effect of which has been to fix, control, establish and maintain the prices at which its products are promoted, offered for sale and sold by certain distributors. In furtherance of such course of conduct Hartz Mountain has:

(a) Entered into and enforced agreements, understandings or arrangements with certain distributors requiring that they sell at prices established or suggested by respondent for its products;

(b) Refused to sell or threatened to refuse to sell to certain distributors who have failed to, or have been suspected of failing to, sell at prices established or suggested by respondent for its products; and

(c) Negotiated directly with certain retailers the wholesale prices to be charged to such retailers by distributors for respondent's products.

Effects

19. The aforesaid acts and practices of the respondent have the tendency to or the actual effect of fixing, maintaining and stabilizing the prices at which respondent's products are sold by certain distributors to retailers.

Violation Alleged

20. The acts and practices of the respondent as set forth in Paragraph 18 above constitute unfair methods of competition and restrain trade in violation of Section 5 of the Federal Trade Commission Act.

Count IV

21. The allegations contained in Paragraphs 1 through 8 are incorporated by reference in Count IV as if fully written herein.

Nature of the Violation

22. In the course and conduct of its business in commerce Hartz Mountain has:

(a) Discriminated in price in the sale of pet supplies of like grade and quality by granting discounts, rebates and other reductions in price to some distributors while not offering or granting such reductions in price to competing distributors; and

(b) Discriminated in price, directly and indirectly, in the sale of pet supplies of like grade and quality by granting discounts, rebates and other reductions in price to some retail customers while not offering or granting such reductions in price to competing retail customers.

Effects

23. The aforesaid acts and practices of the respondent have the effect of:

(a) Substantially lessening competition or tending to create a monopoly in the manufacture, distribution and sale of pet supplies; and

(b) Injuring, destroying or preventing competition with Hartz Mountain or with distributors and retail customers who receive the benefits of such discrimination in price.

Violation Alleged

24. The acts and practices of the respondent as set forth in Paragraph 22 above constitute unlawful discrimination in price in violation of subsection 2(a) of the Clayton Act, as amended.

Decision and Order

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of 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 in that respect, and having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Hartz Mountain Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 700 South Fourth St., Harrison, 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

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

A. "Pet supply" means a product that is utilized in the everyday maintenance, care and enjoyment of common household pets and includes, but is not limited to, such items as pesticidal collars, shampoos, medicinals, rawhide and rubber chewing toys, leashes, feeding dishes, books, bird and small animal cages, cat litter, aquariums, aquariums pumps, heaters, filters and ornaments, dog and cat treats and biscuits, small animal treats, pet and wild bird seed, fish foods and aquarium remedies.

B. "Manufacturer" means any person engaged in production, assembly or packaging of pet supplies or which causes production, assembly or packaging of pet supplies to be done for it. The term manufacturer shall not include any person engaged primarily as a retailer which uses its own trademark in connection with pet supplies.

C. "Distributor" means any person which sells pet supplies for its own account to retailers.

D. "Service distributor" means a distributor which provides a retailer with service ancillary to the sale of pet supplies.

E. "Service" means setting up displays and fixtures, marking individual products with prices designated by a retailer, delivering to

individual retail outlets, stocking the displays or fixtures with less than case lots, setting up promotions and floor displays, cleaning and otherwise maintaining displays and fixtures, and removing damaged, shopworn and slow moving pet supplies.

F. "Retailer" means any person which sells pet supplies primarily for its own account to consumers.

G. "Consumer" means any person who uses pet supplies on a noncommercial basis.

H. "Person" means any individual, partnership, firm, association, corporation or other legal or business entity (other than a corporation in which The Hartz Mountain Corporation owns or controls 50% or more of the outstanding shares of stock representing the right to vote for the election of directors).

I. "United States" means the States of the United States of America, its territories or possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

J. "General marketing area" means the most recent available Neilsen Station Index Designated Market Area.

I

It is ordered, That The Hartz Mountain Corporation (hereinafter referred to as Hartz Mountain), its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into or enforcing any condition, agreement or understanding with any distributor or retailer that such distributor or retailer must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

2. Charging or offering to charge a price to a distributor or retailer, granting or offering to grant to a distributor or retailer any discount from or rebate upon such price, or paying or offering to pay anything of value to or for the benefit of a distributor or retailer, on the condition, agreement or understanding with such distributor or retailer that such distributor or retailer must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

3. Refusing to sell any pet supply to any distributor or retailer because such distributor or retailer has refused to enter into any contract, agreement or understanding that such distributor or retailer

must refrain from the purchase of any pet supply of any manufacturer other than Hartz Mountain.

4. Entering into or enforcing any contract, agreement or understanding with any distributor that such distributor must resell any Hartz Mountain pet supply only from a designated warehouse location or must refrain from expanding its facilities or adding new facilities in existing or new locations, *provided*, *however*, that nothing in this order shall require Hartz Mountain to ship for the account of a distributor to a location other than a warehouse of such distributor.

5. Falsely disparaging in any manner the financial status of any distributor or manufacturer of any pet supply.

It is further ordered, That Hartz Mountain shall:

6. For a period of five (5) years, commencing with the date of service of this order, offer to sell in the ordinary course of business reasonable quantities of any part or all of its pet supplies at its usual prices, terms and conditions of sale to any person engaged primarily as a retailer located in the United States or to any service distributor located in the United States who is a service distributor for Hartz Mountain pet supplies pursuant to a continuing contract, agreement or understanding on the date of service of this order (a) which requests in writing to purchase any pet supply from Hartz Mountain; (b) which is neither owned nor controlled by nor is an agent for a manufacturer of pet supplies; (c) which has not brought a pending suit nor is threatening in writing to bring suit against Hartz Mountain; and (d) which satisfies Hartz Mountain's reasonable credit, minimum quantity and delivery standards, which minimum quantity and delivery standards shall be made available on request in writing to any such retailer or service distributor, *provided*, *however*, that nothing in this order shall be construed to prevent Hartz Mountain from terminating any distributor or retailer in a manner that does not violate this order, and that nothing in this order shall be construed to require Hartz Mountain to offer to sell in a period of scarcity any pet supply that is not available in reasonably sufficient quantities to meet the reasonable requirements of Hartz Mountain's existing customers.

7. For a period of five (5) years, commencing with the date of service of this order, establish and maintain a file of all records referring or relating to Hartz Mountain's refusal to sell any pet supply to any prospective distributor or retailer located in the United States whose request in writing is received at the principal office of Hartz Mountain, which file shall contain a record of a written communication to each such prospective distributor or retailer explaining the reason for Hartz Mountain's refusal to sell and which file shall be made available for Federal Trade Commission inspection on reasonable

notice; and, annually, for a period of five (5) years, commencing with the date of service of this order, submit a report to the Federal Trade Commission listing the names and addresses of all such prospective distributors or retailers to whom Hartz Mountain has refused to sell during the preceding year, a description of the reason for each such refusal, and the date of each such refusal.

II

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into or enforcing any contract, agreement or understanding with any distributor requiring that such distributor provide service in connection with any pet supply sold by it to retailers that have not requested such service, *provided, however,* that nothing in this order shall be construed to prevent Hartz Mountain from (a) requiring any distributor to sell to any retailer or to service and display Hartz Mountain pet supplies in the manner and quantity designated by such retailer, unless otherwise advised by such retailer, (b) requiring any distributor to maintain reasonable facilities, including warehouse facilities, trucks and service personnel so that service ancillary to the sale of pet supplies can be performed if requested by a retailer, or (c) refusing to sell pet supplies to any distributor which does not sell to, service and display Hartz Mountain pet supplies in the manner and quantity so designated by a retailer, unless otherwise advised by such retailer.

2. Entering into or enforcing any contract, agreement or understanding with any distributor that such distributor must not resell or offer to resell any pet supply purchased from Hartz Mountain to one or more designated persons or outside one or more geographic areas.

3. Refusing to sell any pet supply to any distributor because such distributor will not agree that it must not resell or offer to resell any pet supply purchased from Hartz Mountain to one or more designated persons or outside one or more geographic areas.

III

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division

or other device, in connection with offering for sale or sale of any pet supply in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

1. Requiring any distributor to sell, offer to sell or promote any pet supply at a price fixed, established, maintained or suggested by Hartz Mountain.

2. Refusing to sell any pet supply to any distributor because such distributor will not sell, offer to sell or promote any pet supply at a price fixed, established, maintained or suggested by Hartz Mountain.

3. Suggesting in writing to any distributor or retailer any price at which any distributor may or will sell, offer to sell or promote any pet supply, *provided, however,* that if subsequent to three (3) years after the date of service of this order Hartz Mountain makes any such price suggestion, each such suggestion must include a clear and conspicuous statement that such price is suggested only.

4. For a period of three (3) years, commencing with the date of service of this order, suggesting orally to any retailer the price at which any distributor may sell or resell, offer to sell or promote any pet supply unless any such suggestion directed to a retailer is accompanied by a clear statement that such price is suggested only for informational purposes and that the distributor is free to sell at whatever price it may choose, and is accompanied by a list of all of Hartz Mountain's service distributors with warehouse facilities in the general marketing area of the retailer.

5. For a period of three (3) years, commencing with the date of service of this order, suggesting orally to any distributor who buys directly from Hartz Mountain the price at which such distributor may sell or resell, offer to sell or promote any pet supply to a retailer, *provided, however,* that any price suggestion made to a retailer in conformance with the preceding paragraph may be orally reported to a distributor if all distributors whose names appear on the submitted list are so informed, and *provided, further* that any oral price suggestion is accompanied by a clear statement that prices are provided only for informational purposes and that the distributor is free to resell at whatever price it may choose.

IV

It is further ordered, That Hartz Mountain, its successors and assigns, and its officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the sale of any pet supply in

commerce, as "commerce" is defined in the Clayton Act, as amended, shall forthwith cease and desist from:

For a period of ten (10) years, commencing with the date of service of this order, discriminating, directly or indirectly, in the price of Hartz Mountain's pet supplies of like grade and quality by selling any such pet supply to any purchaser (who is not a manufacturer) at a net price lower than the net price charged to any other purchaser competing with the former purchaser in the resale of any such pet supply, unless Hartz Mountain has, in fact, made such lower net price functionally available to all such competing purchasers.

It is further ordered, That nothing in this order shall be construed to prevent any of the following which Hartz Mountain may raise as defenses to be proved by it in any enforcement action brought to enforce Part IV of this order: price discrimination which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such pet supplies are sold or delivered to such purchasers, or which is made in good faith to meet an equally low price of a competitor, or where the purchaser is an agency of the United States of America; nor shall anything in this order be construed to prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the pet supply concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process or sales in good faith in discontinuance of business in the pet supply concerned; and *provided further* that nothing in this order shall be construed to prevent Hartz Mountain from asserting any other defenses available to it under the law to a charge of price discrimination; and *provided further* that for a period of ten (10) years, commencing with the date of service of this order, Hartz Mountain shall maintain a separate file at its principal office containing accurate documentation of: (a) each published price of Hartz Mountain for the sale by it of a pet supply, showing the period during which such published price was in effect; and (b) each variation in price in which Hartz Mountain sells any pet supply at a net price other than that prescribed in the applicable published price, showing the net price charged to such purchaser and the justification for such variation from the published price. Such file shall be made available for Federal Trade Commission inspection on reasonable notice.

V

It is further ordered, That:

1. This order shall not apply to activities outside the United States which do not directly affect the foreign or domestic commerce of the United States.

2. Nothing in this order shall be construed to prevent Hartz Mountain itself from selling pet supplies as a service distributor or otherwise to any retailer.

VI

It is further ordered, That Hartz Mountain shall:

1. Provide a copy of this order to its officers, directors, sales representatives and all distributors and retailers located in the United States who buy Hartz Mountain brand or Delta brand pet supplies directly from Hartz Mountain. Within sixty (60) days of the date of service of this order, Hartz Mountain shall cause to be published in *Supermarket News* the provisions of this order or shall provide a copy of this order to current subscribers of *Supermarket News*. For a period of five (5) years, commencing with the date of service of this order, all new distributors and retailers located in the United States who buy pet suppliers directly from Hartz Mountain are to be furnished a copy of this order.

2. Notify the Commission at least thirty (30) days prior to any proposed change in Hartz Mountain which may affect complaince obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change.

3. File with the Federal Trade Commission, within sixty (60) days of the date of service of this order, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NOLAN'S R.V. CENTER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS WARRANTY ACT

Docket C-3009. Complaint, Feb. 5, 1980—Decision, Feb. 5, 1980

This consent order requires, among other things, a Denver, Colo. retailer of motor homes, campers, and travel trailers to cease failing to place inside each vehicle it offers for sale, all applicable written warranties; and a sign giving the location of such warranties, and stressing the importance of comparing warranty terms before making a purchase. The firm is required to instruct its employees as to their specific obligations and duties under federal law, and to institute a surveillance program designed to detect violators of the order.

Appearances

For the Commission: *F. Kelly Smith, Jr.* and *Brenda V. Johnson.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act") and the implementing Rule Concerning the Pre-Sale Availability of Written Warranty Terms (16 CFR 702 (1979)) (effective January 1, 1977) ("Pre-Sale Rule") duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309 (1976)) (a copy of the Pre-Sale Rule is marked and attached as Appendix A* and is incorporated herein by reference as if fully set forth verbatim), and by virtue of the Authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nolan's R.V. Center, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Pre-Sale Rule, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nolan's R.V. Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws

* Not reproduced herein for reasons of economy.

of the State of Colorado. Its principal office and place of business is located at 6935 Federal Boulevard, Denver, Colorado.

PAR. 2. Respondent has been, and is now engaged in the advertising, offering for sale, and sale of motor homes, campers, recreational vehicles, and travel trailers to the public.

PAR. 3. In the course and conduct of its business, respondent offers for sale and sells to consumers, consumer products distributed in commerce as "consumer product", "consumer" and "commerce" are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act.

PAR. 4. Subsequent to January 1, 1977, respondent, in the course and conduct of its business, has offered for sale and sold motor homes, campers, recreational vehicles, travel trailers and other consumer products costing the consumer in excess of $15.00, many of which are warranted by the manufacturers. Respondent is therefore, a seller as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

PAR. 5. In connection with the offering for sale and sale of motor homes, campers, recreational vehicles, travel trailers, and other consumer products, respondent has failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties available for prospective buyers' review prior to sale through one or more of the following methods:

(a) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product;

(b) Maintaining a warranty binder system which is readily available to the prospective buyers, along with conspicuous signs indicating the availability and identifying the location of binders when the binders are not prominently displayed;

(c) Displaying the package of the consumer product on which the text of the written warranty is disclosed in such a way that the warranty is clearly visible to prospective buyers at the point of sale; and

(d) Placing a sign which contains the text of the written warranty in close proximity to the product to which it applies.

PAR. 6. Respondent's failure to comply with the Pre-Sale Rule as described in Paragraph Five of this Complaint is a violation of the Warranty Act, and is therefore an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the 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, as amended, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and the Rule Concerning the Pre-Sale Availability of Written Warranty Terms promulgated under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of 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 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 Nolan's R.V. Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 6935 Federal Boulevard, Denver, 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. Definitions

For the purposes of this order the definitions of the terms "consumer product," "warrantor," and "written warranty" as defined in Section 101 of the Warranty Act (15 U.S.C. 2301 (1976)) shall apply. The definition of the term "binder" as defined in § 702.1(g) of the Pre-Sale Rule (16 CFR 702 (1979)) shall apply.

II.

It is ordered, That respondent Nolan's R.V. Center, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, and sale of motor homes, campers, recreational vehicles, travel trailers or other consumer products, do forthwith cease and desist from:

1. Failing to make available in respondent's display area for prospective buyers' review prior to sale, the text of any written warranties offered or granted by the manufacturers of motor homes, campers, recreational vehicles, travel trailers and other consumer products sold by respondent.

With respect to motor homes, campers, recreational vehicles, and travel trailers "display area" means a prominent location inside each motor home, camper, recreational vehicle, and travel trailer.

2. Maintaining a binder or series of binders to satisfy the requirements of Paragraph 1, above, unless such binder or binders are located in each motor home, camper, recreational vehicle, and travel trailer being displayed for sale by respondent, and such binder or binders include at least one copy of each written warranty applicable to the motor home, camper, recreational vehicle, travel trailer and the consumer products contained in such motor home, camper, recreational vehicle, or travel trailer.

In utilizing any such binder or binders respondent shall:

(a) provide prospective buyers with ready access thereto; and

(b) (1) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers' attention; or

(2) (i) make such binder(s) available to prospective buyers' on request; and

(ii) place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within each motor home, camper, recreational vehicle or travel trailer, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and

(c) index such binder(s) according to product or warrantor; and

(d) clearly entitle such binder(s) as "Warranties" or other similar title.

III.

It is further ordered, That respondent shall post, in a prominent location in each motor home, camper, recreational vehicle and tra

trailer being displayed for sale, a sign, eleven inches (length) by seventeen inches (width), reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

We provide warranties for you to compare before you buy

Please ask to see them

Check: Full or limited?
What costs are covered?
What do you have to do?

Are all parts covered?
How long does the warranty last?

Such sign shall be posted for a period of not less than three years from the effective date of this order. The language in such sign shall be unencumbered by other written or visual matter, shall be indented and punctuated as indicated in the paragraph above, and shall be printed in black against a solid white background, as follows:

a. The word "Important" shall serve as the title of the notice and shall be printed in capital letters in 60 point boldface type followed by an exclamation point.

b. The next phrase shall be printed on a separate line in capital letters and in 42 point boldface type.

c. The next two phrases shall be printed on separate lines and in 36 point medium face type.

d. Each succeeding phrase shall be printed on a separate line and in 24 point medium face type.

IV.

1. *It is further ordered,* That respondent shall deliver a copy of this der to cease and desist to all present and future employees, lespersons, agents, independent contractors, and other representa- es of respondent engaged in the sale of motor homes, campers, reational vehicles, travel trailers, or other consumer products on alf of respondent, and secure a signed statement acknowledging ipt of the order from each such person.

It is further ordered, That respondent shall instruct all present future employees, salespersons, agents, independent contractors, ther representatives of respondent, engaged in the sale of motor

homes, campers, recreational vehicles, travel trailers or other consumer products on behalf of respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Pub. Law 93–637, 15 U.S.C. 2301, *et seq.*), all present and future implementing Rules promulgated under the Act, and this order.

3. *It is further ordered,* That respondent shall institute a program of continuing surveillance to reveal whether respondent's employees, salespersons, agents, independent contractors, or other representatives are engaged in practices which violate this order.

4. *It is further ordered,* That respondent shall maintain complete records for a period of not less than three (3) years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any of respondent's employees, salespersons, agents, independent contractors, or other representatives. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the individual involved, the date of the communication and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission during normal business hours upon reasonable advance notice.

5. *It is further ordered,* That respondent shall maintain, for a period of not less than three (3) years from the effective date of this order, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of its continuing compliance with all the terms and provisions of this order.

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

7. *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

TEXAS ASSOCIATION OF PROFESSIONAL SURETIES, ET AL.

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

Docket C—3010. Complaint, Feb. 13, 1980—Decision, Feb. 13, 1980

This consent order requires, among other things, an Odessa, Tex. unincorporated trade association of bail bondsmen and its Houston, Tex. affiliate to cease establishing, fixing or maintaining uniform non-competitive prices for the sale of bail bonds; requiring adherence to such prices through coercion or otherwise; and attempting by any means to eliminate competition between or among bail bondsmen. The associations are prohibited from discussing prices and recalcitrant members at meetings; and required to timely amend any rule, by-law or code of ethics so as to conform with the terms of the order. Additionally, respondents are required to terminate the membership of any member who fails to comply with those terms.

Appearances

For the Commission: *Steven E. Weart* and *Joel Winston.*

For the respondents: *Joseph J. Rey*, Jr. El Paso, Tex., and *Michael Ramsey*, Houston, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Texas Association of Professional Sureties and Association of Professional Sureties of Houston, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Texas Association of Professional Sureties (TAPS) is a non-profit, unincorporated trade association whose members are engaged in business for profit. It was organized in 1965 and currently maintains its offices at 318 North Texas St., Odessa, Texas. Respondent TAPS is composed of approximately fifty bail bondsmen located within the State of Texas, comprising approximately one-sixth of all persons engaged in the business of writing bail bonds in the State of Texas. Its affairs are managed by its officers, who are

elected by the membership. These officers include president, vice president, and secretary-treasurer.

PAR. 2. Respondent Association of Professional Sureties of Houston (HAPS) is a non-profit, unincorporated trade association whose members are engaged in business for profit. It maintains its offices at 212 Scanlan Building, 405 Main St., Houston, Texas. Respondent HAPS is composed of approximately 30 bail bondsmen located within Harris County, Texas, comprising approximately 90% of all persons engaged in the business of writing bail bonds in Harris County. Its affairs are managed by its officers, who are elected by the membership. These officers include president, treasurer, and secretary.

PAR. 3. Respondents are organized and function to promote and advance the pecuniary and other interests of their members and the bail bond profession. Their activities include lobbying for legislation favorable to their members, maintaining and supervising member conduct in accordance with their codes of ethics, and serving as conduits for the exchange of information among members.

PAR. 4. Local (county or city-wide) associations of bail bondsmen, including HAPS, are directly affiliated with TAPS. TAPS members pay monthly dues to the local affiliates of which they are members. These dues are then forwarded by the local affiliates to TAPS. Under the TAPS Constitution, local affiliate presidents have numerous functions in the policymaking and day-to-day activities of TAPS. For example, changes in TAPS dues must be approved by the president of TAPS and at least three local affiliate presidents.

TAPS was originally formed by HAPS and its members for the purpose of coordinating the activities of bail bondsmen throughout the State of Texas. The majority of the current membership of TAPS is made up of HAPS members, and two of the three officers of TAPS are also HAPS members. The TAPS Code of Ethics, as described in Paragraph Seven below, was adopted in whole from the HAPS Code of Ethics.

PAR. 5. Most of the members of the respondents write a significant protion of their bail bonds for criminal defendants arrested in Texas, but residing in states other than Texas. Additionally, most of the members write or arrange for the writing of bail bonds for Texas residents arrested in states other than the State of Texas. A large percentage of the members are agents for national surety companies, which underwrite their bail bonds. These surety companies maintain offices in states other than the State of Texas. In the course of their business, the surety companies transmit powers of attorney, contracts, and other correspondence and communications to agents, and receive fees, statistical information and other transmissions from agents

within the State of Texas, through the mails and other instrumentalities of interstate commerce.

As a result of the aforesaid transactions, and by virtue of respondents' representation of their members and promotion of their business, respondents and their memberships have been and are now engaged in a pattern, course of dealing, and substantial volume of trade in bail bonds in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. The bail bondsmen holding membership in the respondent associations are in substantial competition with one another and with other members of the industry in the sale of bail bonds, in or affecting commerce, except insofar as that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

PAR. 7. For many years past, and continuing in the present time, respondents have planned, adopted, put in effect, and carried out policies having the purpose, tendency and effect of hindering, frustrating, restraining, suppressing and eliminating competition in the offering for sale and sale of bail bonds in or affecting commerce. Pursuant to, and in furtherance of, the above policies respondents, alone and by means of agreements, understandings, and combinations and conspiracies with certain of its members and with others, have engaged and continue to engage in the following acts and practices:

(a) Determining, fixing, establishing, stabilizing, effectuating and maintaining uniform, identical, non-competitive prices for the sale of bail bonds.

(b) Promoting, encouraging, and coercing adherence to, and discouraging and deterring variance from, said uniform, identical, non-competitive prices among member and non-member bail bondsmen.

(c) Holding regular meetings at which members discuss with other members the prices for which bail bonds have been and are to be sold by member and non-member bail bondsmen, the identity of member and non-member bail bondsmen charging prices lower than those approved by respondents and their members, and actions to be considered or taken against such bail bondsmen identified, all for the purpose and having the effect of determining, fixing, establishing, stabilizing, effectuating and maintaining uniform, identical, non-competitive prices for the sale of bail bonds.

(d) Promulgating and maintaining Codes of Ethics, with which members are required to comply, which state the following:

(i)n instances where the risk is average, the standard fee charged for bonds will be 10% for local State, 15% out of County State, and 15% Federal. This scale on fees will not be binding where, in the opinion of the Surety the risk on a bond is greater than average.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, as hereinabove alleged, are unfair and to the prejudice of the public because they have the purpose, tendency, and effect of hindering, lessening and restraining competition in the sale of bail bonds between and among bail bondsmen; raising barriers to entry of new competition in the sale of bail bonds; and limiting and restricting channels of distribution of bail bonds.

Said acts, practices and methods of competition constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Texas Association of Professional Sureties is an unincorporated, non-profit trade association with its principal office and place of business located at 318 North Texas St., Odessa, Texas.

2. Respondent Association of Professional Sureties of Houston is an

unincorporated, non-profit trade association with its principal office and place of business located at 212 Scanlan Building, 405 Main St., Houston, Texas.

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

It is ordered, That respondent Texas Association of Professional Sureties and respondent Association of Professional Sureties of Houston, individually, and their respective officers, directors, agents, representatives, employees, successors and assigns, directly or indirectly or through any corporation, subsidiary, affiliate, association, division, committee or other device, in connection with each respondent association's business, or with the offering for sale, sale, distribution or promotion of bail bonds, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, cooperating in, or carrying out any agreement, understanding or combination, express or implied, or unilaterally to do, adopt or perform any of the following acts, policies or practices:

1. Determining, fixing, suggesting, recommending, establishing, stabilizing, maintaining or effectuating, or attempting to determine, suggest, recommend, fix, establish, stabilize, maintain, or effectuate any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds.

2. Promoting, encouraging, requiring or coercing adherence to, or discouraging or deterring variance from, any price, term or condition of sale, price floor or minimum charge to customers for bail bonds.

3. Discussing at any meeting or elsewhere:

(a) any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds;

(b) the prices charged by, or terms or conditions of sale of, any member or non-member bail bondsman or bondsmen; or

(c) any action to be considered or taken in regard to any bail bondsman or bondsmen by reason of the price which such person or persons charge or their terms or conditions of sale.

4. Promulgating, adopting, maintaining, enforcing or requiring adherence to any constitution, code of ethics, rule, regulation, by-law, or other device by which any price, term or condition of sale, price floor, or minimum charge to customers for bail bonds is determined,

fixed, suggested, recommended, established, maintained, or effectuated.

5. Restricting or preventing, or attempting to restrict or prevent, any bail bondsman from carrying on any lawful course of action, or from engaging in trade or commerce by lawful methods of his or her own choosing.

6. Eliminating or attempting to eliminate competition between or among bail bondsmen.

It is further ordered, That each respondent shall, within thirty (30) days after service upon it of this order, mail by first class mail a copy of this order to each of its members, with a notice that such member must abide by the terms of this order as a condition to continued membership in the association.

It is further ordered, That, immediately upon completion of the above mailings, each respondent obtain from the person(s) actually performing the required mailing of each order and notice, an affidavit verifying the mailing of each such document, and specifying the particular person or business entity and address to which such document was mailed.

It is further ordered, That each respondent shall, within thirty (30) days after service upon it of this order, amend its charters, constitutions, by-laws, codes of ethics, rules and regulations by eliminating therefrom any provision which is contrary to or inconsistent with any provision of this order; and that each respondent shall thereafter require as a condition of membership that all of its present and future members act in accordance with the provisions of this order, and shall terminate the membership of any member not acting in accordance with the provisions of this order.

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

It is further ordered, That each respondent, 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 complied with this order including copies of all affidavits required by this order to be obtained by each respondent.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Feb. 15, 1980

ORDER DIRECTING GENERAL COUNSEL TO CONTINUE COURT ENFORCEMENT OF SUBPOENA DUCES TECUM

On November 16, 1979, the administrative law judge certified his recommendation to the Commission that the General Counsel be directed to continue proceedings for enforcement of a subpoena *duces tecum* issued to Hills Bros. Coffee, Inc. By motion dated December 3, 1979, Hills Bros. urged the Commission to withdraw its enforcement efforts. On December 20, 1979, respondent General Foods, filed a pleading in support of the ALJ's recommendation.

Our original order for court enforcement was issued on July 12, 1979, and directed the General Counsel to seek enforcement of those portions of the subpoena that concern marketing plans for Hills Bros.' "High Yield" coffee. After enforcement proceedings were initiated in district court, we learned, through the General Counsel, that complaint counsel had informed the administrative law judge that proof of economic injury to Hills Bros. was not an essential element of their case. However, the ALJ had previously denied Hills Bros.' motion to quash partly because he deemed the documents on "High Yield" coffee relevant to the question of economic injury. We therefore issued an order on November 9, 1979, directing the ALJ to reconsider his ruling in light of complaint counsel's assertions. Our order also directed the General Counsel to seek a stay of enforcement proceedings in district court pending the ALJ's reconsideration.

The ALJ's present recommendation for enforcement recognizes complaint counsel's statement that economic injury to Hills Bros. is not essential to their case. However, his certification is based on the fact that complaint counsel have nevertheless expressed their desire to elicit testimony on this subject. The ALJ believes that information concerning Hills Bros.' ability to introduce "High Yield" to the market after the period of General Foods' allegedly anticompetitive activities is relevant to the economic injury issue. He has limited his recommendation for enforcement, however, to marketing plans that concern only the first year in which "High Yield" coffee was introduced. This modification was suggested to conform to a similar limitation adopted by the ALJ in responding to a motion by Folger Coffee Company to quash a similar subpoena *duces tecum.*

The Commission has consistently held that an administrative law judge has wide discretion in discovery matters and that his determina-

tions should not be reversed absent a clear abuse of discretion. E.g., *Warner-Lambert Co.*, 83 F.T.C. 485 (1973). We find no such abuse of discretion here because the documents sought from Hills Bros. may well have substantial relevance to the testimony adduced by complaint counsel on economic injury. (*See* Commission Rule 3.31(b)(1).) We therefore agree with the law judge's recommendation that court enforcement of the subpoena be sought to the extent its specifications cover marketing plans for the first year "High Yield" was sold.

Hills Bros. has objected to the fact that the protective order issued by the ALJ on August 28, 1978, permits General Foods' in-house counsel as well as its outside counsel free access to the requested marketing plans. In our order of July 12, 1979, we observed that "the safeguards imposed by the ALJ to protect sensitive commercial data seem reasonably designed to prevent unwarranted disclosure of such information to respondent's employees." We have reconsidered these comments, however, in light of the competitive injury that Hills Bros. might suffer if its marketing plans should be disclosed to General Foods. Given the obvious competitive sensitivity of Hills Bros.' marketing plans and the fact that General Foods is represented by outside counsel, it is not clear why access to these materials should be extended to General Foods' three inside counsel of record, one or more of whom may well have advisory responsibilities to their employer that conflict with maintaining the confidentiality of Hills Bros.' marketing plans. Accordingly,

It is ordered, That the General Counsel continue to seek court enforcement of the subpoena *duces tecum* issued to Hills Bros. in so far as it seeks marketing plans for the first year "High Yield" coffee was sold, and

It is further ordered, That paragraph (4)(a) on page 7 of the ALJ's order of August 28, 1978 be modified to delete references to General Foods' named inside counsel. In the event that General Foods concludes that access to the Hills Bros. documents by one of its inside attorneys is essential to ensure fair representation, the ALJ is free to entertain an application by General Foods for a modification of the protective order subject to Hills Bros.' right to oppose any such application, in accordance with paragraph (6) on page 8 of the August 28, 1978 order.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, Feb. 19, 1980

ORDER DENYING MOTION FOR A HEARING TO INTRODUCE EVIDENCE, COMMENT AND ARGUMENT CONCERNING *EX PARTE* COMMUNICATIONS

By motion dated January 23, 1980, respondent AMREP Corporation requests an opportunity for comment and an evidentiary hearing on *ex parte* communications between the investigative and prosecutorial staff and the Commission in this proceeding. The respondents' motion also requests leave to introduce evidence as to whether all *ex parte* communications concerning matters litigated in this case have been disclosed to the respondent. Finally, AMREP seeks to place into evidence communications that are not part of the record.

The respondent argues that its motion for comment and a hearing on *ex parte* matters finds support both in *AMREP* v. *Pertschuk*, No. 79–0491 (D.D.C., filed April 6, 1979), *appeal docketed*, No. 79–1592 (D.C.Cir. 1979) and in the Commission's order of July 12, 1979. We agree that the court's opinion and our order affirmed the respondents' right to comment on *ex parte* communications. Nevertheless, it was apparent in both instances that such comments were to be made in the course of the Commission's normal appellate procedure. The respondent should thus have been well aware that its opportunity to address *ex parte* matters was in its appeal brief and, to the extent full discussion would have required, in its answer and reply briefs. *See* Rule 3.52. Furthermore, while the court's opinion and our order noted that the Commission was empowered to take evidence on appeal, they did not indicate the respondent had any right to an evidentiary hearing. Rule 3.54 makes it clear, in fact, that such hearings are to be held only if the Commission deems them necessary.

Here, AMREP has evidently decided to forego its right to address *ex parte* matters in the context of normal appellate procedures. It has instead raised the issue in a motion filed eleven days after its answer brief. The motion does not explain what the nature of its comments on *ex parte* communications might be, why it feels any evidentiary hearing is required, or even why it waited until the eleventh hour to seek such relief. At this late stage in the proceedings, the Commission is not prepared to grant the respondents' requests on such an insubstantial showing.

We are similarly unprepared to grant AMREP's request to introduce evidence as to whether it has been fully informed of all *ex parte* communications concerning matters in litigation before the agency.

The respondent has already received assurances from counsel representing the Commission in *AMREP* v. *Pertschuk* that all such communications have been disclosed. Indeed, in his opinion disposing of the case, Judge Gasch concluded that "all existing *ex parte* communications even remotely related to [AMREP] have been disclosed and placed on the public record."

The final aspect of AMREP's motion is its request to place into evidence all *ex parte* communications not previously made part of the record. The communications involved in this request are few in number and unrelated to the facts at issue in the matter before us on appeal.[1] Therefore, nothing in the Commission's rules would require us to place the communications on the record. AMREP has, moreover, offered us no indication as to the purpose or the significance of its request. However, while we do not believe that the communications should be introduced into evidence, we have no objection to the communications being placed on the record.[2] Accordingly,

It is ordered, That all *ex parte* communications not previously placed on the record be placed on the record, and

It is further ordered, That in all other respects the respondents' motion be, and hereby is, denied.

[1] Illustrative of the communications involved are a Commission minute of May 17, 1978 authorizing the Bureau of Consumer Protection to submit comments to Federal District Court Judge Lasker on civil cases involving AMREP, and a March 13, 1979 affidavit by John F. Dugan to the effect that specific land sales cases were not discussed at a Commission budget meeting.

[2] Rule 4.7(c) requires *ex parte* communications to be placed in the docket binder of the proceeding, but prohibits the Commission from considering them for purposes of its decision. Because all other *ex parte* communications are in this category, we deem it appropriate for those documents to be located in the same place.

IN THE MATTER OF

AMF INCORPORATED

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

Docket C-3011. Complaint, Feb. 21, 1980—Decision, Feb. 21, 1980

This consent order requires, among other things, a White Plains, N.Y. manufacturer and seller of bicycles, tricycles and other two- or three-wheeled non-motorized vehicles to cease, in connection with the advertising and sale of its products, from representing young children or others riding or operating such vehicles in an improper, unsafe or unlawful manner. The firm is also prohibited from representing any person riding a minibike in traffic unless such operation is permitted by applicable traffic laws and regulations. The order further requires the firm to timely produce two or more versions of a bicycle safety message with the advice, assistance and approval of three independent individuals experienced or knowledgeable in bicycle safety, children's advertising and children's television programming; provide a film of such message to specified television broadcasting stations throughout the country; and monitor the message for four months to ensure that it reaches a designated number of children. Should the message fail to reach the specified audience level, respondent is required to distribute the film for airing by a second group of T.V. stations.

Appearances

For the Commission: *Louise R. Jung* and *John G. Siracusa.*

For the respondent: *Hugh Latimer, Bergson, Borkland, Margolis & Adler,* Washington, D.C.

COMPLAINT

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

PAR. 1. Respondent AMF Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 777 Westchester Ave., White Plains, New York.

Respondent's Wheel Goods Division is principally responsible for the

manufacture and sale of respondent's bicycles, tricycles and other wheeled toys.

PAR. 2. Respondent is now and for all times relevant to this complaint has been engaged in the production, distribution, and sale of a variety of bicycles, tricycles and other wheeled toys.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising material, including, but, not limited to, the advertising referred to herein, to promote the sale of bicycles and tricycles, including, but not limited to, the "Evel Knievel MX," the "Evil Knievel Hot Seat" and the "Avenger."

PAR. 4. In the course and conduct of its aforesaid business, respondent causes and has caused wheeled goods to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce.

PAR. 5. In the course and conduct of its aforesaid business, respondent has disseminated, and caused the dissemination of certain television advertisements concerning said products in or affecting commerce which were broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 6. Typical and illustrative of the statements and representations in respondent's advertisements disseminated by means of television, but not all inclusive thereof, are the "Can't Wait" and "Avenger" advertisements. In "Can't Wait," two young boys are shown riding their respective vehicles, a bicycle and tricycle, down their parallel driveways, continuing a short distance into the adjoining street so as to greet each other, without slowing down or looking out for cars or other possible dangers to themselves or others. In "Avenger," one young boy is shown riding a bicycle on a one-way street, then turning onto a sidewalk and into a vacant dirt lot without slowing down or looking right or left, riding over rough and uneven ground in the dirt lot, and then turning into an alley without slowing down or looking right or left.

PAR. 7. A. The aforesaid advertisements have the tendency or capacity to influence young children to ride or operate a bicycle, tricycle or other similar wheeled toy in a street, road, alley or other traffic thoroughfare.

B. Furthermore, the aforesaid advertisements have the tendency

or capacity to influence children to engage in the following behavior with respect to the use of bicycles, tricycles, or other similar wheeled toys:

1. Riding across rough and uneven ground on a bicycle, tricycle or other similar wheeled toy in a manner which creates an unreasonable risk of harm to person or property.

2. Riding or operating a bicycle, tricycle or other wheeled toy in a manner which is contrary to generally recognized standards of safety for the operation or use of a bicycle, tricycle or other similar wheeled toy.

Therefore, such advertisements have the tendency or capacity to induce behavior which involves an unreasonable risk of harm to person or property, and were and are therefore unfair or deceptive acts or practices.

PAR. 8. In the course and conduct of its aforesaid businesses, and at all times mentioned herein, respondent has been and is now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of bicycles, tricycles and other wheeled toys.

PAR. 9. The aforesaid acts or practices of respondent, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the named 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 the named respondent with violation of the Federal Trade Commission Act; and

The named respondent, AMF Incorporated, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the named 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 the named 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 named respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement on the public record for a period of sixty (60) days and the named respondent having thereafter submitted modifications to the executed agreement, dated September 26, 1979; and

The Commission, having duly considered the comments filed by interested persons pursuant to Section 2.34 of its Rules during the sixty (60) day period and the recommendations of its staff, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. The named respondent, AMF Incorporated, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with an office and place of business located at 777 Westchester Ave., White Plains, New York.

2. Respondent's Wheel Goods Division is principally responsible for the manufacture and sale of respondent's bicycles, tricycles and other wheeled toys.

ORDER

For the purpose of this Order, the term "non-motorized two- or three-wheeled vehicle" shall include bicycles, tricycles, and other similar non-motorized two- or three-wheeled vehicles. The term "minibike" shall refer to motorized two-wheeled vehicles without gears and shall not include mopeds.

I.

It is ordered, That respondent AMF Incorporated, a corporation, hereinafter referred to as respondent, its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any non-motorized two- or three-wheeled vehicle or minibike, cease and desist from, directly or by implication:

A. Representing, in any manner, any child who appears to be eight years old or younger operating any non-motorized two- or three-wheeled vehicle in any public street, road, alley or other traffic thoroughfare; *provided, however,* that this provision shall not apply to

the depiction of any child who appears to be five to eight years old operating a non-motorized two- or three-wheeled vehicle in any public street, road, alley, or other traffic thoroughfare when such child is accompanied and closely supervised by a person who appears to be eighteen years old or older and who is operating a non-motorized two- or three-wheeled vehicle.

B. Representing, in any manner, any person(s) performing stunts, jumps, wheelies, or any other similar act while operating a non-motorized two- or three-wheeled vehicle when such act(s) create(s) an unreasonable risk of harm to person or property; *provided, however,* that this provision shall not apply to the depiction of persons using motorcross bikes in an adult-supervised off-the-road setting and in which the participants are shown wearing helmets and where arms, legs, and feet are suitably covered.

C. Representing, in any manner, any person(s) operating or riding a non-motorized two-or three-wheeled vehicle in any public street, road, alley or other traffic thoroughfare:

1. without obeying all applicable official traffic control devices;

2. other than upon, astride or straddling a regular seat attached thereto;

3. with more persons on it, at any one time, than the vehicle is designed or safely equipped to carry, except that an adult rider may carry a child securely attached to its person in a back pack or sling;

4. while carrying any package, bundle, or article which obstructs vision or interferes with the proper control of the vehicle;

5. when such person attaches himself/herself or the vehicle to any other vehicle; *provided, however,* that this provision shall not apply to the depiction of a bicycle trailer or bicycle semitrailer attached to a bicycle if that trailer or semitrailer has been designed for such attachment and when the operation of such a bicycle with such an attachment does not create an unreasonable risk of harm to person or property;

6. unless such vehicle is equipped with reflectors in conformance with Section 1512.16 of the "Revised Safety Standards for Bicycles" (16 CFR 1512 (1978)) or any successor provision, rule or regulation issued by the Consumer Product Safety Commission and, in addition, a functioning headlamp whenever such person is operating or riding a non-motorized two- or three-wheeled vehicle at dawn, dusk or night;

7. while wearing loose clothing or long coats that can catch in pedals, chains or wheels;

8. against the flow of traffic;

9. unless such person exercises proper caution, such as by riding at

a reasonable speed and at a reasonable distance from parked cars and the edge of the road, with respect to:

a. car doors opening and cars pulling out into traffic; and

b. drain grates, soft shoulders and other road surface hazards;

10. in other than single file when travelling with other such vehicles; *provided, however*, that this provision shall not apply to the depiction of persons riding in other than single file when such behavior does not impede the normal and reasonable movement of traffic and does not create an unreasonable risk of harm to person or property;

11. unless such person exercises proper caution before entering or crossing any public street, road, alley or other traffic thoroughfare from any non-traffic area by first stopping and looking left and right and yielding the right-of-way to all vehicles approaching on such public thoroughfare to the extent necessary to safely enter the flow of traffic;

12. unless such person exercises proper caution before entering or crossing any sidewalk or other pedestrian pathway by first looking left and right and yielding the right-of-way to all pedestrians approaching on such pedestrian pathway.

D. Representing, in any manner, any person operating a mini-bike in any public street, road, alley or other traffic thoroughfare, unless such operation is lawful under applicable vehicle codes.

II.

It is further ordered, That respondent shall produce two or more versions of bicycle safety messages of from one/half to five minutes duration. In the development and production of the safety message(s), respondent agrees to secure the advice, assistance, and approval of each of three independent individuals who will provide experience or knowledge in the areas of (1) bicycle safety, (2) children's television programming, and (3) children's advertising. The conclusion reached by these individuals concerning the appropriateness of the safety messages shall be reported to the Federal Trade Commission.

It is further ordered, That, on or before September 1, 1979, respondent shall provide a film of either bicycle safety message to each television broadcasting station listed in Appendix A. Respondent shall monitor the dissemination of the safety message(s) and shall provide to the Commission a report on the gross impressions achieved by the dissemination of the safety message(s) between September 1, 1979 and December 31, 1979. This report shall be submitted on or before January 31, 1980.

It is further ordered, That, in the event the total gross impressions

for the safety message(s) does not equal or exceed ten percent of the gross impressions achieved by the "Avenger" and "Can't Wait" television advertisements (as reported in Appendix B) respondent shall provide a film of the safety message(s) to each television broadcasting station listed on Appendix C on or before March 1, 1980, and shall continue to monitor the dissemination of the safety message(s) and provide to the Commission on or before July 31, 1980, a second report on the gross impressions achieved by the dissemination of the safety message(s) between March 1, 1980 and June 30, 1980.

It is further ordered, That, in the event that service of this order upon respondent occurs after June 15, 1979, the dates set forth in Section II shall be adjusted so that a period of seventy-five (75) days lapses between the date of service of this order upon respondent and the date by which respondent is required to provide a film of the bicycle safety message(s) to the stations named in Appendix A. All of the dates following this initial date shall also be adjusted to retain and allow for the same periods of time for performance of obligations outlined in this section.

For purposes of this section, the measurement of gross impressions shall include only the 6–11 year old component of the viewing audience. Gross impressions shall be measured by counting each probable exposure of a 6–11 year old child to the safety message(s), with duplication allowed.

III.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions which engage or shall engage in the preparation or dissemination of advertising.

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

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

APPENDIX A

STATION	CITY AND STATE
WBMG	BIRMINGHAM, AL
WSFA	MONTGOMERY, AL
KPHO	PHOENIX, AZ
KERO	BAKERSFIELD, CA
KJTV	BAKERSFIELD, CA
KNBC	LOS ANGELES, CA
KABC	LOS ANGELES, CA
KCOP	LOS ANGELES, CA
KHJ	LOS ANGELES, CA
KTLA	LOS ANGELES, CA
KTTV	LOS ANGELES, CA
KLCS	SAN FRANCISCO, CA
KTVU	SAN FRANCISCO, CA
KGO	SAN FRANCISCO, CA
KPIX	SANTA ANA, CA
KLXA	DENVER, CO
KBTV	DENVER, CO
KGMH	DENVER, CO
KWGN	WASHINGTON, D.C.
WRC	JACKSONVILLE, FL
WJKS	MIAMI, FL
WRN/WTHF	MIAMI, FL
WPLG	MIAMI, FL
WTVJ	TAMPA, FL
WFLA	ATLANTA, GA
WSB	ATLANTA, GA
WXIA	AUGUSTA, GA
WJBF	MACON, GA
WMAZ	SAVANNAH, GA
WTOC	CHICAGO, IL
WLS	HARRISBURG, IL
WSIL	MOLINE, IL
WQAD	ROCKFORD, IL
WIFR	FORT WAYNE, IN
WPTA	INDIANAPOLIS, IN
WISH	CEDAR RAPIDS, IA
WMT	DES MOINES, IA
KCCI	SIOUX CITY, IA
KCAU	PITTSBURG, KS
KOAM	WICHITA, KS
KAKE	

STATION	CITY AND STATE
WDRB	LOUISVILLE, KY
WDSU	NEW ORLEANS, LA
WBFF	BALTIMORE, MD
WJZ	BALTIMORE, MD
WMAR	BALTIMORE, MD
WBZ	BOSTON, MA
WNAC	BOSTON, MA
WCVB	BOSTON, MA
WHYN	SPRINGFIELD, MA
WGPR	DETROIT, MI
WZZM	GRAND RAPIDS, MI
WKZO	KALAMAZOO, MI
WILX	LANSING, MI
WJBX	DETROIT, MI
KCMT	ALEXANDRIA,
WHTV	MERIDIAN, MS
KMOX	ST. LOUIS, MO
KYTV	SPRINGFIELD, MO
KYUS	MILES CITY, MT
KOLN	LINCOLN, NE
WMUR	MANCHESTER, NH
KRWG	LAS CRUCES, NM
KFNW	PORTALES, NM
WTEN	ALBANY, NY
WBNG	BINGHAMTON, NY
WABC	NEW YORK, NY
WCBS	NEW YORK, NY
WOR	NEW YORK, NY
WTVH	SYRACUSE, NY
WSYR	SYRACUSE, NY
WLOS	ASHEVILLE, NC
WTVD	DURHAM, NC
WXII	WINSTON-SALEM, NC
WCPO	CINCINNATI, OH
WKYC	CLEVELAND, OH
WKEF	DAYTON, OH
WUAB	PARMA, OH
WSTV	STEUBENVILLE, OH
WDHO	TOLEDO, OH
WSPD	TOLEDO, OH
WTOL	TOLEDO, OH

STATION	CITY AND STATE
KTVL	MEDFORD, OR
KATU	PORTLAND, OR
WNEP	AVOCA, PA
WGAL	LANCASTER, PA
WPVI	PHILADELPHIA, PA
KDKA	PITTSBURGH, PA
WIIC	PITTSBURGH, PA
WTAE	PITTSBURGH, PA
WJAR	PROVIDENCE, RI
WPRI	PROVIDENCE, RI
WCBD	CHARLESTON, SC
WIS	COLUMBIA, SC
WFBC	GREENVILLE, SC
WCIV	MT. PLEASANT, SC
WBIR	KNOXVILLE, TN
WNGE	NASHVILLE, TN
WTVF	NASHVILLE, TN
WFAA	DALLAS, TX
KXAS	FORT WORTH, TX
KPRC	HOUSTON, TX
KLBK	LUBBOCK, TX
KWBT	RICHMOND, VA
KING	SEATTLE, WA
KOMO	SEATTLE, WA
KSPS	SPOKANE, WA
WSAZ	HUNTINGTON, WV
WISC	MADISON, WI

APPENDIX B

"Can't Wait" and "Avenger"

Total gross impressions of children ages 6–11 for both advertisements: 59,630,000

Total minutes of advertising broadcast from July, 1976 through September, 1977: 960 minutes

Total number of markets in which the two advertisements were broadcast: 37 markets

Total net impressions of children ages 6–11 for both advertisements: 3,619,000

APPENDIX C

STATION	CITY
WBMG	BIRMINGHAM

STATION	CITY
WBRC	BIRMINGHAM
WTVY	DOTHAN
WYUR	HUNTSVILLE
WCOV	MONTGOMERY
KTAR	PHOENIX
KVOA	TUCSIN
KATV	LITTLE ROCK
KBAK	BAKERSFIELD
KJTV	BAKERSFIELD
KNBC	LOS ANGELES
KABC	LOS ANGELES
KHJ	LOS ANGELES
KTLA	LOS ANGELES
KWHY	LOS ANGELES
KXTV	SACRAMENTO
KSCI	SAN BERNARDINO
KFMB	SAN DIEGO
KTSF	SAN FRANCISCO
KEYT	SANTA BARBARA
WFSB	HARTFORD
WHNB	W. HARTFORD
WEVU	BONITA SPRINGS
WBBH	FT. MYERS
WCIX	MIAMI
WPLG	MIAMI
WFTV	ORLANDO
WPTV	PALM BEACH
WJHG	PANAMA CITY
WTSP	ST. PETERSBURG
WXLT	SARASOTA
WCTV	TALLAHASSEE
WIVT	TAMPA
WRBL	COLUMBUS
WMAZ	MACON
KID	IDAHO FALLS
WCIA	CHAMPAIGN
WICD	CHAMPAIGN
WBBM	CHICAGO
WGN	CHICAGO
WLS	CHICAGO
WMAQ	CHICAGO

STATION	CITY
WSIL	HARRISBURG, IL
WMBD	PEORIA
WGFM	QUNICY
KHQA	QUINCY
WKJG	FT. WAYNE
WISH	INDIANAPOLIS
WRTV	INDIANAPOLIS
WTHR	INDIANAPOLIS
WTWO	TERRE HAUTE
WMT	CEDAR RAPIDS
KUPK	COPELAND
KARD	WICHITA
KTVH	WICHITA
WBKO	BOWLING GREEN
WAVE	LOUISVILLE
KALB	ALEXANDRIA
KATC	LAFAYETTE
KFLY	LAFAYETTE
KPLC	LAKE CHARLES
WDSU	NEW ORLEANS
WGNO	NEW ORLEANS
WVUE	NEW ORLEANS
WBFF	BALTIMORE
WHAG	HAGERSTOWN
WBZ	BOSTON
WCVB	BOSTON
WTEV	NEW BEDFORD
WUHQ	BATTLE CREEK
WEYI	SAGINAW
WJBK	DETROIT
KMSP	MINNEAPOLIS
KSTP	ST. PAUL
WCBI	COLUMBUS
WJTV	JACKSON
WHTV	MERIDIAN
KFVS	CAPE GIRARDEAU
KYUS	MILES CITY
KGVO	MUSSOULA
KHGI	KEARNEY
KOLN	LINCOLN
KETV	OMAHA

STATION	CITY
KVVU	BENDERSON
KLAS	LAS VEGAS
KOLO	RENO
KGGM	ALBUQUERQUE
KVIA	FARMINGTON
WSYE	ELMIRA
WHEC	ROCHESTER
WSOC	CHARLOTTE
WFMY	GREENSBORO
WGHP	HIGH POINT
WRAL	RALEIGH
WXIX	CINCINNATI
WEWS	CLEVELAND
WCMH	COLUMBUS
WDHO	TOLEDO
KETA	OKLAHOMA CITY
KWTV	OKLAHOMA CITY
KOTV	TULSA
KPTV	PORTLAND
WTAJ	ALTOONA
WLYH	LEBANON
KYW	PHILADELPHIA
WPVI	PHILADELPHIA
WIIC	PITTSBURGH
WTAE	PITTSBURGH
WSBA	YORK
WBTW	FLORENCE
KXON	MITCHELL
WDEF	CHATTANOOGA
WTVC	CHATTANOOGA
WCPT	CROSSVILLE
WATE	KNOXVILLE
WHBQ	MEMPHIS
WREG	MEMPHIS
WSM	NASHVILLE
WTVF	NASHVILLE
KBMT	BEAUMONT
WFAA	DALLAS
KVIA	EL PASO
KXAS	FT. WORTH
KRIV	HOUSTON

STATION	CITY
KHOU	HOUSTON
KENS	SAN ANTONIO
KMOL	SAN ANTONIO
KCEN	TEMPLE
KLTV	TYLER
KRGV	WESLACO
KUTV	SALT LAKE CITY
WHSV	HARRISONBURG
WSET	LYNCHBURG
WSLS	ROANOKE
KAPP	YAKIMA
WBOY	CLARKSBURG
WTAP	PARKERSBURG
WEAU	EAU CLAIRE
WMTV	MADISON
WAEO	RHINELANDER
WSAU	WAUSAU

IN THE MATTER OF

BRUNSWICK CORPORATION, ET AL.

Docket 9028. Interlocutory Order, Feb. 22, 1980

ORDER DENYING MOTION TO DISQUALIFY COUNSEL

By motion filed with the Secretary on December 26, 1979, respondents Brunswick Corporation and Mariner Corp. (hereinafter "Movants") move that the law firms of Mori and Ota and Pettit & Martin be disqualified as counsel for Yamaha Motor Company, Ltd. in this proceeding.[1] Movants contend that disqualification is required because of the actions of Ronald J. Dolan, a former Commission employee. For the reasons stated below, this motion is denied.[2]

I

The facts regarding this matter are set forth in Mr. Dolan's affidavits of December 14, 1979 ("Dolan Affidavit I") and January 11, 1980 ("Dolan Affidavit II"), the accuracy of which are supported by the December 14, 1979 ("Ferguson Affidavit I") and January 11, 1980 ("Ferguson Affidavit II") affidavits of John P. Ferguson; the January 9, 1980, affidavit of Jun Mori; the January 9, 1980, affidavit of Henry Y. Ota; and the December 11, 1979, affidavit of Shigeru Watanabe.

Prior to June 8, 1979, Mr. Dolan was an Assistant Director of the Commission's Bureau of Competition, and had served as the Commission's lead trial counsel in Dkt. 9028. Dolan Affidavit I ¶ 3. During his employment at the Commission, Mr. Dolan did not discuss with Mori and Ota either his own employment or the possibility that Pettit & Martin might serve as counsel for Yamaha. Dolan Affidavit II ¶ 16; Watanabe Affidavit ¶ 4. Mr. Dolan left the Commission's employment on June 8, 1979, and became employed by Pettit & Martin as "counsel" on July 2, 1979. In July 1979 an announcement of Mr. Dolan's employment by Pettit & Martin was sent to Jun Mori of Mori and Ota. Dolan Affidavit II ¶ 3.

On September 18, 1979, Mr. Mori telephoned Mr. Dolan and arranged to meet with him. *Id.* at ¶ 4. Mr. Dolan and Mr. Mori dined together on September 20, 1979, and Mr. Dolan "broached the possibility of Pettit & Martin handling some of the Washington legal business for Mori and Ota's clients." *Id.* at ¶ 5. Mr. Mori stated that the only Washington

[1] By motions of January 8 and 21, 1980, Movants sought a stay of the proceeding until the Commission ruled on their disqualification motion. By orders of January 18 and 23, 1980, the Commission denied these motions.

[2] The Commission having found oral argument on this motion to be unnecessary, Movants' request for such argument is denied. Movants' motion for leave to file their reply of January 21, 1980, is granted, as is Yamaha's motion for leave to file its reply of January 22, 1980.

anti-trust business then being handled by his firm was the *Brunswick* matter, in which Mori and Ota alone had represented Yamaha throughout the initial trial and appeal. Mr. Mori indicated his feeling that because of Mr. Dolan's previous involvement in the proceeding at the Commission, Mr. Dolan could not participate in any such representation. Mr. Dolan responded that Pettit & Martin could handle the matter so long as he personally was screened, and he suggested that John R. Ferguson, a Pettit & Martin partner, be asked to undertake the representation. Mr. Dolan described the nature of Mr. Ferguson's qualifications. This was the first discussion between Mr. Mori and Mr. Dolan regarding the possible representation of Yamaha by Pettit & Martin. *Id.*

At the time, the Commission had under consideration complaint counsel's appeal from the administrative law judge's dismissal of the complaint in this proceeding. At their September 20, 1979, meeting, Mr. Mori asked Mr. Dolan if he knew if the Commission would soon issue its decision, and Mr. Dolan replied that he did not know, but would inform Mr. Mori if he learned anything. *Id.* On October 3, 1979, Mr. Mori called Mr. Dolan to ask again if he knew whether publication of the Commission's decision was imminent. Mr. Dolan advised Mr. Mori that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." *Id* at ¶ 6.

The Commission's opinion and order remanding this matter to the administrative law judge for the taking of additional evidence was issued on November 9, 1979. Mr. Dolan learned of the Commission's decision, and obtained a copy of it, on November 16, 1979. *Id.* at ¶ 7. That same day, Mr. Dolan telephoned Mr. Ota of Mori and Ota to tell him of the Commission's decision. *Id.* at ¶ 8. Mr. Ota said he had already learned of the Commission's decision from the administrative law judge's clerk, but "indicated a continuing interest in retaining Pettit & Martin to represent Yamaha." *Id.* Later that evening, Mr. Dolan informed Mr. Ferguson of his discussion with Mr. Ota, and Mr. Dolan subsequently sent a copy of Mr. Ferguson's resume to Mori and Ota. *Id.*

Since November 16, 1979, Mr. Dolan has not spoken to anyone at Mori and Ota about this matter. *Id.* Mr. Dolan's subsequent discussions with Pettit & Martin personnel about this matter have been limited to discussions to enable Pettit & Martin to evaluate the propriety of its participation in this matter. *Id.* at ¶¶ 9–14. Since he left the Commission, Mr. Dolan has had no discussion with anyone at either law firm about the pre-complaint investigation in *Brunswick*, the facts or

theories involved in the litigation, trial tactics, or Commission procedures. *Id.* at ¶¶ 13–14; Ferguson Affidavit II ¶ 6; Mori Affidavit ¶ 3.

Based upon a telephone conversation between Mr. Ferguson and Mr. Ota on November 20, 1979, Pettit & Martin agreed to represent Yamaha in this proceeding. Ferguson Affidavit II ¶ 4. Yamaha retained Pettit & Martin with full knowledge that Mr. Dolan would not participate. Watanabe Affidavit ¶ 5. On November 21, 1979, Mr. Ferguson circulated a memorandum to all Washington, D.C. office personnel of Pettit & Martin[3] disclosing Pettit & Martin's representation of Yamaha and the fact that Mr. Dolan could not participate. This memorandum directed that: (i) no documents concerning this matter be shown to Mr. Dolan; (ii) no discussions concerning this matter include Mr. Dolan; and (iii) Mr. Dolan not communicate with representatives of Yamaha.

These procedures have been followed. Ferguson Affidavit I ¶ 6. Mr. Dolan will receive no added compensation from Pettit & Martin as a result of its representation of Yamaha, and if Mr. Dolan becomes a partner during the course of Pettit & Martin's representation of Yamaha, "a compensation formula will be devised so as to assure that Mr. Dolan does not share in the fees attributable to such representation." Ferguson Affidavit I ¶¶ 4–5.

II

We turn first to the broadest issue presented, whether general ethical standards require that the personal disqualification of Mr. Dolan be imputed to his law firm, under the reasoning of *Armstrong* v. *McAlpin*, 606 F.2d 28 (2d Cir. 1979) *reh. en banc granted* (No. 79–7042, Dec. 12, 1979), despite the procedures announced in Mr. Ferguson's memorandum of November 21, 1979. We hold that Pettit & Martin's enforcement of screening measures that effectively isolate Mr. Dolan from this proceeding permits the law firm to participate. We thus respectfully disagree with the reasoning in *Armstrong*.

The facts and the panel's holding in *Armstrong* may be summarized as follows: An attorney at the Securities and Exchange Commission left that agency to join a law firm. While at the SEC, he had been personally involved in an enforcement action against an individual. Later his law firm was engaged to bring a private action against that same individual. The former SEC attorney, who was concededly disqualified from the matter, was screened from any participation in

[3] No employee of Pettit & Martin outside the Washington office is involved in the representation of Yamaha. Ferguson Affidavit II ¶ 5.

the firm's representation, in accordance with the procedures set forth in Formal Opinion 342 of the American Bar Association.[4] The district court, relying upon the efficacy of the screening, denied a motion to disqualify the firm.

A panel of the court of appeals for the Second Circuit reversed. Finding a risk that the conduct of government investigation and litigation may be influenced by future employment opportunities so long as the attorney has a direct, active, and personal involvement in such matters, the panel held that the attorney's disqualification alone was insufficient to forestall that harm, or its appearance. Rather, the individual's disqualification should be imputed to the attorney's firm as well. Screening procedures were deemed by the panel to be unsatisfactory because, in the panel's view, they do not create the appearance "to the public, that there will be no possibility of financial reward" for shaping government action to enhance private employment. 606 F.2d at 34.

In so concluding, the panel focused on two factors: the possibility that the screened-out lawyer may nevertheless receive some sort of compensatory bonus or indirect share in the firm's earnings from the matter; and the belief that a firm's internal screening procedures are unlikely to be known "to casual observers" or to be persuasive to "the more informed." *Id.* Although the panel asserted that it was not attempting to formulate a general rule for imputed disqualification of a firm (*id.* at 33), it nevertheless declared that its decision did not turn on the particular facts, but on its rejection of the view that "the principle of using screening procedures to enforce DR 9–101(B) is applicable to this type of case. . . ." *Id.* at 34 n.7. Indeed, Movants would have us apply the rationale of the panel's decision in this proceeding. However, the Commission declines to accept this rationale, believing it to be incorrect in its underlying assumptions, and contrary to sound public policy.

The panel's rejection of screening procedures rests upon a chain of assumptions. Law firms adopting screening, the panel reasoned, may nevertheless provide some sort of compensation to screened attorneys attributable to the matter in which they are disqualified. Government attorneys, it was said, will be aware of this prospective benefit, and

[4] Opinion 342, issued on November 25, 1975, and appearing at 62 A.B.A.J. 517 (1976), clarifies and ameliorates the effects of Disciplinary Rules 5–101(D) and 9–101(B). DR 9–101(B) bars an individual lawyer from accepting employment "in a matter in which he had substantial responsibility while he was a public employee"; and DR 5–101(D) prohibits a law firm from accepting employment in a matter if any lawyer at the firm is disqualified from that matter. Opinion 342 states that the disqualified lawyer's firm need not be disqualified if it has adopted screening measures sufficient to "effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it," so long as these measures are satisfactory to the government agency concerned, and so long as "there is no appearance of significant impropriety affecting the interests of the government." The final proposal of the District of Columbia Bar, now pending before the D.C. Court of Appeals, likewise provides for a screening mechanism. Proposed DR 9–102(B)–(D); see 3 *District Lawyer* No. 5, at 56 (April/May 1979).

thus will continue to perceive an incentive that may influence their official actions even when they know they will be personally disqualified and screened.

The Department of Justice, in its brief *amicus curiae* on rehearing in *Armstrong*, has argued that these assumptions about lawyers' behavior were unsupported in the record of that case. We find them to be unsupported here. Screening procedures must, under ABA Opinion 342, bar direct or indirect compensation to a disqualified attorney.[5] In view of this, the probability that government lawyers will nevertheless anticipate some post-employment reward for their official actions is so low as to be without significance. Moreover, our experience does not support the panel's apparent assumption that a significant number of private firms or government attorneys will seek to evade the strictures of Disciplinary Rule 9–101(B) and Opinion 342. As the Justice Department said in its *amicus* brief, at 43:

> Government lawyers engaged in investigation and litigation know that their future employment prospects in private practice depend on other factors. These are chiefly their reputation for professional competence in their chosen specialty, their demonstrated vigor in exercising that competence solely in the public interest, and complete personal integrity. The possibility of either direct or indirect post-employment compensation for official action is thus too speculative and unsupported to outweigh the adverse impact that a total rejection [of] screening would have on the recruitment of government attorneys.

We do not share the panel's conclusion that the entire firm must be disqualified because of the "appearance" that internal screening procedures are inadequate. The standard for judging the appearance of impropriety is not governed by what "casual observers" might perceive, or by what may be unpersuasive to a skeptic. It is measured by the perception of a reasonable person. On-the-record public disclosure, as here, that a former government attorney has disqualified himself and has been screened from a firm's participation in a matter is amply sufficient to meet the test of reasonableness. Absent a showing of unethical conduct that would taint the underlying proceeding, ". . . appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). See also *Woods* v. *Covington County Bank*, 537 F.2d 904, 813 (5th Cir. 1976); *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (Ct. Claims 1977).

The panel's holding is, in our view, inconsistent with the conflict-of-interest restrictions enacted by Congress in amending 18 U.S.C. 207. This statute specifically covers a former government employee's prior

[5] The record before us shows that Mr. Dolan is barred from such compensation. Ferguson Affidavit I ¶¶ 4–5.

involvement, both directly and in a supervisory capacity. Congress declined, however, to extend the statute's restrictions, in either case, to the former government employee's current associates. In framing the scope of these restrictions, Congress explicitly considered their impact on important policy goals, such as the government's recruitment capabilities. S. Rep. No. 95–170, 95th Cong., 1st Sess. 32 (1977); H.R. Rep. No. 96–115, 96th Cong., 1st Sess. 3–6 (1979); 125 Cong. Rec. H3391–3403 (daily ed., May 16, 1979); *id.* at H3689–3698 (daily ed., May 24, 1979).

Finally, we note that our rejection of any general prophylactic ban on screening devices is consistent with other recent expressions on this subject. On December 14, 1979, the Administrative Conference of the United States adopted Recommendation 79–7, "Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency." This recommendation contains a section directly addressed to the *Armstrong* issue:

> [T]he disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the matter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus "screened" should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the "screening" arrangement affords adequate protection to its interest. 45 Fed. Reg. 2310 (Jan. 11, 1980).

In addition, the Federal Legal Council, a forum of fifteen agency general counsels established by Executive Order, adopted a resolution declaring that: "[T]he public interest, the legal profession, and the various Federal legal offices are best served by scrupulous adherence to existing laws . . . and the existing ethical guidelines of the American Bar Association (particularly Formal Opinion 342 of the A.B.A.'s Committee on Professional Ethics, which sets forth an approved screening procedure to be applied in situations such as found in the *Armstrong* case) . . . ."

Such support for the use of screening mechanisms reflects not only a considered belief in their efficacy but also a proper regard for the detrimental consequences that the *Armstrong* principle would produce. The Commission believes that a general rule of imputed disqualification without the possibility of screening would seriously impair its ability to attract qualified attorneys to its service. As the Senate Committee on Government Operations observed when it endorsed the ABA screening mechanism:

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We have no doubt that the proposed restrictions [*i.e.*, imputed disqualification without the possibility of screening] would have a detrimental effect on the government's ability to recruit able and experienced regulators from the legal community: those with established careers might not be interested in jeopardizing later practice by a stint in government, and those without established practices may view agency service as a limitation upon future career alternatives and options. For both reasons, the effectiveness of government could be adversely affected. Study on Federal Regulations, Vol. I, 95th Cong., 1st Sess. 87 (1977).

See also Resolution of the Federal Legal Council, *supra*, at 1–2 ("The [*Armstrong*] holding would have a serious adverse effect on the ability of Government legal offices to recruit and retain well-qualified attorneys.")

For these reasons, we decline to adopt the reasoning of the *Armstrong* panel decision in the regulation of practitioners who appear before this agency.[6] We hold that the firm of Pettit & Martin has adopted and enforced satisfactory screening procedures.[7] The firm is accordingly not automatically disqualified from participation in this matter because of the personal disqualification of Mr. Dolan.

III

We also conclude that neither law firm has violated the Commission's Rules of Practice, though as we discuss *infra*, the actions of Mr. Dolan and Pettit & Martin cause concern and prompt us to adopt, for the first time, an interpretation of our rule intended to prohibit active solicitation by a disqualified attorney which secures for his or her law firm new business from which the attorney is disqualified.

Movants contend that Mr. Dolan, Pettit & Martin, and Mori and Ota have violated Rule 4.1(b)(1). This rule prohibits former Commission employees from "appear[ing] as attorney or counsel or otherwise participat[ing] through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission," unless the Commission authorizes such participation. Mr. Dolan has not obtained authorization to appear in this proceeding, nor could he, because he participated personally and substantially in the proceeding while at the Commission. See Rule 4.1(b)(3)(i). However, in accordance with the Rule, Mr. Dolan is not currently participating in Pettit & Martin's

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[6] We similarly decline to adopt the result in *Price* v. *Admiral Insurance Co.*, No. 78-2812 (E.D. Pa. Sept. 28, 1979), which was based upon the particular circumstances of that case and which contains no discussion of Formal Opinion 342 and the policy considerations underlying it.

[7] Under the Commission's current practice, which is consistent with the Administrative Conference recommendation, specific advance approval of a screening mechanism need not be sought.

representation of Yamaha, and Pettit & Martin has established procedures to ensure that he will not do so.[8]

Thus, the issue raised by Movants is not Mr. Dolan's current participation in the proceeding, but that of Pettit & Martin and Mori and Ota. These firms are not literally disqualified by Rule 4.1(b)(1), the terms of which expressly apply only to the activities of former employees themselves. Movants argue, however, that the law firms have violated Rule 4.1(b)(4), which states that if a former employee is disqualified from a matter, "his services shall not be utilized in any respect in such matter nor shall the matter be discussed with him in any manner by any partner or legal or business associate." Any violation of this Rule can only have occurred on or before November 16, 1979, because Mr. Dolan's only subsequent activity relating to this proceeding has involved resolution of the disqualification issue, activity that the Commission plainly did not intend to proscribe.

The primary objective of Rule 4.1(b)(4) is to require a law firm to adopt screening measures sufficient to prevent any discussion with the disqualified attorney that would aid the firm's participating attorneys in their legal representation. Pettit & Martin has done so, and the record is clear that Pettit & Martin has not utilized Mr. Dolan's services in their representation of Yamaha.[9]

The record also indicates, however, that it is unlikely that Pettit & Martin would have been retained by Yamaha had it not been for Mr. Dolan's actions. Indeed, we believe that, taken together, Mr. Dolan's course of conduct here constituted solicitation of the business in question. He "broached" to Mr. Mori the possibility of Pettit & Martin handling some of Mori and Ota's Washington legal business—though we note that this was a reference to legal business in general, and not to the particular matter from which Mr. Dolan was and is disqualified. When Mr. Mori responded that the only Washington antitrust business then being handled by his firm was the *Brunswick* matter and that Mr. Dolan could not participate in that matter because of his prior involvement as a Commission employee, Mr. Dolan explained that Pettit & Martin could handle the matter so long as he personally was screened, and he went on to suggest a particular Pettit & Martin partner for the job and to describe the partner's qualifications. At the same meeting, Mr. Mori asked Mr. Dolan whether he knew if the Commission would soon issue its decision in *Brunswick*. Mr. Dolan replied that he did not know, but would inform Mr. Mori if he heard anything. A few days later Mr. Mori called Mr. Dolan to ask again

[8] We also conclude that even if Mr. Dolan's actions prior to November 21, 1979, contravened Rule 4.1(b)(1), we would reach the same determination set forth below with respect to disqualification of the firms.

[9] We note that Mori and Ota could not be viewed as "legal or business associates" of Mr. Dolan, as that phrase is used in Rule 4.1(b)(4), before they retained Pettit & Martin as co-counsel on November 20, 1979.

whether he knew if the publication of the decision was imminent, and Mr. Dolan replied that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." Mr. Dolan then telephoned Mr. Ota shortly after the Commission decision in *Brunswick* was issued, and subsequently sent a copy of the previously mentioned partner's resume to Mori and Ota.

Given the likelihood that Pettit & Martin obtained the business in question as a result of Mr. Dolan's activities, the question under Rule 4.1(b)(4) is whether Mr. Dolan's solicitation of Mori and Ota constituted "services" which Pettit & Martin "utilized in any respect" in the *Brunswick* matter. The quoted language is ambiguous. The most apparent meaning is that when an attorney is disqualified from participating in a matter, he may not aid his firm in any manner in its provision of legal representation in that matter. It is not clear whether the language also means that an attorney who is disqualified in a matter is prohibited from seeking to obtain that matter for his firm. The Commission has not previously construed the language, and the "legislative history" of the rule provides no guidance.[10]

We decline to find, therefore, that Pettit & Martin violated Rule 4.1(b)(4)—as the rule would reasonably have been understood—when it obtained the *Brunswick* matter as a result of Mr. Dolan's solicitations on the firm's behalf. We do so because the vague language of the rule, together with the absence of any interpretation of it, fails to provide adequate notice that conduct of the kind under consideration here constitutes a violation. In addition, we note that our decision not to disqualify Pettit & Martin rests on a finding that Mr. Dolan's conduct has resulted in no actual impropriety. Mr. Dolan has provided no aid to Pettit & Martin in its representation of Yamaha in this proceeding. And Movants do not state, nor do we discern, how Mr. Dolan's conduct has itself affected the course of this proceeding in any way or how it has injured them. See *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Board of Education* v. *Nyquist, supra,* 590 F.2d at 1246. Moreover, there is no allegation that Mr. Dolan has received additional compensation for having brought this business to his firm, or that he pursued his responsibilities at the Commission with anything less than the customary vigor of complaint counsel.

[10] When Rule 4.1(b)(4) was orginally adopted, it contained a procedure for Commission approval of law firm participation in a matter only after review of an affidavit showing no use by the law firm of the disqualified attorney's services in any respect in such matter and no fee-splitting, and only after a Commission finding that the firm's participation would entail no "actual or apparent impropriety." 32 FR 8456 (June 13, 1967). When the present language of the rule was adopted in 1975, the Federal Register notice simply stated that the revision "eliminate[d] the requirement for filing affidavits in a case in which a former Commission member or employee is prohibited from appearing or participating in a Commission proceeding or investigation, and his partner(s) or associate(s) desire to appear or participate therein without utilizing his services." 40 FR 15235 (April 4, 1975).

However, our conclusion here—that disqualification would be unfair given the ambiguous and previously uninterpreted language of Rule 4.1(b)(4)—should not be perceived as approval of Mr. Dolan's behavior and Pettit & Martin's acquiescence in it. To the contrary, serious ethical concerns arise from affirmative actions by a disqualified attorney designed to bring to his firm new business directly related to a matter from which the attorney is disqualified.

The appearance of impropriety in such a situation might manifest itself in two ways. An observer might suppose that the attorney had been unwarrantedly solicitous to a potential client while still with the government, to inspire gratitude or good feelings in that client and thereby pave the way toward bringing the client's business to the attorney's new firm. Or, the observer might surmise that if the client retained the disqualified attorney's new firm at the behest of the attorney, it would do so to obtain that attorney's services surreptitiously, notwithstanding supposed screening devices.

There is no countervailing policy reason in support of a law firm obtaining business from the active solicitation of an attorney who is disqualified from such business. We do not believe firms should expect that government lawyers will bring into the firm business from which the former government lawyer is personally disqualified. Similarly, our concern for the rights of clients to counsel of their choice is greatly diminished where they are led to retain a firm to represent them through the intercession of a former government attorney who is personally disqualified from representing them.

The Securities and Exchange Commission has adopted a specific rule dealing with this situation. 17 CFR 200.735–8. At such time as we conclude our rulemaking on comprehensive revisions of Rule 4.1(b),[11] we will adopt a comparable rule. In the interim, we shall make the applicability of the current rule clear: If a private party asks a former Commission attorney to provide legal representation in a matter from which the attorney is disqualified, the disqualified attorney may state that he is disqualified and recommend another attorney, even an attorney in his or her own firm. In such a situation, the disqualified attorney is a mere passive recipient of an inquiry, and we see no ethical problem in referring the matter on to someone else. But henceforth, any firm which obtains a matter through the active solicitation of an attorney who is disqualified from that matter, will be considered to have utilized that attorney's services in the matter in violation of Rule 4.1(b)(4).

For the foregoing reasons, *it is ordered*, That the petition of

[11] 43 FR 35947 (Aug. 14, 1978); 44 FR 45179 (Aug. 1, 1979).

respondents Brunswick Corporation and Mariner Corp. to disqualify the firms of Mori and Ota and Pettit & Martin is hereby denied.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

Docket 9074. Interlocutory Order, Feb. 25, 1980.

DENIAL OF INTERVENOR'S MOTION FOR ACCESS TO CONSENT ORDER

By motion filed February 12, 1980, intervenor, the National Automobile Dealers Association ("NADA") has requested that the Commission (1) grant NADA access to the consent order signed by General Motors Corporation and General Motors Acceptance Corporation ("the GM Respondents"), including all supporting documents; (2) vacate the Commission order dated January 23, 1980, withdrawing this matter from adjudication as to the GM respondents and remand the matter to the administrative law judge; and (3) if the order is not vacated, grant NADA thirty days within which to comment on the proposed consent order before the Commission determines whether or not to accept the order pursuant to Section 3.25(f) of its Rules of Practice. Complaint counsel have opposed the motion.

In support of its motion, NADA observes that it was not served with the joint motion of complaint counsel and the GM Respondents, dated December 28, 1979, to withdraw this matter from adjudication, and that it was, thereby, precluded from objecting to or otherwise taking action on the motion.

It does appear that NADA was not served with the joint motion. However, because of the unusual nature of the motion involved, it does not appear that there has been any prejudice to NADA from the failure to make service, and, accordingly, there is no need, nor would any purpose be served, by restoring this matter to adjudication.

The Commission's Rules of Practice, Section 3.25(c), prescribe that where both complaint counsel (including the appropriate Bureau Director) and any respondent to an adjudication have executed a consent agreement, the Secretary *shall* issue an order withdrawing the matter from adjudication with respect to such respondent(s). Withdrawal is not discretionary on the Secretary's part, and, accordingly, no objection that NADA might have raised could possibly have altered the outcome of the motion. Similarly, restoration of this matter to adjudication would simply result in the matter again being withdrawn therefrom, regardless of what objection NADA might interpose.[1]

[1] It should be noted that inasmuch as the Secretary is *required* to withdraw from adjudication as to consenting respondents any matter as to which the requisite consent has been signed, the issuance of an order to withdraw will often occur almost *simultaneously* with the filing of the motion to withdraw. In most cases, therefore, parties to a matter other than the joint movants (complaint counsel and the consenting respondent) will receive service of the joint motion to withdraw at the same time they receive the order granting it. In this case, it appears that the motion to withdraw was filed prior to the time the Bureau Director signed the consent agreement, and several weeks elapsed

(Continued)

With respect to NADA's alternative request that it be shown a copy of the consent order and be given 30 days within which to comment upon it prior to the time any decision is made by the Commission as to whether it should be accepted, the Commission finds the situation identical to that which arose with respect to Dkt. 9073, wherein the same request by NADA was denied. The Commission believes that if the proffered consent order should be accepted, the 60-day public comment period will provide ample opportunity for NADA to make its views with respect to the order known, and any such views that it may submit will be given fullest consideration by the Commission.

Therefore, *It is ordered*, That intervenor NADA's motion is hereby denied.

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before that signature was obtained and the Secretary could issue the order to withdraw. Technically, this premature motion to withdraw should have been served upon intervenor NADA, but we cannot see how the failure to do so deprived it of any right it would otherwise have had.